Environment, Energy, and Resources Law

The Year in Review 2016

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Introduction

The Year in Review: 2016 is the thirty-third 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 Managing Editor, Timothy Spencer, and Executive Editors, Billy Boyd and Ryan Gaddis. 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 extended to Mary Ellen Ternes, Chair of the Special Committee on The Year in Review; Erin Potter Sullenger, Vice Chair of the Special Committee on The Year in Review; and Ellen Rothstein, Section Publications Manager. Their time and efforts were instrumental in making the editing and publication process run smoothly.

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

Susan Cunningham
Student Editor-in-Chief

Robert Butkin
Faculty Advisor

Tulsa, Oklahoma
April 7, 2017

HIGHLIGHTS OF THE YEAR IN REVIEW 2016[1]

And Now for Something Completely Different

I. INTRODUCTION

The impact of President Trump's election on environment, energy and resources law likely cannot be overstated. While drafting this Introduction, Congress voted under the Congressional Review Act to remove the Bureau of Land Management's (BLM) Planning Rule 2.0, BLM 2016 regulatory revisions, the development of which were reported in this Year in Review by the Forest Service and Climate Change, Sustainable Development and Ecosystems Committees. The Planning Rule 2.0 joined the fate of the Department of Interior's stream buffer rule, Securities and Exchange Commission's disclosure rule for resource extraction, and the BLM's methane venting rule. To confirm for the reader, this 2016 YIR issue includes the Committees' faithful reports of 2016 developments, as well as some initial impressions of the impacts of the new Trump Administration by a few of the reporting committees. However, where 2016 developments were already loudly undone as of the 2017 drafting date of the relevant Highlights section, further Highlights typing on that already undone development may have ceased. Look to next year's Year in Review for the catalogue of deconstructed statutes and regulations.

In the context of a full reversal reminiscent of the early Reagan Administration, while predictably some industry sectors are quite encouraged, particularly fossil fuel and energy stakeholders, others are concerned by the new administration's expressed dismissal of climate change as an issue of concern. As the new administration continues rolling out its policy direction, other concerns have developed about the future of core EPA programs and delegated state programs dependent upon EPA funding, and with President Trump's initial budget proposal, even deeper proposed cuts elicit concerns regarding safety and emergency response programs.

Generally, the new administration has stated goals of reigning in EPA's scope of discretion, including cessation of unnecessary rules and rulemaking, and signaling an about face regarding the EPA's ongoing rulemaking litigation, particularly the Clean Power Plan and Waters of the United States. New executive orders call for elimination of two rules for every single rule adopted, sweeping regulatory reform, and drastic budget cuts, while Congress has made good on commitments to eliminate recently adopted rules through aggressive use of the Congressional Review Act (CRA). And while many see the current environment resulting in litigation, particularly citizen suit litigation, Congress is pursuing enactment of the Lawsuit Abuse Reduction Act, which would Amend Rule 11 of the Federal Rules of Civil Procedure to require mandatory sanctions against attorneys filing

[1]These highlights of the following committee reports were prepared by Mary Ellen Ternes, Partner, Earth & Water Law, LLC, Oklahoma City, Oklahoma, Chair of the ABA SEER Special Committee on The Year in Review, allowing some augmentation for current events, with special thanks to Erin Potter Sullenger, Crowe & Dunlevy, Oklahoma City, Oklahoma, YIR Vice Chair and former YIR Editor in Chief, and the wonderful student editors and faculty at the University of Tulsa School of Law, especially this year's Editor in Chief, Susan Cunningham. 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 committee modified from the committee's own ABA SEER webpage, followed by a summary of the highlights from the committee's report, largely excluding duplicative coverage.

non-meritorious lawsuits, potentially chilling citizen suits that might otherwise be expected to fill the enforcement void that could result from budget constraints.

Pursuit of this agenda would suggest future uncertainty and litigation, at least for a time, while those embracing a more streamlined vision of environmental regulation work toward their goals. And while the stock market has been supportive so far, in what has become a predictable trend, 2016 is reported to be the hottest year on record, again.

II. ENVIRONMENT COMMITTEES

A. Agricultural Management

The Agricultural Management Committee focuses on developments in federal and state legislation, regulation, contracts, litigation, and policy. Committee topics include the Clean Water Act (CWA), Clean Air Act (CAA), developments in biotechnology, livestock and grain issues, sustainability, food safety, and farm data privacy.

In this year's report, the Committee focuses on urban agriculture, with the United States Department of Agriculture's (USDA) publication of the Urban Agriculture Toolkit highlighting the Farm Services Agency's authority to issue microloans to urban farmers. The report continues regarding California's cannabis cultivation, and Hawaiian genetically engineering crop bans with *Atay v. County of Maui*, while Oklahoma voters defeated a proposed right to farm amendment to the Oklahoma Constitution. The USDA approved new biotech crops, including non-browning apples and lower bruising potatoes, and considered whether to regulate genetically-edited biotech crops, like Canada and Australia-New Zealand, while the Syngenta litigation arising from China's rejection of United States corn shipments was consolidated in the United States District Court for the District of Kansas. The USDA's efforts to smooth biotech and organic issues continued with the formation of another Advisory Committee on Biotechnology and 21st Century Agriculture. Finally, the Committee focuses on several California agricultural developments involving groundwater use responding to the ongoing drought, exacerbated by climate change, population, and demand.

B. Air Quality

The Air Quality Committee focuses on CAA legislation, regulation and litigation. This year, the Committee summarizes caselaw addressing challenges to National Ambient Air Quality Standards (NAAQS) implementation, including state and federal implementation plans, and conformity regulations, addressing ozone, particulate matter $PM_{2.5}$, PM_{10} and regional haze, as well as permitting of new sources, operating permits, and technology performance standards. These interesting developments include *Rogue Advocates v. Mountain View Paving, Inc.*, where a federal district court in Oregon found compliance with local land use restrictions determinative of CAA compliance, and *Minnesota Automobile Deals Associates v. Stine*, wherein a federal district court in Minnesota found state biodiesel percentage diesel fuel requirements not preempted by the CAA, finding further that challenges were barred by the Eleventh Amendment.

Also reported, the Volkswagen "Clean Diesel" Marketing, Sales Practices and Product Liability Litigation resolved with the consent decree requiring billions invested in a mitigation trust and zero emission vehicles; the *United States v. Ameren Missouri* decisions wherein the federal district court in Missouri rejected a total of ten motions for summary judgment, including one deferring to EPA's permissible construction of the State Implementation Plan (SIP) and theories of emissions expectations as well as actual emission increases, in pursuing a Prevention of Significant Deterioration (PSD) and Title V enforcement action based on Ameren's replacement of coal-fired electric generating unit components, addressing arguments regarding the required standard of care for "a

reasonable power plant operator or owner," proper use and scope of "demand growth" and "routine monitoring, repair and replacement," among other issues.

The D.C. Circuit's decision, *United States Sugar Corp. v. EPA*, regarding the EPA's significant Boiler Maximum Achievable Control Technology (MACT) rule is discussed in depth, outlining the bases for the court's denial of all industry challenges, acceptance of some environmental challenges, and remand. Also reported are several procedural cases as well as citizen suit cases, including the Fifth Circuit's opinion vacating and remanding for assessment of penalties the district court's dismissal of citizens' citizen suit against ExxonMobil alleging thousands of violations.

The EPA proposed or finalized several rules regarding Federal Implementation Plans (FIPs), SIPs, and conformity, including a proposal to remove from operating permit programs the affirmative defense for emergency circumstances. EPA issued several final rules impacting oil and gas upstream operations including source aggregation, and New Source Performance Standards (NSPS), as well many other proposed and final rules regarding the solid waste incineration, Clean Energy Incentive Program (CEIP), stationary engines, Title V operating permit petition process, municipal solid waste landfills, source emission testing, NSR and Title V permit program public notice requirements, refinery NSPS reconsideration, and others. Regarding mobile sources, EPA issued several final and proposed rules impacting the Renewable Fuels Standard program and greenhouse gas and fuel economy standards.

Regarding hazardous air pollutants, the EPA: proposed an extension of the compliance date for the refinery MACTs 1 and 2; proposed a revision of the CAA Section 112(r) Risk Management Program's (RMP) Accidental Release Prevention Requirements; proposed to expand the site remediation National Emission Standards for Hazardous Air Pollutants (NESHAP); reconsideration of the Brick and Structural Clay Products Manufacturing NESHAP; revised the NESHAPs for Secondary Aluminum Production and Portland Cement Manufacturing Industry, and the compliance date for the Aerospace Manufacturing and Rework Facilities NESHAP; announced reconsideration of the Ferroalloys Production NESHAP; issued a Boiler MACT final rule pursuant to the D.C. Circuit's decision, *United States Sugar Corp. v. EPA*, addressing the five issues remanded for reconsideration; issued a final supplemental finding pursuant to *Michigan v. EPA*, 135 S. Ct. 2699 (2015), that the Mercury and Air Toxics Standards (MATS) for HAP emissions from power plants was necessary and appropriate; proposed to amend the Phosphoric Acid Manufacturing and Phosphate Fertilizer Production, Publicly Owned Treatment Works, Manufacturing of Nutritional Yeast, and Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills NESHAP.

The EPA issued final stratospheric ozone rules, first, regarding the International Trade Data System, and second, listing certain ozone-depleting substances (ODS) as either acceptable, subject to use conditions, or unacceptable pursuant to the Significant New Alternatives Policy Program (SNAP), providing exemptions for propane. Also, the EPA addressed greenhouse gases (GHG) with proposed amendments to the Greenhouse Gas Reporting Rule, a final rule adding new monitoring methods for methane leaks from oil and gas equipment, a final Endangerment Finding for aircraft GHG emissions, and a final rule imposing management requirements for hydrofluorocarbon ODS due to their global warming potentials. The EPA also proposed New Source Review (NSR) and Title V amendments, setting GHG permitting emission thresholds pursuant to *Utility Air Regulatory Group v. EPA.*

Finally, the Committee reported EPA actions impacting criteria pollutant implementation requirements including: a new ambient PM_{10} reference method; several revisions to the volatile organic compound (VOC) definition; nitrogen dioxide monitoring requirements; initial area designations for primary sulfur dioxide NAAQS; $PM_{2.5}$ NAAQS implementation requirements; Exceptional Events Rule amendments; Cross-State Air

Pollution Rule (CSAPR) update for 2008 ozone NAAQS and implementation process. The EPA also finalized its determination to retain the lead NAAQS.

C. Endangered Species

The Endangered Species Committee focuses the Endangered Species Act (ESA), and related endangered species and biodiversity issues. This year, the Committee reports significant administrative developments, including a final rule regarding critical habitat issues, revising the criteria and process for critical habitat designation, with provisions designating unoccupied habitat, revising the definition of "destruction or adverse modification," and revisions regarding exclusions from critical habitat designations, all currently being litigated, in addition to final rules regarding review and processing of listing petitions and Candidate Conservation Agreements with Assurances. The Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) also revised the Habitat Conservation Planning Handbook.

Judicial developments included decisions focusing on listing species consistent with the Policy for Evaluation of Conservation Efforts, including significantly the D.C. Circuit's *Defenders of Wildlife v. Jewell* regarding the dunes sagebrush lizard, as well as other courts' climate change based decisions regarding the Pacific bearded seal and the North American wolverine. Critical habitat designation decisions included significantly a critical habitat designation decision from the Fifth Circuit, *Markle Interests, LLC v. FWS*, regarding dusky gopher frog habitat, but no frogs, on private land, while the Sixth Circuit issued a significant ESA Section 6 county rule preemption decision with *Florida Panthers v. Collier County*. Several decisions addressed ESA Sections 7 and 9 issues of conservation duties and take prohibitions respectively, significantly again the Florida Panthers case which also addressed ESA liability of local land use authorities in issuing building and other permits. Several decisions addressed Section 10 habitat conservation plans for experimental and reintroduced populations, as well as several decisions involving the commerce clause, takings and the Migratory Bird Treaty Act, and Bald and Golden Eagle Protection Act, with these last cases finding that these bird protection statutes protect against incidental take as well as direct take.

D. Environmental Disclosure

The Environmental Disclosures Committee provides a forum for the discussion of corporate environmental disclosure in light of Sarbanes-Oxley requirements and the increasing number of environmental "transparency" initiatives. The Committee focuses on legally mandated Securities and Exchange Commission (SEC) and financial statement disclosure of environmental matters and the relationship between such disclosures and voluntary corporate sustainability and social responsibility disclosures of environmental matters to stakeholders. It also treats issues arising from product-related environmental disclosures in the commercial marketplace.

In its 2016 report, the Committee generally recognizes uncertainty created by the new administration's deregulatory agenda, noting that, while future additional disclosure requirements are unlikely, uncertainty itself is an issue public companies should consider in reassessing disclosure obligations. More specifically, the Committee reviews in depth the ExxonMobil climate change investigation and litigation involving New York, Virgin Islands, and Massachusetts, as well as the SEC. The SEC proposed a Concept Release to update Regulation S-K business and financial disclosure requirements, focusing on sustainability information, as well as new requirements for disclosures by the mining industry. The Committee also discusses disclosure requirements that would be triggered by two significant rulemakings, with uncertain futures, including the Clean Power Plan (CPP) (currently stayed while litigated) and the BLM's hydraulic fracturing rule (held to be

outside BLM's jurisdiction). Also, at the tail end of 2015, EPA announced its "eDisclosure" webportal for self-disclosures pursuant to EPA's self-audit policy.

Shareholder litigation was active in 2016, alleging misstatements of environmental risk and compliance, including ExxonMobil and Volkswagen, as well as shareholder lawsuits filed against Vale SA and BHP Billiton Ltd. in response to the Mariana, Brazil dam collapse regarding Barrick Gold's failure to comply with Chilean environmental requirements at its Pascua Lama mine, and against BP for alleged misrepresentation of Macondo well production.

The Committee also reviews Global Reporting Initiative's (GRI) new global standards for sustainability reporting, GRI's collaboration with the Carbon Disclosure Project (CDP), PricewaterhouseCoopers survey of the status of related disclosures, and the Financial Stability Board's new Task Force on Climate-Related Financial Disclosures. Also, the Government Accounting Standards Board (GASB) issued a review of pollution remediation obligations, and certain asset retirement obligations, while ASTM revised its standard guides for estimating costs, liabilities and disclosure obligations for environmental matters and liabilities (E2137 and E2173 respectively).

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 practical issues arising in civil and criminal environmental enforcement. Current topics include the government's worker endangerment initiative, RIN fraud (renewable energy credits), Lacey Act violations (unlawful trade in animals and plants), vessel pollution prosecutions, CAA and the CWA enforcement, and emerging issues in sentencing and penalty assessment, including a jury instruction library.

The Committee reports comprehensive 2016 enforcement statistics, including a slight increase in civil enforcement with, but significant decrease in criminal enforcement from 2015, both of which significantly decreased, along with EPA inspections, since 2010, in addition to 2016 assessed penalties and injunctive relief, and Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or "Superfund") recovery funds and pollution reductions. The Volkswagen and BP settlements are discussed and noted for their significance. EPA's 2016 National Enforcement Initiatives retain large air pollution emission sources, energy extraction, municipal sewer systems, animal waste, while expanding hazardous air pollution emission sources, adding prevention of accidental releases, and industrial sources of water pollution.

Significant criminal cases reviewed include convictions for constructing boat lifts in navigable waters in the Florida Keys, misrepresentation of safety required vapor monitoring at Texas oil and chemical processing facilities with tragic consequences, Renewable Identification Number (RIN) fraud, a novel case involving misrepresentations of power plant operability under the Federal Power Act (FPA), and the Freedom Industries, Inc. 2014 chemical spill into Elk River, West Virginia.

Significant civil cases reviewed include the Volkswagen case, the final 2016 resolution of the 2010 BP Deepwater Horizon event, Chemoil Corporation's 2011-2013 biodiesel export ignoring RIN requirements, the Enbridge oil pipeline release into Kalamazoo River, Michigan, and a broad Tesoro CAA enforcement resolution of violations at several Tesoro refineries.

F. Environmental Litigation and Toxic Torts

The Environmental Litigation and Toxic Torts Committee focuses on current litigation developments, which include vapor intrusion, talc powder, lead in drinking water,

coal ash, and the CWA, in addition to the state of the law on insurance coverage for environmental and toxic torts claims.

For its 2016 report, the Committee carries forward its 2015 report regarding oil and gas litigation, including *Felts v. Devon Energy Production Co.*, Oklahoma "earthquake" litigation, noting challenges in proving causation in such cases, describing relevant Pennsylvania case history.

Regarding admissibility of expert testimony, a District of Columba court adopted *Daubert*, over *Frye*, in *Motorola, Inc. v. Murray*, while a New Jersey court applied a modified *Frye* test in *Carl v. Johnson & Johnson.* Sovereign plaintiffs pursued statutory and common law tort suits with mixed results in *Vermont v. Atlantic Richfield Co.*, regarding methyl tertiary butyl ether (MTBE), and *Washington v. Monsanto, Co.*, regarding polychlorinated biphenyls (PCB), both involving historic wide spread contamination. Regarding remedies, in *Plumbing Supply, LLC v. ExxonMobil Oil Corp.*, a federal district court in New York allowed plaintiff's nuisance claims seeking injunctive relief to continue over arguments the claims were barred by the statute of limitations, held inapplicable to abatement actions, while in *BSK Enters., Inc. v. Beroth Oil Co.*, a North Carolina state appellate court upheld the trial court's decision to limited plaintiff's underground storage tank pollution-based nuisance damage recovery to merely diminution in value, rather than the much higher cost of remediation, finding the doctrine's personal use exemption not available to commercial plaintiffs.

The Committee reviews two class actions, including *Ebert v. Gen Mills, Inc.*, where the Eighth Circuit rejected two proposed classes of plaintiffs alleging damage from trichloroethylene groundwater contamination, and *Reece v. AES Corp.*, where the Tenth Circuit dismissed plaintiffs proposed class alleging injuries from defendants' operation disposing of coal ash with oil and gas wastewater because the injuries were based only on "reasonable concern" about exposure. Regarding causation, in *Milward v. Rust-Oleum Corp.*, the First Circuit upheld the lower court's rejection of causation testimony attempting to link benzene exposure to promyelocytic leukemia finding the expert unreliable, having failed to consider findings contrary to her conclusions, while in *Burst v. Shell Oil Co.*, the Fifth Circuit upheld the lower court's rejection of causation testimony finding the expert's benzene (only) exposure studies unpersuasive for gasoline exposure. In *Sahu v. Union Carbide Corp.*, the Second Circuit rejected plaintiffs' claims against Union Carbide stemming from the 1984 Bhopal, India disaster, finding plaintiffs failed to prove Union Carbide was a "substantial factor" in causation of plaintiffs' property damages and explaining application of the test. See also the Committee's summary of *Abrams v. Related, L.P.* a New York case illustrating challenges in bringing multiple chemical sensitivity claims, and *Blanyar v. Genova Products., Inc.*, illustrating limitations period bars to medical monitoring claims.

2016 saw developments in mass tort litigation, with the Committee reviewing: the *Good v. American Water Works Co.*, Elk River spill litigation; *Vigneron v. E.I. du Pont de Nemours and Co.*, perfluorooctanoate drinking water contamination; and *Barkley v. D.C. Water & Sewer Authority*, regarding D.C. drinking water lead contamination that predates the Flint, Michigan claims. Finally, developments in "take home" asbestos liability occurred with *Schwartz v. Acccuratus Corp.*, wherein the New Jersey Supreme Court held that a company's duty of care may extend to a plaintiff beyond the spouse of the company's worker.

G. Environmental Transactions and Brownfields

The Environmental Transactions and Brownfields (ETAB) Committee focuses on environmental issues that arise in business, energy or real estate transactions, including mergers and acquisition deals, asset-based transactions, fossil fuel and renewable energy projects, and remediation and redevelopment of brownfields. Substantive areas include:

liability protection, transfer and apportionment; parent/successor liability; lender liability; insurance; incentive programs (for example, voluntary cleanup programs (VCP), brownfield cleanup programs (BCP), solar renewable energy credits (SREC), tax increment funding (TIF); deal structure and finance.

For its 2016 report, the Committee reviews several developments regarding bankruptcy, institutional controls, and lender liability. Regarding bankruptcy, the Committee discusses *Asarco LLC v. Noranda Mining, Inc.*, a Tenth Circuit decision addressing a CERCLA Section 113(f) contribution claim filed following emergence from bankruptcy; a federal district court case in New York, *DMJ Associates, LLC v. Capassso*, addressing contribution claims considering historic contamination in light of *United States v. Atlantic Research Corp.*; and the Third Circuit's *G-I Holdings, Inc. v. GAF Corp.*, regarding a recast previously discharged monetary claim. The Interstate Technology and Regulatory Council adopted a new guidance document, *Long-Term Contaminant Management Using Institutional Controls*, while Alabama, Florida, Indiana, and New Jersey focused on clarifying and streamlining their state specific institutional control process. Finally, the Committee discusses the United Nations Environment Programme (UNEP) lender liability report, *Lenders and Investors Environmental Liability: How Much is Too Much?*, the China's *Guidelines for Establishing the Green Financial System*, and references *Tingley v. PNC Financial Services Group, Inc.*, from a federal district court in Michigan, for its discussion regarding alleged lender "arranger" liability based on the soil removal in the context of a development project.

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

The Pesticides, Chemical Regulation and Right-to-Know (PCRRTK) Committee focuses on chemical law and regulation pursuant to the Toxic Substances Control Act (TSCA), the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) and the Emergency Planning and Community Right to Know Act (EPCRA). This year, the Committee provides with its report a detailed review of the 2016 Frank R. Lautenberg Chemical Safety for the 21st Century Act (Lautenberg Act), the first comprehensive revision of the TSCA, providing summaries of key TSCA amendments and implementation elements. Beyond Lautenberg, the EPA issued final TSCA rules for formaldehyde emission standards and third-party certification, amended the Chemical Data Reporting (CDR) rules to exempt certain mixtures of fatty acids, methyl esters, corn oil, tallow and soybean oil, and issued Significant New Use Rules (SNURs) for trichloroethylene (TCE) and two alkylpyrrolidones ("NEP" and "NiPP"), while also amending SNUR regulations.

Regarding FIFRA, the EPA proposed for public comment: draft biological evaluations of insecticides' (chlorpyrifos, diazinon and malathion) effect on endangered and threatened species and critical habitat; the draft pollinator-only ecological risk assessment for imidacloprid, a neonicotinoid insecticide; two draft Pesticide Registration Notices addressing pesticide resistance with management labeling. The EPA's regional offices issued their final 2016 National Pollutant Discharge and Elimination System (NPDES) pesticide general permits, which replace the 2011 general permits. Following the Ninth Circuit's remand, the EPA reviewed the FIFRA registration for Enlist Duo for synergistic effects between component chemicals 2,4-D choline and glyphosate, finding none. The Environmental Appeals Board upheld the EPA's cancellation of conditional registrations for flubendiamide, an insecticide. Finally, the EPA issued application standards for applicators of restricted-use pesticides, and removed seventy-two chemicals from its approved inert ingredient list.

With respect to EPCRA, EPA added hexabroocyclododecane (HBCD) and proposed to add nonylphenol ethoxylates (NPEs) to the Toxic Release Inventory (TRI), while amending reporting requirements consistent with Occupational Safety and Health Administration (OSHA's) Hazard Communication Standard (HCS), and Toxic Release

Inventory (TRI) implementation was transferred to the Office of Chemical Safety and Pollution Prevention (OCSPP).

Regarding hydraulic fracturing, in *Wyoming v. Department of Interior*, a federal district court in Wyoming vacated BLM's hydraulic fracturing rules, while EPA issued final oil and gas wastewater Publicly Owned Treatment Works (POTW) pretreatment standards requiring zero discharge, and the Pennsylvania Supreme Court struck additional Act 13 provisions as unconstitutional.

In biotechnology, the United States Department of Agriculture (USDA) announced preparation of a programmatic environmental impact statement (PEIS) to review impacts of revisions to regulations governing releases of genetically engineered plants and other organisms.

I. Superfund and Natural Resource Damages Litigation

The Superfund and Natural Resource Damages (NRD) Litigation Committee focuses on federal and state law, cases and policy related to Superfund (CERCLA) sites and NRD. Issues include assignment of liability, cost allocation, enforcement, and interactions between agencies, trustees and potentially responsible parties. The Committee provides updates on settlement options, litigation techniques, and technical issues of interest to environmental practitioners.

With no 2016 legislative developments under CERCLA, the Committee focuses on regulatory developments, including the addition of fifteen new National Priority List (NPL) sites, revision of the Hazard Ranking System (HRS) adding vapor intrusion, increases in potential CERCLA financial penalties, and a new rule requiring financial assurance for the hard rock mining industry, as well as many judicial developments. The Committee also provides summaries of caselaw addressing CERCLA jurisdiction, as barring Resource Conservation and Recovery Act (RCRA) citizen suits, and as triggered by active human conduct, as well as the limits of CERCLA liability for owners and operators, generators, transporters and arrangers, parent/shareholder and successors. The Committee also summarizes many cases addressing private cost recovery, contribution and contribution protection, allocation, indemnification and subrogation, and cases addressing CERCLA contribution defenses including the requirement that recoverable costs are necessary and consistent with the National Contingency Plan (NCP), liability defenses asserted as act or omission of a third party, innocent landowner or bona fide prospective purchaser, statute of limitations, and finally, judicial estoppel with this Committee's summary of *Asarco, LLC v. Noranda Mining, Inc.* also discussed by the Environmental Transactions and Brownfields Committee. The Committee also summarizes cases addressing the scope of recoverable response costs including attorneys' fees, claims against the government, and natural resource damages.

J. Waste and Resource Recovery

The Waste and Resource Recovery Committee focuses on solid and hazardous waste management issues governed by Subtitle C or Subtitle D of RCRA, or similar state programs particularly from a regulatory and compliance perspective including emerging issues, regulatory and statutory changes, and litigation that affects waste generators, transporters, and treatment, storage, and disposal facilities.

This year, the Committee provides summaries of several noteworthy cases, administrative developments and a comprehensive summary of electronic waste developments. Significant 2016 caselaw includes: *Center for Biological Diversity v. United States Forest Service,* which found environmental groups had standing to sue pursuant to RCRA regarding lead bullets in national forests; *In re Carbon Injection System* which addresses the thorny RCRA status of hydrocarbon vapors when injected for combustion;

Northern Illinois Gas Co. v. City of Evanston, which confirms the non-RCRA waste status of methane released from leaking natural gas pipelines; and another case finalizing EPA's settlement with Wholefoods for mishandling returned consumer goods.

RCRA administrative developments include the EPA's final Hazardous Waste Generator Rule revising standards for hazardous waste generators, and the EPA's remand of the coal combustion residuals rule, while the Committee also summarizes the rulemaking petition seeking review and more stringent RCRA regulation of oil and gas exploration and production derived ("E&P") waste as well as the coal ash provisions contained in the Water Infrastructure Improvements for the Nation (WIIN) Act.

Caselaw developments regarding electronic waste (e-waste) are reported for Connecticut, where the state e-waste law was upheld, for Washington, where an e-waste recycler was fined for improper disposal, and for California, where an auto parts retail chain settled claims of mishandling e-waste, and also where Apple, Inc. resolved California's claims based on unreported e-waste facilities. The Committee also summarizes state e-waste legislative developments for New Jersey, West Virginia, California, Minnesota, and the District of Columbia, as well as international e-waste developments in India, Hong Kong, and Ghana, including updates regarding the International E-Waste Management Network and the North American Commission for Environmental Cooperation.

K. *Water Quality and Wetlands*

The Water Quality and Wetlands Committee focuses on CWA legislation, regulation and litigation. This year the Committee reports judicial developments regarding CWA Section 303 water quality standards and total maximum daily load allocations (TMDL), CWA Section 303 and 306 effluent limitation guidelines (ELG) and performance standards, and CWA Section 309 enforcement, including resolution of several significant matters such as the Enbridge Energy Michigan pipeline release and the Freedom Industries, Inc. West Virginia Elk River chemical spill. Also reported are: CWA Section 401 state certification cases; many CWA Section 402 NPDES permitting cases including *Sierra Club v. BNSF Railroad Co.*, finding that railcars, i.e., "rolling stock," allowing coal particles blowing off and out of railcars to land in water, may be point sources; CWA Section 404 permitting determinations including the significant United States Supreme Court decision, *Hawkes Co., Inc. v. United States ACE* finding that an approved jurisdictional determination is a final agency action subject to judicial review; and several CWA Section 404 citizen suit cases.

Administrative developments include several that impact tribes, including: water quality standards proposed for waters in Maine pursuant to CWA Section 303; a revised interpretation of CWA Section 518 tribal provisions regarding burden of establishing treatment as state (TAS); an advance notice of proposed rulemaking regarding baseline water quality standards for Indian reservations; and a final rule establishing TAS for tribal CWA Section 303(d) TMDLs. Additionally, the EPA published guidance to define and interpret baseline aquatic ecosystem quality and measure changes, the 2016 preliminary effluent limitation guidelines program plan, as well as proposing and promulgating several rulemaking actions addressing copper, cadmium, and selenium in fresh and marine water bodies. The EPA also promulgated the Oil and Gas ELGs prohibiting discharges to POTWs, among other actions. The Committee also includes: the CWA Section 401 Federal Energy Regulatory Commission (FERC) conditional approvals to the Continental Pipeline Company, Northwest Pipeline, LLC, and Transcontinental Gas Pipe Line Company, LLC; the EPA draft 2017 NPDES general permit for construction related stormwater discharges; an EPA proposed rule to revise small municipal separate storm sewer system (MS4) permits; the United States Corps regulatory guidance letter clarifying jurisdictional

determinations, their applicability and use; and the Corps proposed rule to revise the Nationwide Permits (NWP).

Finally, in addition to summarizing proposed legislation impacting CWA Section 303(d) TMDLs and CWA Section 402 NPDES, the Committee reports regarding the Senate and House joint resolution passed to nullify the 2015 EPA rule defining "Waters of the United States" (WOTUS) and late 2016 congressional reports regarding the WOTUS rulemaking process.

III. ENERGY AND RESOURCES

A. Energy and Natural Resources Litigation

The Energy and Natural Resources Litigation Committee focuses on litigation in areas such as oil and natural gas, emerging natural resources damages, hydraulic fracturing, and renewable energy through newsletters, electronic communications, and programs.

This year the Committee reviews the most significant 2016 energy and natural resources litigation cases within the Committee's scope that are not included in the Oil and Gas Committee Report summarized below, or other energy and resources reports. Among these most significant energy and natural resources cases, those focusing on environment and natural resource issues include, first, the 2016 developments in *Chevron Corp. v. Donziger*, involving oil and gas development in Ecuador allegedly resulting in massive environmental damage, which initially resulted in a 2011 $17.9 billion judgment against Chevron, reduced in 2012 to less than $10 billion, and in 2016, held by the Second Circuit Court of Appeals to constitute the result of fraud and racketeering on the part of plaintiff's counsel Donziger and his team, while not invalidating the judgment but preventing Donziger and his team from profiting from it.

In *Energy Coal S.P.A. v. CITGO Petroleum Corp.*, Energy Coal (an Italian company) had contracted with Petroleos de Venezuela S.A. (a Venezuelan company), and after finding itself in a contract dispute, attempted to avoid applying its contract's choice of law provision dictating application of Venezuelan law by suing CITGO, a Petroleos affiliate, in Louisiana, asserting "the single enterprise theory" and arguing application of Louisiana Civil Code. The Fifth Circuit Court of Appeals found the single enterprise theory had never been adopted in Louisiana, but in any case, found there could be no reasonable expectation that Louisiana law could apply given the contract's choice of law provisions, particularly given the overly broad implications of such a result. Then, in *RSM Production Corp. v. Global Petroleum Group, Ltd.*, the Texas Court of Appeals reviewed RSM's claims filed in Texas that Global misappropriated seismicity data, and dismissed based on lack of personal jurisdiction over Global which, though active internationally, had no business ties in Texas.

Certain Underwriters at Lloyd's, London v. New Dominion, LLC, is a significant 2016 development in Oklahoma earthquake litigation, in which the insured, New Dominion, one of several oil and gas defendants sued in Oklahoma induced seismicity litigation, seeks insurance coverage for its earthquake litigation costs under a pollution liability insurance policy, coverage that was disputed by the insurer which concluded that the injected water allegedly causing the earthquake is not a pollutant and the injuries resulting from earthquakes did not result from a pollution condition. In this 2016 development, a federal district court in New York found that for purposes of reviewing claims regarding the insurance policy, New Dominion consented to personal jurisdiction in New York pursuant to the insurance policy's choice of law provisions.

Also, in *Mary v. QEP Energy Co.*, a federal district court in Louisiana excluded evidence of environmental damage where the suit alleged merely disgorgement of profits which could be decided solely upon the possessor's good or bad faith possession, and not bad faith operation which may be evidenced by environmental damage.

B. Energy Markets and Finance

The Energy Markets and Finance Committee brings together practitioners working in the converging fields of environmental markets, utility regulation, project development and finance, energy transactions, compliance, and energy trading. The Committee focuses on federal and state regulation of energy resource developers and energy generators and utilities, financing of energy projects, including alternative funding sources, regulation and oversight of energy commodities and wholesale energy markets, environmental regulation of energy projects, particularly with respect to new regulatory markets, financial reforms, energy trading rules, and climate change and clean energy regulations.

This year the Committee reports significant developments including the United States Supreme Court's *Hughes v. Talen Energy Marketing, LLC* decision upholding Federal Power Act (FPA) jurisdiction over wholesale capacity auctions, FERC's proposed rulemaking regarding electric grid storage, revised financial security measures adopted by the Bureau of Ocean Energy Management (BOEM), decoupling economic growth and carbon dioxide emissions, greenhouse gas emission regulation in state, federal and international forums, renewable energy, and oil and gas debt collection.

The Committee's comprehensive summary of the *Hughes* unanimous decision reviews the Maryland state program, the issues upon which turned the FPA jurisdictional preemption of the Maryland statute, bases for limitation of the holding, i.e., the state statute's disregard of a FERC required interstate wholesale rate, and concurring opinions addressing preemption issues. FERC's proposed grid storage rule defines electric storage resources broadly, and addresses eligibility, bidding parameters, wholesale market participation requirements, and a minimum size requirement of 100 kW, as discussed by the Committee. The BOEM's financial security developments arose from BOEM's notices issued to lessees that removed the self-insurance option previously allowing larger companies to avoid posting supplemental financial security with BOEM to cover future decommissioning liabilities, and changing the methodology for estimating the costs of these liabilities that significantly increases the calculated decommissioning costs.

Regarding decoupling economic growth and carbon dioxide emissions, the Committee reviews reports regarding recent global data which conclude that both China and the United States grew economically while lowering carbon dioxide emissions, while significant credit for lower emissions goes to China for mothballing its worst emitting coal plants and carbon intensity of wealthier nations continues to decrease as coal use diminishes. Though, the news regarding carbon dioxide is generally good, concern regarding increasing methane emissions from oil and gas production remains. The Committee discusses the CPP and related state action including litigation, the California Cap and Trade Program (AB 32) and the Paris Climate Change Agreement together, synthesizing interaction of these authorities in the context of an openly hostile Trump Administration, concluding that the California program is relatively immune from external opposition. In addition to the California's AB 32, the Committee summarizes California 2016 implementation of SB 350, which set renewable energy and energy efficiency goals and a regional energy market.

Finally, the Committee reviews renewable energy developments in coal country with solar projects in Kentucky, and finishes up with debt collection in oil and gas country discussing accelerated litigation to resolve payment disputes, a sign of consistently low oil prices and resulting sluggish production.

C. Forest Resources

The Forest Resources Committee addresses virtually every issue that touches both private and public forest lands, focusing on all legal, policy and practical issues relevant to

owners, lenders, trade associations, managers, users, non-profits, and others who are interested in forest lands.

This year the Forest Resources Committee reports forest resource federal and state litigation, and federal legislative and administrative developments. The federal courts reviewed Forest Service actions including: reissuing special use permits for a Wisconsin oil pipeline in *Sierra Club v. United States Forest Service*; allowing clear cutting for a log landing area in *Beard v. United States*; rendering ESA and National Environmental Policy Act (NEPA) determinations regarding lynx and grizzlies in *Alliance for the Wild Rockies v. Christensen*; and reviewed EPA's issuance of a CAA PSD permit to a biomass fueled power plant in *Helping Hand Tools v. EPA*.

Then, in the states, in *Oliver v. Ball*, a Pennsylvania court reviewed whether harvestable timber must be demonstrated to be "unique" before awarding specific performance. In *Georgia Pacific Corp. v. Cook Timber Co., Inc.*, a Mississippi court addressed detailed aspects of timber processing in reviewing contractual performance in response to Cook Timber's claims alleging breach of contract, antitrust and conspiracy. In *Kirk v. Wescott*, an Idaho court found that a deed may create a future easement, as a contingent future interest that was also temporary.

In addition to EPA's decision to not regulate stormwater from logging roads and BLM's proposed Planning 2.0 resource management regulations, the Forest Service issued its final Record of Decision for a forest plan amendment for Alaska's Tongass National Forest, the first one under its 2012 Planning Rule, while also issuing a final regulation modifying the 2012 Planning Rule clarifying requirements for forest plan amendments. Finally, the Committee reports that the United States lumber industry, specifically the Committee Overseeing Action for Lumber International Trade Investigations or Negotiations (COALITION), filed antidumping and countervailing duty petitions with the United States Department of Commerce and the International Trade Commission alleging injury from unfair trading by Canadian softwood imports.

D. Hydro Power

The Hydro Power Committee focuses on the law and regulation of hydroelectric projects, which use the flow of water, a renewable resource, to provide an important source of electric power in the United States and serve multiple additional purposes, including flood control, navigation, storage of water for irrigation and municipal and industrial purposes, protection and enhancement of fish and wildlife resources, and recreation. Hydroelectric projects are heavily regulated by federal and state agencies and the complex regulatory process is constantly evolving. Currently the Committee is focusing on marine and hydrokinetic technology and the possible legislative reform of the FERC's hydro relicensing process, as well as hydro as a renewable resource and how the EPA's CAA CPP will impact hydropower.

With its 2016 report, the Hydro Power Committee reviews a Ninth Circuit decision and several administrative developments. Specifically, in *United States v. Washington*, the Ninth Circuit affirmed a permanent injunction issued by the lower federal district court requiring the State of Washington to address culverts which impede fish passage and infringe on Tribes treaty-reserved fishing rights, preventing them from earning a livelihood.

Administrative developments include FERC's issuance of its first license under its two-year licensing process to the Kentucky River Lock and Dam No. 11, while signing an updated MOU to streamline hydro project FERC permitting of non-federal hydroelectric projects at Corps facilities with the Corps of Engineers. The EPA proposed a rule regarding design and expanding the scope of the CEIP, a component of the CPP. Finally, the Committee reviews the Department of Energy Office of Energy Efficiency and Renewable

Energy's report, *Hydropower Vision: A New Chapter for America's 1st Renewable Electricity Source*.

E. Marine Resources

The Marine Resources Committee is "oceancentric" focusing on issues arising from the protection and use of coastal and ocean areas, including the Great Lakes' "sweet water seas" and the multiple stressors that operate on ocean and coastal ecosystems. Specific areas of focus 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, atmospheric deposition, sewage and coastal zone development and degradation, to non-indigenous or exotic nuisance species.

With its 2016 report, the Committee reviews developments in fisheries, marine mammals pursuant to the Marine Mammal Protection Act (MMPA), the ESA, the 1982 U.N. Law of the Sea Convention, and the Coastal Zone Management Act (CZMA) as well as offshore wind.

Regarding fisheries, in *Anglers Conservation Network v. Pritzker*, the D.C. Circuit held fishery management councils action or inaction are not final agency actions subject to review under the Administrative Procedures Act (APA). In addition to the Ninth Circuit's decision in *Alaska Oil and Gas Ass'n v. Pritzker* upholding NMFS's bearded seal ESA determination, discussed by both the Endangered Species and Oil and Gas Committees, the Ninth Circuit, in *Marilley v. Bonham*, also upheld California's fishing fee differential for nonresidents over constitutional challenges. Also, two fisheries statutes were enacted in 2016, the Assuring Access to Pacific Fisheries Act, and amendments to the legislation implementing the Western and Central Pacific Fisheries Convention.

For marine mammals under the MMPA, in *United States v. Archibald*, considerable argument purporting to distinguish intentional lethal take from intentional killing mens rea failed to secure the federal district court of New Jersey's dismissal of a criminal complaint against a crewman alleged to have shot and killed a pilot whale in violation of the MMPA. In *Pacific Ranger, LLC v. Pritzker*, the federal district court for D.C. had no trouble determining that an incidental take permit does not simply allow fishermen to take any marine mammals as long as they do not intentionally take them. In *NRDC v. Pritzker*, the Ninth Circuit reversed and remanded the lower court decision in finding that the NMFS had not properly determined that the Navy met the MMPA least practicable adverse impact requirement for its low frequency sonar systems. While several bills were introduced, none were enacted. Also, several rules were proposed, but only two final rules are reported: NMFS promulgated its determination that a beluga whale is a depleted marine mammal stock under the MMPA; a final rule replacing right whale North Atlantic critical habitat with new areas.

For polar bears, sea turtles and salmon under the ESA, in *Alaska Oil and Gas Ass'n v. Jewell*, the Ninth Circuit upheld the FWS final rule designating critical polar bear habitat, while in *National Wildlife Federation v. National Marine Fisheries Service*, the federal district court for Oregon held the NMFS failed to comply with NEPA in preparing an EIS for a 2014 Biological Opinion (BiOp) regarding the Federal Columbia River Power System, and in *Wild Fish Conservancy v. Irving*, a federal district court in Washington found the NMFS BiOp regarding the Leavenworth National Fish Hatchery's effects on Chinook salmon and steelhead was arbitrary and capricious for failing to consider climate change effects, among other deficiencies. In legislative and administrative developments, the FWS issued a final rule regarding incidental take of Pacific walruses and polar bears from oil and gas activity in the Beaufort Sea and coastline.

Regarding deep seabed mining, the International Seabed Authority met in its twenty-second annual session to discuss contract status for various minerals, including polymetallic nodules, sulfides and ferromanganese crusts and issued draft regulations. The Commission on the Limits of the Continental Shelf met in its Fortieth and Forty-first Sessions, approving recommendations and reviewing submissions over several areas of the continental shelf. In the Arctic, the United States remains chair of the Arctic Council, publishing a list of accomplishments in its midterm update, while as reported by the Oil and Gas Committee, President Obama issued an executive order creating the Northern Bering Sea Climate Resilience Area, withdrawing many square miles of land from future oil and gas leasing. Also, the United States Coast Guard is preparing to implement the Polar Code, a new International Code for Ships Operating in Polar Waters.

With respect to the 1982 Law of the Sea Convention, a significant ruling was issued from the *South China Sea Arbitration* associated with *The Republic of the Philippines v. The People's Republic of China* interpreting the Law of the Sea Convention, though the United States is not a party.

Regarding coastal zone management, a federal district court in California held, in *Pacificans for a Scenic Coast v. California Department of Transportation*, that the Department did not violate the CZMA in issuing its highway widening project approval, which did not constitute federal agency activity. In addition to NOAA's proposed CZMA rule addressing the process for adopting changes to coastal management programs, the National Ocean Council finalized the first United State ocean plans, specifically the Northeast Ocean Plan and the Mid-Atlantic Ocean Action Plan, which create data portals to inform ocean projects and decision-making.

Finally, the Committee summarizes judicial decisions and projects involving off-shore wind. While the off-shore wind projects are generally summarized in the Renewable, Alternative and Distributed Energy Resources Committee report and thus not highlighted here, the judicial developments include *Fisheries Survival Fund v. Jewell*, challenging the first federal offshore wind energy lease sale, and the D.C. Circuit's decision in *Public Employees for Environmental Responsibility v. Hopper*, reversing lower court decisions upholding elements of DOI's 2011 Cape Wind project approvals, and invalidating the EIS and the incidental take statement.

F. Native American Resources

The Native American Resources Committee is a forum and educational resource for lawyers representing tribes, tribal entities, indigenous peoples, and businesses engaged in development or other commercial activities around Indian country, Alaska Native villages, and other lands of indigenous peoples. The Committee focuses on broad ranging current and emerging environmental, energy, land use, resource, and environmental justice issues.

For its 2016 report, the Committee reviews the most significant 2016 Native American law primarily including the Indian Child Welfare Act and the status of Native Hawaiians, while reporting regarding developments in tribal sovereignty. To best appreciate these Indian Law developments, this author urges the reader to carefully review the Native American Resources Committee Report. However, among these significant Native American Resources developments, the most significant environmental development reported by the Committee in 2016 was the Dakota Access, LLC pipeline (DAPL) regarding which, in the final days of 2016, the USCOE had determined it would not approve an easement to route DAPL under the Missouri River, and for this reason, at the end of 2016, legal construction of the pipeline had halted. DAPL continues to evolve.

G. Nuclear Law

The Nuclear Law Committee focuses on the legal issues related to nuclear power and nuclear materials. Nuclear power is more than just the licensing and operation of power plants—the nuclear fuel cycle also involves fuel production, storage, and disposal. Nuclear materials are used to diagnose and treat many types of illness and injury; in industrial and construction applications; and in academia and scientific research.

For its 2016 report, the Committee reported several litigation matters and a few administrative developments, as well as state clean energy initiatives. First, with *New York v. NRC II*, the D.C. Circuit Court of appeals rejected challenges to the Nuclear Regulatory Commission's Continued Storage Rule (CSR) and the related Generic EIS regarding storage of spent nuclear fuel. In *Brodsky v. NRC*, the Second Circuit affirmed the district court's ruling upholding NRC's fire safety program exemptions approved for the Indian Point Nuclear Power Plant. In *NRCD v. NRC*, the D.C. Circuit denied NRDC's challenges to the NRC's refusal to grant NRDC's hearing request regarding the Limerick Generating Station's alleged failure to consider new information regarding Severe Accident Mitigation Alternatives.

In *System Fuels, Inc. v. United States*, the Federal Circuit determined an appeal of a decision regarding claims that the government's failed to accept and dispose of spent nuclear material, finding the Federal Court of Claims erred in denying damages for costs incurred in loading storage casks and containers regardless of the type of fuel loaded.

In administrative developments, significantly, the Watts Bar Nuclear Plant Unit 2 began commercial operation, constituting the first new nuclear generation in the United States in twenty years. Also, the NRC issued combined licenses for construction and operation of six new reactors in South Texas, along with an early site permit for new facility in New Jersey. Small modular reactors were also issued permits in 2016, including the Clinch River site near Oak Ridge, Tennessee, while NuScale Power completed its design certification application. Exelon won its appeal of an NRC exercise of authority to impose additional design requirements for its Byron and Braidwood nuclear power plants to mitigate concerns arising in the updated Final Safety Analysis Reports regarding water passing through valves. The NRC affirmed an Atomic Safety and Licensing Board decision rejecting Friends of the Earth challenge to the Diablo Canyon nuclear power plant license alleged to be a de facto license amendment, finding that to gain a hearing for a de facto license amendment, one must show an actual change in the license.

Finally, both Illinois and New York incorporated zero emission credits into state renewable energy programs to assist nuclear energy plants receive clean energy benefits.

H. Oil and Gas

The Oil and Gas Committee focuses upon many topics of interest to energy law practitioners including: legal issues and new trends and developments pertinent to the business of exploring for and producing oil and natural gas; regulatory, statutory, and case law developments pertinent to the exploration and production business; and the future of the domestic and international oil and gas exploration and production industry.

With its report, the Committee reviews the most significant 2016 oil and gas legislative, judicial and administrative developments primarily at the state level in oil and gas producing states, including Alaska, Arkansas, California, Colorado, Kansas, Louisiana, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, Texas, West Virginia, and Wyoming, generally addressing taxation, contractual, property rights and royalty disputes, local ordinances prohibiting oil and gas activity, and other oil and gas business and production related issues. To best appreciate these oil and gas law state developments, this author urges the reader to carefully review the Oil and Gas Committee Report.

However, among these significant oil and gas law developments, there are many specific environment and natural resource issues, including endangered species developments also discussed in both the Endangered Species and Marine Resources Committee reports such as the Pacific bearded seal, arctic subspecies of ringed seal and polar bear habitat, as well as climate change developments impacting oil and gas operations also discussed in both the Marine Resources and the Climate Change, Sustainable Development and Ecosystems Committee reports, such as President Obama's Executive Order creating the Northern Bering Sea Climate Resilience Area. This Highlights section will include only those significant environmental and resource issues arising in oil and gas operations that are not addressed by other committees.

Significant 2016 environmental and natural resources developments not addressed by other chapters include California's emergency rulemaking imposing safety and reliability standards, and responsive legislation addressing the factors leading to the Aliso Canyon natural gas storage facility leak, providing for storage well inspection, development of final rules establishing standards for design, construction and maintenance requirements, as well as mechanical integrity testing, and revising the civil penalty structure for violations and appellate process. Additionally, California notified the EPA that ten of its aquifers used for injection and previously classified as exempt failed to meet the Safe Drinking Water Act (SDWA) criteria for exemption. The State of Kansas recognized a significant increase in seismic activity, which the Director of the Kansas Geological Society testified appeared to be resulting from disposal of large volumes of saltwater that has activated critically stressed faults in the deep subsurface, in response to which the Kansas Corporation Commission issued orders reducing saltwater injection rates in impacted areas.

In New Mexico, in addition to caselaw confirming appropriate adoption of the 2013 "pit rule" and express rejection of the expert witness *Daubert* refining case *General Electric Co. v. Joiner*, New Mexico revised its definition of oil field waste to clarify the scope of waste disposal rules to include oil and gas storage, transportation, treatment, refining, and oil field services, as well as significantly revise the permitting and financial assurance requirements for surface waste management facilities. Ohio adopted new emergency notification rules for oil and gas related emergencies, such as uncontrolled fires or natural gas releases, or spills of oil, brine, or hazardous wastes. Oklahoma revised its regulations to add a provision regarding monitoring and reporting within induced seismicity areas of interest, address shutdown of wells, orders, permits, and transfer of injection of authority, as well as several revisions to waste management requirements such as liner requirements for flow back water pits, monitor well sampling and leachate collection systems, and waste management at truck wash pits and similar provisions for commercial facilities, in addition to provisions regarding Brownfield sites. Finally, Oklahoma added provisions addressing natural gas surface seeps, rulemaking and enforcement authority, notification requirements, and provisions providing for property owner assistance.

Pennsylvania adopted more stringent regulations for development of unconventional well sites including provisions for storage wastewater in impoundments and prohibiting disposal of drill cuttings at well sites. Continuing Act 13 litigation resulted in a 2016 Pennsylvania Supreme Court decision striking provisions of Act 13, finding that the Public Utilities Commission no longer has authority to review local ordinances for Act 13 compliance, striking physician restrictions preserving confidentiality of fracturing fluid trade secrets, striking Act 13 requirements limiting water supply notifications of possible contamination related to a spill to public water supplies only, rather than all water supplies, finding it to constitute a special law, and finally, striking authority for private company imminent domain for gas storage.

West Virginia enacted legislation adopting a requirement that accidents with serious injuries or explosions be reported by both well operators and pipelines to Homeland

Security within fifteen minutes, and also adopted two new air emission general permits, specifically General Permit G35-C for natural gas compressors and dehydration facilities used in gathering, transmitting or compressing natural gas and General Permit G70-D for natural gas production facilities at well sites. GP G35-C was promptly appealed by the West Virginia Oil and Natural Gas Association.

In Wyoming, of national significance, the federal district court for Wyoming struck down the BLM's hydraulic fracturing rule. Also, Wyoming amended legislation allowing the State Oil and Gas Supervisor to convert a carbon dioxide injection permit for enhanced recovery (UIC II), regulated by the Wyoming oil and Gas Conservation Commission, into a geologic sequestration permit (UIC VI) regulated by the Wyoming Department of Environmental Quality. Finally, Wyoming amended regulations to reduce by 66% the maximum volumetric flow rate allowed for venting natural gas, and requiring monthly reports regarding flaring and venting volumes, number of days flaring and/or venting, the measurement methods and all related circumstances, in addition to increasing blanket well bond requirements.

I. Petroleum Marketing

The Petroleum Marketing Committee focuses on developments under the Federal Petroleum Marketing Practices Act (PMPA), state statutes and regulations attempting to apply to the relationship between refiners and downstream suppliers or jobbers and retail operators, pricing statutes and regulations, and impacts to the industry of anti-trust laws, consumer statutes, environmental law, development of cross-franchising, the Americans with Disabilities Act, laws regarding personal injuries to consumers, zoning ordinances and consolidation of refiners.

The Committee reports several decisions pursuant to the Petroleum Marketing Practices Act focusing on rights of action and removal jurisdiction, the definition of "franchise," and termination issues including grounds for, and proprietary nature of notice regarding, termination.

In *Puma Energy Caribe, LLC v. Riollano-Caceres*, a federal district court in Puerto Rico held that the PMPA does not provide franchisors with a cause of action, while in *AVP Metro Petroleum, LLC v. Sepahvand*, a federal district court in Oklahoma, and *Wallis Petroleum, L.C. v. Creve Coeur Oil and Car Wash, Inc.*, from a federal district court in Missouri, both confirmed franchisors' breach of contract actions seeking to collect unpaid amounts under supply agreements do not claims under the PMPA. The Committee discusses, in some detail, a federal district court's decision in *Kirman v. Bill Wolf Petroleum Co.*, in which the court carefully reviews the elements of franchise relationship absent a supply relationship, finding no franchise existed in that case.

In the termination cases, the federal district court for Puerto Rico held, in *Total Petroleum Puerto Rico Corp. v. Quintana*, that clearly defendant had attempted to evade personal service of process and therefore, the plaintiff was entitled to prevail on their TRO sought with a declaration of plaintiff's franchise termination, while in *BP W. Coast Products, LLC v. Crossroad Petroleum, Inc.*, a federal district court in California found that BP had lawfully terminated fifty-three franchises, addressing notice, assignment options and other termination issues.

J. Public Land and Resources

The Public Land and Resources Committee focuses on a broad array of federal, state, and local land and resource issues involving the BLM, National Forest Service (NFS), NPS, FWS, National Wildlife Refuge System, other federal and state agencies, other federal and state land holdings and inholdings, and municipal lands, where public land and resource law intersects endangered species, Native American resources, air

quality, forest management, mining and mineral resources, oil and gas, climate change, renewable resources, and energy infrastructure such as recreation (developed and undeveloped), wilderness, wildlife, water, open space, grazing, species conservation, conventional energy, renewable energy, mining, and other uses of the public lands and resources.

With its report, the Committee reviews significant regulatory developments with BLM's final revisions to regulations regarding rights-of-way over federal land, as well as judicial developments regarding the Quiet Title Act (QTA), federal preemption and the grazing and wild horse legislation.

BLM's final rights-of-way revisions pursuant to the Federal Land Policy Management Act (FLPMA) and the Mineral Leasing Act promotes renewable energy development (solar and wind) on designated leasing areas, addressing terms and conditions and other issues, summarized comprehensively by the Committee.

Reported QTA cases include *State of Alaska Department of Natural Resources v. United States*, wherein the Ninth Circuit held Alaska's QTA claim properly dismissed under the Indian Lands exception, and the *Northern New Mexicans Protecting Land Water & Rights v. United States*, where the federal district court in New Mexico dismissed property owners QTA claims for failure to plead with particularity. Preemption cases include *Bohmker v. Oregon*, where the federal district court in Oregon held an Oregon statute restricting mining activities in state waters was not preempted by the FLPMA or the National Forest Management Act. The Ninth Circuit reviewed Taylor Grazing Act claims in *United States v. Estate of E. Wayne Hage*, reversing the district court's small government award for trespass, finding bias, remanding with instructions to reassign the case to a different judge. And finally, the Tenth Circuit reviewed claims under the Wild Free-Roaming Horses and Burros Act, reversing the district court in finding the BLM cannot simply designate private lands as public lands to expedite removal of wild horses.

K. *Renewable, Alternative, and Distributed Energy Resources*

The Renewable, Alternative, and Distributed Energy Resources (RADER) Committee focuses on those legal policy and practical implementation issues affecting expansion of markets for renewable and distributed energy resources, particularly: innovative approaches to stimulating renewable and distributed energy resource development; measures for commoditization and value maximization of fuel, environment and tax-related legal at-tributes of renewable energy and distributed generation production; constraints on fitting renewable resources and distributed generation (whether or not powered by renewable fuels) into the framework of national and states' energy policy; relating renewable energy resource and distributed generation development to environmental legal requirements; and issues related to structuring finance for renewable energy and distributed generation

This year the Committee reports a strong year for solar and wind with more than half of additional new generation capacity consisting of renewable technology, particularly solar and wind, with solar capacity increases driven by new utility photovoltaic (PV) but benefitted by development outside California including Georgia, Utah and Mississippi. However, the Committee reports future uncertainty for the energy sources within the Committee's scope, given the Trump Administration's support of fossil fuel and discusses possible positive and negative influences including the likely fate of the CPP and the Paris Agreement.

State developments regarding renewable portfolio standards include: California's increase in renewable energy procurement goals; New York's Clean Energy Standard, Massachusetts commitment to offshore wind power; Iowa's commitment to onshore wind power; and Oregon's renewable energy and coal cessation commitment. However, efforts to expand renewable energy failed in Washington regarding biomass and Maryland

regarding its renewable portfolio standard. Net metering continued its faulty progress with states revisiting and revising associated rates and charges, notably in Maine and Nevada, California, Arizona, Massachusetts, and New York.

Federal energy policy developments include the significant *FERC v. EPSA* demand response case reviewed by the Energy Markets and Finance Committee, as well as the FERC's decision to allow coop and municipal utilities to purchase power from small energy providers and its proposed rule addressing battery storage, other energy sinks, and aggregated distributed energy resources.

Offshore wind made records in 2016 with the first off-shore commercial wind farm electricity generation by Deepwater Wind's Block Island project, which should soon be followed by the Cape Wind project, if all approvals can be secured, as discussed in the Marine Resources Committee report. Meanwhile, as reported by the Public Lands Committee, the BLM promulgated revisions to regulations promoting renewable energy on federal lands in designated leasing areas, SunEdison declared bankruptcy, SolarCity fell into debt only to be saved by Elon Musk via TESLA acquisition, and Bill Gates formed the $1 billion Breakthrough Energy Fund to support emerging clean energy technologies. Finally, corporate renewable energy procurement progressed with Google, Microsoft, and Amazon achieving renewable energy or carbon neutral goals, and significant additional corporate renewable commitments made by Johnson & Johnson, Apple, Switch, and Walmart.

L. *Water Resources*

The Water Resources Committee focuses on substantive and practice developments that impact water allocation and availability for all water users. These developments fall into a broad spectrum of subject areas, including state water law; federal and tribal water law; issues arising under the ESA and CWA; interstate allocation of water; the Public Trust and Prior Appropriation Doctrines; reserved water rights; state, local and municipal water supply; water rights transfers; and federal reclamation law. In light of increasing issues of water scarcity, the committee's interests encompass the interdependence of water uses by all economic sectors - agriculture, mining, fisheries, tourism, energy, and water and wastewater utilities among them - and the inescapable connection between water quantity and water quality.

This year, the Committee reports federal and individual state developments in water resources law, not all of which are highlighted here. Federal developments impacting the states include, in Alaska, the United States Supreme Court reversed the Ninth Circuit in *Sturgeon v. Frost*, remanding for district court consideration of the NPS regulations under Alaska's National Interest Lands Conservation Act, specifically whether a river constitute public lands and the Park Service's scope of authority. Colorado was impacted by the Forest Service's revision of its Special Uses Handbook water management provisions for ski areas, while Kansas saw two new agreements approved by the Republican River Compact Commission among Kansas, Colorado, and Nebraska. The Public Lands Committee also reported the Ninth Circuit's decision in Nevada's *United States v. Estate of Hage* regarding grazing rights asserted as appurtenant to existing water rights, while in New Mexico, with the *Jemez River Adjudication*, a federal district court held Spain had extinguished aboriginal water rights for several pueblos, and the same court approved a settlement of tribal water rights for several other pueblos in *State v. Aamodt.* In Oregon, in *Bohmker v. Oregon*, also reported by the Public Lands Committee, the federal district court in Oregon upheld the Forest Service's ESA consultation requirements in issuing grazing permits on the banks of the Sycan River, while significantly, the same court, in *Juliana v. United States*, held the plaintiffs had standing to assert violation of constitutional due process rights for failing to control carbon pollution recognizing the federal government's

public trust responsibilities. Finally, in Wyoming, the *Montana v. Wyoming* case regarding the 1950 Yellowstone River Compact progressed but no final resolution yet.

The Committee also reports detailed developments at the state level regarding state water resources law. This author urges the reader to review the Committee's full report, especially to appreciate the full scope of these individual state developments. Most interesting to this author are the varying approaches water limited states utilize: Arizona's water storage on state trust lands; California's statutory residential metering and water use restrictions, stormwater capture and water data acquisition mandates, and public/private partnership water management projects; Colorado's rain barrels, burning for watershed restoration, and water storage strategies; Idaho's managed groundwater recharge goals; and other developments in water resource management approaches in Kansas, Montana, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, Texas, Utah, Washington, and Wyoming, as well as the Eastern and Great Lakes states. Regardless of an environmental practitioner's desired scope of work, all environmental law practices will likely be impacted by water resource issues in the future.

IV. CROSS PRACTICE

A. Alternative Dispute Resolution

The Alternative Dispute Resolution Committee is focused on all aspects of alternative dispute resolution (ADR), conflict prevention and resolution, and collaboration as the field affects environmental, energy, and resource issues and its primary goal is the development and dissemination of information on practical applications for ADR and conflict prevention and resolution techniques in the environmental, energy, and resource fields.

The Committee reports resolution of several disputes, involving land use, water and endangered species, and illustrating how alternative dispute resolution offers unique benefits where resources are limited and legal interpretations may become less certain, characteristics particularly encouraging use of ADR for environmental cases generally, and possibly more so in the new Trump Administration.

Legislative and administrative developments were adopted in 2016 that encourage ADR including: the Indian Trust Asset Reform Act; the FOIA Improvement Act; proposed legislation, S. 293/H.R 585 requiring remediation of ESA citizen suits; and the proposed Emergency Wildfire and Forest Management Act which would create a pilot arbitration program.

ADR was used in: *United States v. City of Detroit* to resolve EPA's enforcement action against Detroit for thirty-five years of NPDES noncompliance; *In Re E.I DuPont De Nemours* to determine reasonable timeframes for mediation before resuming trial; *Gold Reserve Inv. v. Bolivarian Republic of Venezuela*, to determine domestic enforceability of international arbitration awards and agreement; and *Rose v. Interstate Oil Co.*, where successful settlement through mediation of damages arising from gasoline leaks from an underground storage tank was upset due to failure of contingencies.

The Committee provides several case studies describing in more detail the benefits of ADR in environmental cases involving limited resources, including settlement of water rights disputes such as: the Chickasaw and Choctaw Nations settlement with Oklahoma and Oklahoma City; the Kickappo Tribe's settlement with Kansas; the Colorado, Kansas, and Nebraska settlement of their Republican River Compact issues; and Missouri's Hinkson Creek Watershed settlement utilizing a Collaborative Adaptive Management (CAM) plan. Land issues reviewed include: land use disputes among neighborhood groups and Spokane County in Oregon; Spanish-speaking residents participation in a Kettleman City; California hazardous waste landfill permitting process; and the 2012 National Forest Management Planning Rule, discussed in the Forest Resources Committee report.

Endangered species issues reviewed include: the Oregon's water allocation dispute in the Deschutes River Basin impacting the endangered Spotted Frog; the Massachusetts habitat conservation plan for the threatened piping plover and California's gray wolf management plan.

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.

The Committee finds itself in a year of contrasts, from the staying of the CPP in February 2016, to the election of Donald J. Trump in November 2016, followed immediately by the entry into force of the Paris Agreement. Nonetheless global progress towards climate change mitigation continues despite any particular setbacks in the United States.

The Paris Agreement was signed at the Twenty-First Session of the Conference of the Parties (COP) to the United Nations Framework for the Convention on Climate Change (UNFCCC) in December 2015, the conditions for entry into force were met in October, and the Agreement entered into force in November 2016. The First Session of the Meeting of the Parties to the Paris Agreement was held in November 2016 and focused on the work programs. The next meeting will be in November 2017.

Additional significant progress in mitigating climate change occurred with the Montreal Protocol, and the Twenty-Eighth Meeting of the Parties (MOP28) where 197 countries voted to regulate global consumption of hydrofluorocarbons (HFCs) (powerful greenhouse gases (GHG) with global warming potentials (GWP) up to 14,000 carbon dioxide equivalents (CO_2e)) with the Kigali Agreement, scheduled to enter into force January 2019, with twenty parties ratifying the amendment.

The United Nations International Civil Aviation Organization's (ICAO) Thirty-Ninth Assembly agreed to limit GHG emissions from international aviation, adopting a Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA), voluntary participation from 2021-2026, and mandatory participation 2027-2035. Also, the Marine Environment Protection Committee (MEPC) of the International Maritime Organization (IMO) adopted measures to mitigate GHG emissions from international shipping, including measures to monitor fuel oil consumption and plans to develop a strategy to reduce emissions.

Carbon pricing programs are present in about half of countries' GHG mitigation plans. Canada is requiring carbon pricing implementation in all jurisdictions by 2018, with other programs developing in Latin America, Chile, Mexico, China, and South Africa.

In the United States, the Committee summarizes the EPA's CAA CPP and related litigation, the EPA and BLM methane regulations applicable to the oil and gas industry, and also the EPA's CAA Information Collection Requests, and the Obama Administration's mid-century strategy for deep decarbonization, all of which have been immediately targeted for deconstruction by the new Trump Administration. Also, the EPA issued its cause and contribute finding for aviation GHG emissions, while the EPA and the National Highway Traffic Safety Administration (NHTSA) made progress on mobile source GHG emissions with corporate average fuel economy standards mid-term evaluation and final Phase 2 standards for light-duty vehicles and medium and heavy duty trucks respectively, and the EPA proposed stationary source PSD and Title V rulemaking setting permit thresholds at 75,000 tons per year of CO_2e pursuant to the Supreme Court's decision in *UARG v. EPA*.

The Committee reports significant climate change litigation, including the *Juliana v. United States* climate change due process case reported by the Water Resources and Constitutional Law Committees, as well as several other decisions involving climate

change related issues, including: *Zero Zone, Inc. v. United States Department of Energy*, in which the Seventh Circuit upheld the DOE's rulemaking for commercial refrigeration equipment based on the Social Cost of Carbon; litigation related to state investigations into corporate climate change financial disclosures, such as Massachusetts and New York versus ExxonMobil; and also the Volkswagen $2 billion settlement.

Regional and multi-jurisdictional climate change activities developed with: the Western Climate Initiative's (WCI) Canadian launch; the Regional Greenhouse Gas Initiative's (RGGI) 2016 Program Review; the Governors Accord for a New Energy Future signed by seventeen states; the Pacific North American Climate Leadership Agreement; as well as specific state developments, particularly California, Illinois, Maryland, Massachusetts, Nevada, New Hampshire, New York, Oregon, Pennsylvania, Vermont, Virginia, and Washington, much of which is also reported in the RADER report.

Turning to adaptation, the Committee reports developments including the degree and manner regarding which adaptation is addressed by the Paris Agreement, which is recognized as separate and apart from loss and damage. The International Organization for Standardization (ISO) is working toward ISO standard for adaptation developed in coordination with UNFCCC. Also, climate adaptation finance is being recognized as an urgent issue, with developing mechanisms including the Green Climate Fund and multilateral development banks, highlighting the need for public-private partnerships. In the United States, adaptation is considered in a Department of Defense Directive, final FHA regulations, final CEQ guidance incorporating adaptation into NEPA reviews, HUD's National Disaster Resilience Competition, and FEMA and HUD proposed rules responding to the Federal Flood Risk Management Standard Executive Order, as well as state adaptation efforts in New Hampshire, California, Maryland, Delaware, and New York and particularly vulnerable urban areas such as the San Francisco Bay Area.

Regarding international sustainable development, the United Nations is working towards measuring progress in sustainable development with approved indicators while credit rating institutions are joining with major investors to promote analyses of sustainable development factors impacting investment risk, and the number of exchanges participating in the UN's Sustainable Stock Exchanges (SSE) has grown to sixty. The Global Reporting Initiative (GRI) changed its G4 Sustainability Reporting Guidelines to three standards for comparability and reporting purposes, while the Sustainability Accounting Standards Board (SASB) published reporting guidelines for infrastructure and the ISO completed another draft of its ISO 20400 Sustainable Procurement- Guidance. Nationally, the SEC released a proposal requesting comment on updated reporting requirements including public policy and sustainability matters.

Finally, regarding ecosystems, internationally, the Thirteenth Meeting of the Conference of the Parties (COP13) to the Convention on Biological Diversity (CBD) met, confirming that almost all members had incorporated their biodiversity targets from COP10, though implementation measures were still not achieved, discussing biotech organism protocols, and making progress toward further commitments, including commitments to incorporate ecosystem approaches in climate policies. The International Union for the Conservation of Nature (IUCN) met for its quadrennial World Conservation Congress, themed "Planet at a Crossroads." The Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) met and established the Ross Sea Region Marine Protected Area (MPA), south of New Zealand. Additional progress toward conservation occurred with the third Our Ocean Conference, British Columbia's agreement to protect the Great Bear Rainforest, as well as President Obama's actions prior to leaving office to conserve areas of the Arctic from oil and gas development, reported also by the Oil and Gas and Marine Resources Committees, expand the Papahanaumokuakea Marine National Monument, and create the Northeast Canyons and Seamounts Marine National Monument and the Bears Ears National Monument. Additional developments include the

BLM's adoption of revised procedures for resource management plans, "Planning 2.0," also reported by the Forest Services Committee.

C. Constitutional Law

The Constitutional Law Committee focuses on collaborating with other committees on the fastest developing areas of constitutional law, including the WOTUS rule and constitutional challenges to mandatory environmental disclosure laws like genetically modified organism (GMO) labeling on food products.

In its 2016 report, the Constitutional Law Committee summarizes the key relevant cases focusing on standing, Commerce Clause, preemption, takings, due process, the First and Eleventh Amendments and developments in state constitutional law.

Regarding standing, in *Spokeo, Inc. v Robins*, the United States Supreme Court found individual standing to sue a credit reporting agency under the Fair Credit Reporting Act, and in *Wittman v Personhuballah*, the Court found no standing for intervenors to appeal a redistricting decision. The Ninth Circuit addressed standing in the *Atay v. County of Maui*, also reported by the Agricultural Law Committee, while the D.C. Circuit addressed standing in *In Re: Idaho Conservation League*, from an incentives-based theory arising from a petition requesting EPA to establish financial assurance rules. The Committee reported three additional standing cases: *Markle Interests, LLP v. United States Fish & Wildlife Service*, Fifth Circuit (critical habitat designation); *North Dakota v. Heydinger*, Eighth Circuit (state energy import prohibition statute); and *Missouri ex rel. Koster v. Harris*, Ninth Circuit (state conditional egg sale prohibition statute).

With respect to the Commerce Clause, the Committee reports two significant cases, including *North Dakota v Heydinger*, above, where in addition to finding standing, the Eighth Circuit held that Minnesota's statute banning importation of power that increased the state's carbon emissions unlawfully regulated activity wholly outside the state, and *Richland/Wilkin Joint Powers Authority v. United States Army Corps of Engineers*, where the same court found Minnesota law appropriately applied because part of the construction project was located in Minnesota.

On preemption, the Committee reviews the particular constitutional elements of the Supreme Court's FPA decision in *Hughes v. Talen Energy Marketing, Inc.*, discussed in detail by the Energy Markets Committee, as well as the preemption elements of the Ninth's Circuit's *Atay* case and the Eighth Circuit's *Heydinger* cases above. Also reported are the Ninth Circuit's decision in *Oregon Coast Scenic Railroad, LLC v. State of Oregon*, finding a local regulation of a rail line serving a local intrastate rail network to be preempted, and three district court cases finding no preemption of state common law tort claims by environmental statutes, including FIFRA, the CWA, and mining statutes.

For due process, the Committee covers the *Juliana v. United States* climate change public trust due process Oregon federal district court case also reported by the Water Resources Committee. Regarding the First Amendment, there is *Competitive Enterprise Institute v. Mann*, where the D.C. Court of Appeals is allowing Dr. Mann, noted climate scientist, to proceed in a defamation suit against attacking bloggers over their First Amendment defenses, in addition to the Massachusetts, New York, and United States Virgin Islands Attorney General investigations against ExxonMobil, CEI, and others. Regarding the Eleventh Amendment, several cases including *Delaware Riverkeeper Network v. Secretary Pennsylvania Department of Environmental Protection*, where the Third Circuit found no Eleventh Amendment protection for challenges to state CWA 401 water quality certifications, and *Concerned Pastors for Social Action v. Khouri*, where a federal district court in Michigan found no Eleventh Amendment protection for state and officials sued in relation to the Flint water crisis, which claims sought prospective relief.

Regarding the states, the United States Supreme Court supported states' rights in *Franchise Tax Board of California v. Hyatt*, supporting California's state sovereign

immunity in another state's court, while the Committee reported regarding state constitutional law decisions in: Washington, regarding the Washington Shoreline Management Act; Nebraska, regarding special irrigation district authority; and Vermont, regarding a municipal noise ordinance.

D. Government and Private Sector Innovation

The Government and Private Sector Innovation (GPSI) Committee focuses on those innovations that occur when the public and private sector collaborate or at times exchange roles in order to better advance and fast track sustainable and smart growth goals. In the past, the Committee has focused on the related areas of environmental/energy regulatory innovation, environmental management systems, trading initiatives and producer responsibility issues, such as the flurry of recent legislation on electronic waste.

With its report, the Committee reviews a broad scope of projects. First, Public-Private Partnership (P3) infrastructure projects expanded grid modernization efforts, with $200 million in funds granted by the DOE for eighty-eight projects, with roughly half completed with the National Renewable Energy Laboratory (NREL) and state projects. Also, President Trump has promised $1 trillion to rebuild United States infrastructure, and though the contemplated scope may include fossil fuel energy infrastructure more than green infrastructure initiatives, this promised funding may support Environmental Justice initiatives, if the EPA's Office of Water can pursue 2016 draft plans to use state revolving funds for P3 projects in low-income communities.

Some P3 projects were impacted in 2016 by political turnover, including the Kentucky Broadband Project, and the Maryland Purple Line (light rail) Project, leading to calls for more local hiring to discourage local politicians from so easily dismissing private investment in these projects when the political winds change.

Progress in data accessibility for P3 projects was achieved in Tennessee, with legislation providing for traffic data collection, and education benefitted when the Nature Conservancy received a $200,000 grant for green infrastructure education at a Philadelphia high school.

Finally, residential energy efficiency federal tax incentives were renewed in 2016, while solar tax credits will continue through 2019. The Federal Highway Administration announced electric vehicle charging corridors, and the State of Washington approved $1 million to incentivize private investment in electric vehicle charging stations.

E. International Environmental and Resources Law

The International Environmental and Resources Law Committee focuses on climate change, illegal wildlife trafficking, trade and the environment, and the Keystone XL pipeline controversy.

This year, the Committee reports international developments, many of which are reported by other committees,[2] but which the Committee discusses in its report from its unique perspective of international law. Reported by the Committee, but not highlighted again here, include the Paris Agreement, ICAO actions to curb aviation GHG emissions, Montreal Protocol HFC commitments, the CCAMLR's designation of the Ross Sea Region MPA, United States enactment of the Ensuring Access to Pacific Fisheries Act, Our Ocean Conference, President Obama's protection of Arctic areas from oil and gas development, CBD COP 13, British Columbia's Great Bear Rainforest agreement, the South China Sea

[2] Including the Marine Resources, Oil and Gas, Climate Change, Sustainable Development and Ecosystems, Agriculture Management, Pesticides, Chemical Regulation and Right-to-Know Committees, Water Resources, Constitutional Law, and Environmental Disclosures Committees.

arbitration, Ecuador Chevron litigation, and Oregon climate change due process case *Juliana v. United States*, and the Brazil mine collapse litigation against Brazil Vale S.A. and BPH Billiton Ltd.

Additional international fishing developments reported by the Committee include the 2009 UN Food and Agriculture Organization Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA) which was implemented to prevent illegal, unreported and unregulated (IUU) fishing. The United States also ratified the Convention for the Strengthening of the Inter-American Tropical Tuna Commission, and thirteen WTO members, including the United States, committed to prohibit harmful fisheries subsidies.

Costa Rica, Colombia, and Ecuador expanded three UNESCO World Heritage Sites in 2016.

Regarding waste and chemicals, International hazardous waste developments include further progress by the Basel Convention on the Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention) with COP13, focusing on clarity and better policies for management of hazardous waste, persistent organic pollutants (POPs) and electronic waste (ewaste). The Persistent Organic Pollutants Review Committee (POPRC) of the Stockholm Convention on Persistent Organic Pollutants met for the twelfth time (POPRC-12) adopting many decisions including risk profiles for chemicals including pentadecafluorooctanoic acid (PFOA), recommendations for short-chain chlorinated paraffins (SCCPs) and decabromodiphenyl ether (c-decaBDE), evaluation of hexachlorobutadiene (HCBD) releases, and alternatives to perfluorooctane sulfonic acid (PFOS). The Chemical Review Committee (CRC) also met for the twelfth time (CRC-12) adopting draft guidance regarding carbofuran and carbosulfan, and reviewing notifications for benzidine, hexachlorobenzene and atrazine. The Intergovernmental Negotiating Committee (INC) on Mercury met for the seventh time (INC7), agreeing on guidance for best management practices, among other issues.

With respect to natural resources, the United Nations Office of Drugs and Crime (UNODC) issued *World Wildlife Crime Report: Trafficking in Protected Species*, spurring commitments to action by the United Nations General Assembly. The Convention on International Trade in International Fauna and Flora (CITES) met for the seventeenth time (COP17), focusing on wildlife trafficking, how to regulate trade in wildlife products, and tightening protections for the pangolin and grey parrot, sharks, rays, and tree species. The International Union for the Conservation of Nature (IUCN) released its 2016 Red List, reflecting uplisting of giraffes, great apes, zebras, and the grey parrot, among other species, with dire predictions for cheetah, elephants, and coral. Reported by other committees was the CBD COP 13, while additionally, China has announced the end of its ivory trade in 2017, and reports more aggressive measures to address its illegal wildlife trade with its Wildlife Protection Law, amended in 2016 to require confiscation of illegal goods and harsher penalties. Invasive species was the focus of a new European Commission's EU Invasive Alien Species regulation, listing measures to protect native species, with additional national efforts by Canada and Sweden.

International litigation developments, among other previously reported cases, include Hungary's acquittal of fifteen individuals initially charged in the 2010 heavy metal sludge accident killing ten people, finding appropriate government approvals and no criminal negligence. Climate change litigation cases not previously reported include the Peruvian farmer Saul Luciano Lliuya's suit against RWE, a German utility, for melting glaciers, which was dismissed for lack of linear causal chain, and the *Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council*, seeking to compel governmental climate change mitigation by enforcing duties under the Swiss Constitution.

F. *Science and Technology*

The Science and Technology Committee provides a comprehensive summary of the Frank R. Lautenberg Chemical Safety Act, also summarized comprehensively by the Pesticides Committee. The Committee also summarizes climate change science and litigation developments, which are comprehensively reviewed by the Climate Change Committee.

G. *Ethics*

The Ethics Committee reports that the ABA House of Delegates approved Revised Resolution 109, amending ABA Model Rules of Professional Conduct Rule 8.4, Misconduct, to include anti-harassment and anti-discrimination provisions. The Committee also summarizes two ethics opinions, with the first resulting in an admonishment based on complaints of unauthorized practice of law arising from the attorney representation of clients in negotiations via email, in a forum where the attorney was not licensed, regarding an issue of state and local law rather than federal or nationally-uniform law, and the second case resulting in the voiding of a notice of appeal filed by an attorney not licensed in the forum state, which the attorney filed before applying for admission *pro hac vice*.

The Committee also summarizes 2016 developments arising from DOJ implementation of the *Individual Accountability for Corporate Wrongdoing* (Yates) Memorandum, as well as the SEER Book Project, *Ethics and Environmental Practice*, which should be available in 2017.

The Year in Review 2016

Chapter 1 • AGRICULTURAL MANAGEMENT
2016 Annual Report[1]

I. URBAN AGRICULTURE

Spurred on by major investment from the federal government, 2016 was a big year for urban agriculture. The United States Department of Agriculture (USDA) substantially increased support for urban farms. The agency published an *Urban Agriculture Toolkit* which outlines the basics of establishing an urban farm, including how to access land, analyzing soil quality, accessing capital and financing, and production strategies, among other things.[2] The toolkit highlights the Farm Services Agency's (FSA) ability to issue "microloans" (loans less than $50,000) to help meet some of the financing needs of urban farmers.[3] Touting urban farms as a means to encourage small businesses and food production, the FSA funded several "urban entrepreneurs" who started vertical farms in New York City using microloans.[4] USDA also provided larger grants to municipalities, like the $1 million Conservation Innovation Grant to the City of Chicago, that will support promoting urban agriculture and a full-time "urban agriculture coordinator" to help disperse federal funds to local farming groups.[5]

Local governments also continued to turn to urban agriculture to address food insecurity, rejuvenate urban areas, and promote economic development. The Santa Fe City Council passed an urban farming ordinance that allows residents to sell homegrown fresh produce.[6] Similarly, New Port Richey, Florida approved an ordinance that permits sale of produce from local gardens in residential, commercial and industrial zones.[7] Sales in residential areas are limited to a permitting process currently used for garage sales.

As more cities embrace urban farming, the county and possibly state governments will soon follow. The Prince George's County Maryland Council passed legislation that would permit non-profits and businesses to operate urban farms in cooperation with the County Soil Conservation District.[8] Following on the heels of the City of Sacramento passing an urban agriculture ordinance which allows for the sale of produce on residential property, Sacramento County is considering its own legislation that would allow urban farming activities.[9] Sacramento County is considering allowing urban farmers to keep livestock, which is generally a more contentious issue than enabling produce production.

Some groups are sidestepping zoning ordinance hurdles and the government altogether and independently establishing urban farms. Most notably, the Michigan Urban Farm Initiative (MUFI) established an "agrihood," or a neighborhood growth model "that

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[2]U.S. DEP'T OF AGRIC., URBAN AGRICULTURE TOOLKIT (Apr. 2016).

[3]*Id.* at 7.

[4]*USDA Officials Tour New York City's "Urban Ag" Successes*, MADISON CTY. COURIER (Dec. 22, 2016).

[5]Greg Trotter, *Five Urban Farming Projects in Chicago to Watch in 2017*, CHI. TRIB. (Dec. 21, 2016).

[6]County Res. 2016-85, Santa Fe, N.M. (July 26, 2016).

[7]NEW PORT RICHEY, FLA., ORDINANCE 2016-2073 (2016).

[8]PRINCE GEORGE'S COUNTY, MD., ORDINANCE CB-025-2016 (July 19, 2016).

[9]Ellen Garrison, *Sacramento County is Poised to Expand Urban Farming. Here's a Look at What Could Come*, SACRAMENTO BEE (Dec. 24, 2016).

positions agriculture as the centerpiece of a mixed-use urban development."[10] The three-acre parcel includes vacant land, occupied and abandoned homes. The non-profit is supported by corporate partners including General Motors and BASF.

II. SELECTED BALLOT MEASURES IMPACTING AGRICULTURE

A. Regulation of Farming Practices: Right to Farm Measures

Oklahoma voters defeated, by a vote of 60% to 40%, a ballot measure which would have added a new right-to-farm provision to the Oklahoma Constitution.[11] The measure, State Question 777, would have granted farmers and ranchers guaranteed rights to challenge statutes, ordinances or regulations adopted after December 31, 2014 limiting: (1) the right to make use of agricultural technology; (2) the right to make use of livestock procedures; and (3) the right to make use of ranching practices. Only those laws shown to have a compelling state interest would have survived a legal challenge under the defeated measure.

B. Marijuana (Cannabis) Cultivation

A major policy concern in California is the impact of increasing cannabis cultivation on the state's water resources. In June 2016, California enacted Senate Bill 837, a measure requiring growers to obtain a permit for water used in irrigating and maintaining a cannabis crop.[12] The bill specifies numerous operating details of the Medical Marijuana Regulation and Safety Act, a measure signed into law on October 9, 2015. This law established the first comprehensive system to regulate marijuana cultivation in California.

The federal government also plays a significant role in the cultivation of issue of marijuana and water use in the western United States. The cultivation of marijuana is prohibited by the federal Controlled Substances Act.[13] Many farms and ranches in California and other western states rely on water supplied by the Department of Interior's United States Bureau of Reclamation water projects and facilities. In 2016, the Bureau extended, until May 16, 2017, a policy statement that provides: (1) "[the Bureau] will not approve use of Reclamation facilities or water in the cultivation of marijuana"; (2) Bureau employees should inform their Regional Director of cultivation of marijuana with the use of Reclamation water or facilities; and the Regional Director will report the use to the United States Justice Department.[14] The policy does not extend to the use of non-contract water commingled with contract water in non-Federal facilities.

C. Ninth Circuit Ruling on Hawaiian County GE Crop Bans

In November 2016, the United States Court of Appeals for the Ninth Circuit issued a ruling in the case *Atay v. County of Maui*, which addressed a legal challenge to a Maui County citizens ballot initiative which prohibited the cultivation and testing of genetically engineered (GE) plants in the county.[15] Hawaii has become a focus of GE crop testing, especially the testing of crops bioengineered to resist pesticides. In addition to the

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[10] Press Release, Mich. Urban Farming Initiative, America's First Sustainable Agrihood Debuts in Detroit (Nov. 30, 2016).
[11] *State Question 777, Known As "Right To Farm," Voted Down*, NEWS9 (Nov. 8, 2016).
[12] S.B. 837, 2016 Leg. (Cal. 2016).
[13] *Id.*
[14] U.S. BUREAU OF RECLAMATION, RECLAMATION MANUAL POLICY: TEMPORARY RELEASE (Apr. 4, 2016) (expires May 16, 2017).
[15] Atay v. Cty. of Maui, 842 F.3d 688 (9th Cir. 2015).

challenge to the Maui County bans, cases addressing a Hawaii County ban and a Kauai County ban on GE crop cultivation were also pending before the Ninth Circuit.

The court ruled the banning of GE crops was expressly preempted by the federal Plant Protection Act when applied to GE crops were subject to regulation by USDA's Animal and Plant Health Inspection Service. But preemption would not apply to crops, if USDA oversight has been terminated with the agency's decision to "deregulate" the crop, i.e. to cease direct agency oversight of the crop. The court further ruled, however, that regulation of GE crops by local Hawaiian governments was impliedly preempted by Hawaii's comprehensive state measures for regulating potentially harmful plants. The *Atay* ruling appears to leave intact local measures banning GE crops in several counties within the Ninth Circuit states of Washington, Oregon, and California that are not subject to direct USDA regulation.

III. BIOTECHNOLOGY

USDA opened a rulemaking regarding whether it should regulate genetically-edited biotech crops, perhaps joining Canada and Australia-New Zealand in regulating these new technologies.[16] The courts had earlier limited USDA to regulating for only risks as "plant pests."[17] Grain trade groups and others in the chain of commerce objected, suggesting "the proposal was 'premature and potentially harmful to U.S. agriculture' because of the possible impact on trade."[18]

After China spent over a year rejecting US corn shipments due to the presence of traces of the unapproved Agrisure Viptera™ corn trait, growers and grain traders sued Syngenta in late 2014 and early 2015, seeking compensation for lost export markets and impacts to corn prices.[19] The federal cases filed by growers brought public nuisance, negligence, and other claims and were consolidated in the United States District Court for the District of Kansas. The case will go to trial in June 2017.[20] A ruling finding Syngenta at fault could pose a threat to the commercial launches of the global pipeline of biotech crops, including those produced via genetic editing. The "precautionary approach" to regulation that prevails among the 170 nations that are parties to the Cartagena Protocol on Biosafety will be applied to genetically edited crops.[21] The lack of synchronized approvals could continue to create mass tort liability risk in the United States courts for any crop lacking approval in an overseas market that could become "major" at some future time.[22]

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[16] Environmental Impact Statement; Introduction of the Products of Biotechnology, 81 Fed. Reg. 6225 (Feb. 5, 2016).

[17] Hank Campbell, *9th Circuit Court Of Appeals Denies Claim That GM Alfalfa Is A 'Plant Pest'*, SCI. DIRECT (May 17, 2013).

[18] Philip Brasher, *Grain trade groups say USDA's biotech regulations overhaul could disrupt global trade*, GENETIC LITERACY PROJECT (May 3, 2016).

[19] *Syngenta receives Chinese import approval for Agrisure Viptera® corn trait*, SYNGENTA (Dec. 22, 2014); *See also* Lisa Schlessinger & A. Bryan Endres, *The Missing Link: Farmers' Class Action Against Syngenta May Answer Legal Questions Left After the StarLink and LibertyLink Litigation*, FARMDOC DAILY (Feb. 25, 2015).

[20] Kristine A. Tidgren, *Syngenta Producer Class Certification Granted*, IOWA ST. U. (Sept. 27, 2016).

[21] *Terms of Reference for the AHTEG on Synthetic Biology*, BIOSAFETY CLEARING-HOUSE (Mar. 8, 2016).

[22] Thomas P. Redick, Megan R. Galey & Theodore A. Feitshans, *Litigation and Regulatory Challenges to Innovation in Biotech Crops*, 20 Drake J. Agric. L. 71, 83 (2015); *See also* THOMAS P. REDICK, GENETIC EDITING AND LIABILITY FOR TRADE DISRUPTION (2016).

The USDA has approved various new biotech crops: low-lignin alfalfa,[23] three non-browning apples,[24] and a potato with lower acrylamide potential and reduced bruising that uses new gene silencing methods of plant breeding, leaving no traces of foreign DNA and reducing acrylamide-related toxicity in frying potatoes.[25] While the FDA finally approved the first GE animal bound for food use,[26] it promptly banned its import to the US under a legislative order from Congress.[27]

To find common ground on biotech-organic coexistence, in 2015 the USDA formed another Advisory Committee on Biotechnology and 21st Century Agriculture (AC21) to look at compensation for non-GMO farmers' economic losses after their crops commingle with biotech crops above the legally contracted tolerance for GMO content.[28] USDA collected data on non-GMO/organic farmers with economic losses from unwanted commingling over the years 2006-2014,[29] and additional data collection is are ongoing.[30] A key issue, seed purity, could be addressed by "specialty seed companies" who could provide seed to a farmer's contracted tolerance for "unintended GE presence, or to provide specific information upon request on the purity of particular seed lots."[31]

IV. Developments in California Agriculture and Groundwater

Developments in California agriculture and groundwater are moving quickly, spurred on by California's on-going drought, reduced surface water availability, population growth, increased demand, and climate warming trends.

A. State Administrative Developments

With respect to drought and agriculture water use efficiency (WUE), the Governor issued an executive order expanding the irrigation districts required to develop Agricultural Water Management Plans (AWMPs) from those servicing 25,000 to those servicing 10,000 acres or more, and requiring an annual water budget, drought plan, and increased WUE measures.[32]

In 2014, California passed the Sustainable Groundwater Management Act, which requires local or regional groundwater sustainability agencies (GSAs) to develop and

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[23]Cheryl Anderson, *Second GMO trait in Alfalfa, Low lignin Approved by USDA*, NorthernAg (Nov. 24, 2014).

[24]Kristin Falzon, *Third GMO Arctic Apple Gets USDA Approval*, Eco-Watch (Sep. 29, 2016).

[25]Emily Waltz, *USDA Approves Next-generation GM Potato*, Nature Biotechnology (Jan. 2015).

[26]Letter from Bernadette M. Dunham, Dir., Ctr. For Veterinary Med., FDA, to Ronald Stotish, CEO and Pres., AquaBounty Techs., AquAdvantage Salmon Approval Letter and Appendix (Nov. 19, 2015).

[27]Brady Dennis, *FDA Bans Imports-of-Genetically-Engineered-Salmon-For-Now*, Wash. Post (Jan. 29, 2016).

[28]U.S. Dep't of Agric.'s USDA Advisory Comm. on Biotechnology and 21st Century Agric., Draft Report on Local Coexistence Efforts for AC21 (2016) [hereinafter USDA Advisory Comm.].

[29]U.S. Dep't Agric. Nat'l Agric. Stat. Serv., 2014 Certified and Exempt Organic Farm Data, Table 19: Table 19. Value of Organic Crops Loss from Presence of Genetically Modified Organisms (GMOs) – Certified and Exempt Organic Farms: 2014 and Earlier Years (2014).

[30]USDA Advisory Comm., *supra* note 28, at 3.

[31]*Id.* at 28.

[32]Cal. Exec. Order, No. B-37-16 (May 9, 2016).

implement groundwater sustainability plans (GSPs) that achieve sustainability in basins deemed medium and high priority, or the state will step in.[33] Twenty-one groundwater basins were designated "critically overdrafted"[34] and must meet achieving sustainability by 2020, two years before the 2022 deadline for other basins.[35] Additionally, regulations were adopted for evaluating groundwater sustainability plans (GSPs), plan implementation, and coordination agreements between multiple GSAs in a basin that governs: technical requirements, data, and reporting; plan contents; sustainable management criteria, objectives and thresholds; and plan evaluation.[36] The state also issued best management practices for monitoring, data gaps identification, hydrogeologic modeling, water budgeting,[37] an annotated outline of a GSP, and a GSP checklist.[38]

California's irrigated land discharges to groundwater are regulated through state and regional water board Waste Discharge Requirements (WDRs) that implement Clean Water Act requirements.[39] In response to petitions regarding the Central Valley Regional Water Quality Control Board's (CVRWQCB) WDR for the East San Joaquin River Watershed, the SWRCB proposed an expansion of WDR standards and individual reporting and monitoring: data, scope, frequency, expert certification, public disclosure and notice requirements.[40] Central Valley Salinity Alternatives for Long-Term Sustainability, a public-private effort to develop a comprehensive salt and nutrient management plan (SNMP) for the Central Valley that integrates federal, state and local requirements (including WDRs),[41] released its *CVSC's Final Draft SNMP*, with the goal of beginning implementation in 2017. Additionally, the Central Coast Regional Water Quality Control Board proposed amendments to the *2012 WDR* which would expand the scope and detail of monitoring and reporting to all farms while also expanding its scope and detail, expand "domestic use purposes," and end cooperative groundwater reporting.[42] The *2012 WDR* is expanded upon in the proposed 2017 WDR, with additional monitoring and reporting requirements and public disclosure for all farms, domestic wells and pesticides.[43]

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[33]CAL. WATER CODE § 10720 (West 2016).
[34]CAL. DEP'T WATER RES., FINAL LIST OF CRITICALLY OVERDRAFTED BASINS (2016).
[35]§ 10720(a)(1)-(2).
[36]CAL. CODE REGS. tit. 23, §§ 350-358 (2016) (pursuant to CAL. WATER CODE § 10733.2 (West 2016)).
[37]CAL. DEP'T WATER RES., BEST MANAGEMENT PRACTICE FRAMEWORK (Dec. 27, 2016).
[38]CAL. DEP'T WATER RES., PREPARATION CHECKLIST FOR GSP SUBMITTAL (Dec. 27, 2016); CAL. DEP'T WATER RES., GSP ANNOTATED OUTLINE (Dec. 27, 2016).
[39]Porter-Cologne Water Quality Control Act, CAL. WATER CODE § 13370 (2016).
[40]Cal. State Water Res. Control Bd., Order WQ 2016- In the Matter of Review of Waste Discharge Requirements General Order No R5-2012-0116 for Growers Within the Eastern San Joaquin River Watershed that are Members of a Third-Party Group Issued by the California Regional Water Quality Control Board, Central Valley Region, SWRCB/OCC FILES A-2239(a)-(c) (Feb. 8, 2016).
[41]*Final Draft SNMP for Central Valley Water Board Consideration*, CENT. VALLEY SALINITY COALITION (Dec. 28, 2016).
[42]Cal. Reg'l Water Quality Control Bd. Cent. Coast Region, Monitoring and Reporting Program, Order No. R3-2012-0022-01, Tier I, Dischargers Enrolled Under the Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands (Dec. 8, 2016).
[43]Cal. Reg'l Water Quality Control Bd. Cent. Coast Region, Order No. R3-2017-0002-1, Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands (Nov. 1, 2016).

B. Legislative Developments

The federal Water Infrastructure Improvements for the Nation Act of 2016 authorizes: planning assistance and funding for groundwater replenishment, aquifer storage and recovery, and storage supply augmentation; funding of groundwater storage projects in Reclamation states, with California projects to be consistent with its 2014 Water Bond; and grants for agricultural waste or impaired groundwater recycling and reuse projects, prioritizing areas in a drought emergency.[44]

The Open and Transparent Water Data Act requires creation of a public statewide Integrated Water Data Platform for water and ecological date from federal, state, and local agencies, and academia by August 2020.[45]

Groundwater Sustainability Plans must take into account general plans[46] and requirements that sufficient groundwater supply be demonstrated before changes to a general plan have been strengthened.[47]

C. Litigation Developments

In *City of Santa Maria v. Adam*, the court held that the quantification of the proportionate share of loss due to the City's prescriptive right is not necessary for a quiet title judgment clarifying priority of use where there is sufficient safe yield.[48] In *Zamora v. CCRWQCB*, the court ruled that CCRWQCB staff review of the letters to confirm compliance, even though those documents remain in the coalition's possession, constituted "use" of the such that they constituted monitoring data subject to public disclosure, ordering their release.[49]

[44]Water Infrastructure Improvements for the Nation Act of 2016, Pub. L. No. 114-322, 130 Stat. 1628, §§ 1116-1118, 4007, 4009.
[45]The Open and Transparent Water Data Act, A.B. 1755, 2016 Leg. (Cal. 2016) (adding CAL. WATER CODE §§ 12400-12420).
[46]A.B. 731, 2016 Leg. (Cal. 2016) (§ 230 amending CAL. GOV'T. CODE § 65352.4).
[47]CAL. GOV'T. CODE § 66473.7 (West 2017).
[48]248 Cal. Rptr. 3d 758, 764 (Ct. App. 2016).
[49]No. 15-CV-0247, *2-3 (Super. Ct. San Luis Obispo Cty. Oct. 28, 2016).

I. JUDICIAL DEVELOPMENTS

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

In *Nebraska v. EPA*,[2] the Eighth Circuit denied petitions for review of the EPA's partial disapproval of Nebraska's regional haze state implementation plan (SIP) and substitution of a federal implementation plan (FIP). Nebraska's SIP had provided the best available retrofit technology (BART) standard required no sulfur dioxide (SO_2) controls for a particular electric plant because the costs would have been unreasonable. The EPA disagreed. The EPA's FIP relied on the Transport Rule[3] in place of source-specific BART for the electric plant. Conservation organizations challenged the FIP on the grounds that the EPA ignored evidence that BART would have reduced more SO_2 than the Transport Rule. The court ultimately deferred to the EPA's judgment that the Transport Rule would nevertheless improve visibility to an equivalent or better degree in the various affected areas.

In *Phoenix Cement Co. v. EPA*,[4] the Ninth Circuit denied petitions for review of the EPA's partial disapproval of Arizona's regional haze SIP. In upholding the EPA's conclusion that a power plant was BART-eligible, the court deferred to the EPA's interpretation of its guidelines, under which sources reconstructed after 1977 are exempt from BART only if the reconstruction went through New Source Review (NSR)/Prevention of Significant Deterioration (PSD) permitting. The reconstruction in question had not gone through NSR/PSD permitting. The court also upheld the EPA's determination that a second plant was BART-eligible, finding the EPA gave a satisfactory explanation for disfavoring Arizona's three-year averaging approach—it obscured the plant's effect on visibility in individual years. The court also upheld BART determinations at four smelters because the State had not proven that two of them were below the de minimis threshold for nitrogen

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[2]812 F.3d 662 (8th Cir. 2016).

[3]Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208 (Aug. 8, 2011) (to be codified at 40 C.F.R. pts. 51, 52, 72, 78, and 97) (final rule).

[4]647 F. App'x 702 (9th Cir. 2016).

oxides (NO_x) and had not considered whether new SO_2 control technologies could be adapted for use at two other smelters.

In *Texas v. EPA*,[5] the Fifth Circuit granted a motion to stay an EPA final action disapproving the regional haze plans of Oklahoma and Texas, and imposing federal plans in their place. The court held the EPA had no basis under the Clean Air Act (CAA) or its implementing regulations to require Texas to conduct a source-specific emissions analysis or provide such an analysis to downwind states as part of its regional haze obligations. The court also denied the EPA's motion to dismiss or transfer the case to the D.C. Circuit because the challenged EPA action was not national in scope. Rather, the disapproved state plans concerned emissions from local sources which contribute to regional haze levels.

In *Physicians for Social Responsibility–Los Angeles v. EPA*,[6] the Ninth Circuit rejected three challenges to the EPA's approval of California's revised plan to comply with the one-hour ozone national ambient air quality standard (NAAQS). The court held Petitioner's claim to adjust the attainment deadline was filed well beyond the sixty-day filing period,[7] and therefore was dismissed as untimely. Applying *Chevron* deference, the court upheld the EPA's approval of a provision in California's plan that included use of new technology measures to achieve compliance with the NAAQS. The court also rejected arguments that the plan's emission tonnage commitments were unenforceable, holding that virtually identical commitments had been previously upheld for use in California's plan to comply with the eight-hour ozone NAAQS.

In *WildEarth Guardians v. EPA*,[8] the D.C. Circuit dismissed in part and otherwise denied a petition for review of the EPA's implementation rule for the 1997 and 2006 $PM_{2.5}$ NAAQS. The D.C. Circuit had previously held in *Natural Resources Defense Council v. EPA*,[9] that the EPA erred when it implemented those NAAQS under Part D, Subpart 1 of the CAA,[10] rather than Subpart 4.[11] The EPA promulgated a revised implementation rule in June 2014. The petitioner challenged the implementation rule as contrary to Subpart 4. The D.C. Circuit dismissed the challenge as moot as applied to the 1997 NAAQS, because all affected nonattainment areas for that standard had already been reclassified as serious or received clean data determinations. Additionally, the court denied the petition with respect to the 2006 NAAQS, finding the 2013 opinion had created "unique circumstances" justifying a deviation from Subpart 4's deadlines to avoid unfair "retroactive consequences."

In *Bahr v. EPA*,[12] the Ninth Circuit granted in part and denied in part a petition challenging the EPA's approval of revisions to Arizona's PM_{10} SIP for the eastern part of Maricopa County (the Area). Arizona submitted the SIP to comply with 42 U.S.C. section 7513a(d), which applies when a serious PM_{10} nonattainment area fails to attain the NAAQS by the applicable deadline. The Ninth Circuit rejected arguments that Arizona should have been required to update the "best available control measures" demonstration it had made when the EPA originally reclassified the Maricopa Area as serious nonattainment and the "most stringent measures" demonstration it had made when Arizona later requested a five-year extension of its attainment deadline. The court also rejected arguments that the EPA had violated its "Exceptional Events Rule,"[13] and the EPA guidance when it excluded 135 exceedances of PM_{10} from Arizona's air quality monitoring data for the Maricopa Area.

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[5] 829 F.3d 405 (5th Cir. 2016).
[6] 655 F. App'x 605 (9th Cir. 2016).
[7] 42 U.S.C. § 7607(b)(1) (2015).
[8] 830 F.3d 529 (D.C. Cir. 2016).
[9] 706 F.3d 428 (D.C. Cir. 2013).
[10] 42 U.S.C. §§ 7501–7509a (2015).
[11] 42 U.S.C. §§ 7513–7513b (2015).
[12] 836 F.3d 1218 (9th Cir. 2016).
[13] 40 C.F.R. § 50.14. (2016).

But the court agreed Arizona had failed to include true "contingency measures" in its nonattainment SIP, as required by 42 U.S.C. section 7502(c)(9), because Arizona's purported "contingency measures" had already been completed and, thus, could not be implemented in the future if the Area missed the attainment deadline or failed to make reasonable further progress towards attaining the NAAQS.

In *Nucor Steel-Arkansas v. EPA*,[14] the district court granted the EPA's motion to dismiss Nucor's claim for declaratory and injunctive relief related to a FIP. The EPA had disapproved an Arkansas SIP for regional haze and stated that the EPA would approve a SIP or FIP within twenty-four months. The EPA neither received a revised SIP nor issued a FIP within that time period. Upon a challenge by the Sierra Club, the court ordered the EPA to issue a FIP. Nucor Steel commenced an action alleging the EPA would be engaging in *ultra vires* activity because more than two years had passed. The court did not view the EPA's moving forward with the FIP as falling within the narrow bounds of *ultra vires* activity that may be addressed outside the normal avenues of judicial review. The court found Nucor Steel had adequate measures to protect its interests, including submitting comments regarding a proposed FIP and filing a challenge in the appropriate court of appeals.

In *Rogue Advocates v. Mountain View Paving, Inc.*,[15] the district court granted in part and denied in part a nonprofit group's motion for summary judgment on claims for declaratory and injunctive relief stemming from alleged violations of defendant's air quality permit, which was issued by the state pursuant to the CAA. Rogue Advocates argued an asphalt plant's apparent violation of local land use restrictions constituted a violation of the facility's air permit, as compliance with all local land use regulations was required by the permit. The district court held that because the defendant had relocated its batch plant and was no longer running those operations on the property, Rogue Advocates' claim was moot. However, to the extent the plant's other ongoing operations violated local land use regulations, the court determined a genuine issue of fact existed as to whether those operations violated the CAA.

On cross-motions for summary judgment in *Utah Physicians for a Healthy Environment v. Kennecott Utah Copper, LLC*,[16] the district court dismissed a challenge by citizen groups against a mining company in which the citizen groups alleged that the company failed to seek federal approval for increased operations. The court found the unambiguous plain meaning of the regulatory language did not require federal approval and that Utah was simply implementing its SIP by issuing state-level approval.

In *Sierra Club v. EPA*,[17] the district court denied the EPA's motion to dismiss as moot Plaintiff's claim that the EPA had failed to promulgate an interstate transport FIP for Texas with respect to the 1997 ozone and $PM_{2.5}$ NAAQS. The court held that although the EPA had promulgated the Cross State Air Pollution Rule (CSAPR), which addressed the interstate transport of $PM_{2.5}$ from Texas, the D.C. Circuit's ruling in *EME Homer City Generation, L.P. v. EPA*[18] had invalidated that portion of CSAPR and remanded the rule to the EPA. Although CSAPR remained in effect during remand, CSAPR was still invalid and did not satisfy the EPA's non-discretionary duty to address the interstate transport of pollution from Texas under the good neighbor provision.

[14]No. 3:15CV00333JLH, 2016 WL 4055695 (E.D. Ark. Apr. 13, 2016).
[15]No. 1:15-cv-01854-CL, 2016 WL 6775636 (D. Or. Nov. 15, 2016).
[16]191 F. Supp. 3d 1287 (D. Utah 2016).
[17]No. 10-cv-01541 (CKK), 2016 WL 3281244 (D.D.C. June 14, 2016).
[18]795 F.3d 118, 129 (D.C. Cir. 2015).

B. Pre-emption of State Law Claims & Displacement of Federal Law Claims

In *Minnesota Automobile Dealers Ass'n v. Stine*,[19] the district court held that the plaintiffs–five selling and manufacturing trade organizations–lacked standing to assert claims against the Minnesota Commissioners of the Departments of Agriculture, Commerce, and Pollution Control regarding enforcement of a requirement that diesel fuel sold to consumers in Minnesota contain a specific percentage of biodiesel. The court held the plaintiffs did have standing to pursue federal preemption claims against the Director of the Minnesota Department of Commerce's Weights and Measures Division because the Director had enforcement authority. The court further held the biodiesel mandate does not frustrate the means that Congress chose to use in implementing the Renewable Fuel Standard or otherwise pose an obstacle to the accomplishment of congressional objectives. Finally, the court held Plaintiffs' claims regarding violation of the Minnesota Administrative Procedure Act were barred by the Eleventh Amendment, which removes federal court jurisdiction over state law claims against nonconsenting states or state officials when the state is the real, substantial party in interest.

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

In *Sierra Club de Puerto Rico v. EPA*,[20] the D.C. Circuit dismissed a petition filed by environmental organizations seeking to vacate 40 C.F.R section 51.165(a)(2)(i) (which relates to NSR permitting in nonattainment areas). Petitioners argued this provision unlawfully limited the preconstruction review program for nonattainment areas under the CAA to a new major stationary source that is major for the pollutant for which the area is designated nonattainment. Although the EPA issued the rule in 1980, the groups argued their claim ripened on May 19, 2014, when the EPA published notice of a permit issued to an energy company to build a waste incinerator in Arecibo, Puerto Rico. The EPA moved to dismiss the petition on jurisdictional grounds, arguing the petition for review was untimely. The court agreed, ruling that challenges to the EPA's regulations must be raised promptly "within sixty days from the date notice of such promulgation . . . appears in the Federal Register" or, "if such petition is based solely on grounds arising after such sixtieth day, then any petition for review . . . filed within sixty days after such grounds arise."[21] The court noted: "If a party could trigger a new 60-day statute of limitations period simply because a regulation was being enforced against it for the first time, our 'concerns about preserving the consequences of failing to bring a challenge within 60 days of a regulation's promulgation would be meaningless.'"[22]

In *National Parks Conservation Ass'n v. McCarthy*,[23] the Eighth Circuit denied conservation groups' petition to review the EPA's approval of Minnesota's regional haze implementation plan. Minnesota's plan adopted the Transport Rule,[24] rather than source-specific BART, and incorporated reasonable progress goals to attain natural visibility conditions in Class I federal areas by 2093 and 2177. The court held that it—not the D.C. Circuit—properly had jurisdiction to review the petition, since the challenge was based on "an entirely local factor," i.e., whether the Transport Plan as applied to the five sources

[19]No. 15-2045(JRT/KMM), 2016 WL 5660420 (D. Minn. Sept. 29, 2016).
[20]815 F.3d 22 (D.C. Cir. 2016).
[21]42 U.S.C. § 7607(b)(1) (2015).
[22]*Sierra Club de Puerto Rico*, 815 F.3d at 27 (quoting Am. Rd. & Transp. Builders Ass'n v. EPA, 705 F.3d 453, 458 (D.C. Cir. 2013)).
[23]816 F.3d 989 (8th Cir. 2016).
[24]Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. at 48,208.

subject to BART in the Minnesota Plan is "better than BART." Additionally, the court held the EPA's approval of Minnesota's plan was not arbitrary and capricious, despite some evidence indicating that source-specific BART might achieve better results in Minnesota than the Transport Rule. In addition, even though Minnesota's reasonable-progress goals did not meet the 2064 target for natural visibility conditions, the court concluded the EPA had demonstrated, based on uncontrollable causes and weighing of four prescribed factors, that Minnesota's progress goals were reasonable.

In *Nucor Steel-Arkansas v. Big River Steel LLC*,[25] the Eighth Circuit affirmed a district court judgment dismissing a CAA citizen suit brought by Nucor Steel-Arkansas against Big River Steel LLC. The Arkansas Department of Environmental Quality (ADEQ) had issued Big River a combined PSD-Title V permit to construct and operate a steel recycling and manufacturing facility that would compete with a nearby Nucor facility. Nucor had unsuccessfully challenged the combined permit in state administrative and judicial proceedings. It had also initiated a separate federal lawsuit against EPA for failing to respond to Nucor's petition requesting EPA to object to ADEQ's issuance of the combined permit. Nucor's citizen suit against Big River alleged Big River was violating the Arkansas SIP and PSD permitting requirements because the combined permit issued by ADEQ failed to include all the requirements of the CAA. The Eighth Circuit affirmed the district court's conclusion that it lacked jurisdiction over Nucor's citizen suit because: (1) Nucor failed to allege Big River's SIP violation was repeated or ongoing, as required by 42 U.S.C, section 7604(a)(1); and (2) Nucor's PSD allegations amounted to a collateral attack against ADEQ's issuance of the combined PSD-Title V permit – a challenge not available under the CAA's citizen suit provision.

In *Helping Hand Tools v. EPA*,[26] the Ninth Circuit held–in granting a PSD permit for construction of a new wood-burning (biomass) power plant at a lumber mill–the EPA reasonably drew the line between BACT under 42 U.S.C. section 7479(3) and redefining the source at issue. An environmental advocacy group had challenged the permit, arguing the EPA should have considered solar power and a greater mix of natural gas in the BACT analysis. The court held when a fuel source is co-located with a facility, in this case the burning of wood wastes, the EPA need not consider in the BACT analysis fuel sources which are not readily available because it would redefine the source. Finally, the court held that considering wood waste fuel as a baseline at the first step of the BACT analysis is not arbitrary, capricious, or even unreasonable.

In *United States v. Ameren Missouri*,[27] the district court denied Ameren's summary judgment motion asking the court to rule that the replacement of certain components on two coal-fired electric generating units could trigger PSD and Title V permit requirements only if the work increased both actual emissions and potential emissions. Missouri's approved SIP incorporated by reference federal PSD regulations, which require PSD permits for "major modifications" that increase emissions. Ameren argued that the SIP definition of "modification," which focuses on potential emissions increases, must also be satisfied to trigger the PSD permitting requirements. The court rejected this two-part test because: (1) the SIP specifically incorporated the federal PSD regulations, thereby displacing the state's generally applicable regulatory definitions; (2) EPA's SIP approval provided that the PSD regulations would trump conflicting provisions in the SIP; (3) Ameren's interpretation would render superfluous elements of federal and state regulations and likely exempt from PSD review a large number of projects that would cause an actual emissions increase; and (4) EPA offered a "permissible construction" of the SIP, warranting some deference.

[25]825 F.3d 444 (8th Cir. 2016).
[26]836 F.3d 999 (9th Cir. 2016).
[27]158 F. Supp. 3d 802 (E.D. Mo. 2016).

In a related decision in the same *United States v. Ameren Missouri*[28] litigation, the district court largely denied nine additional competing motions for summary judgment. The district court also denied motions by both parties to exclude expert testimony. Considering cross motions for summary judgment on two PSD program exclusions, the court held that the routine monitoring, repair, and replacement (RMRR) exclusion is "generally limited to de minimis circumstances" and that what constitutes a "project" for purposes of the RMRR exclusion is a broad inquiry. The court further held multiple component replacements may be considered part of the same project and "whether the challenged work was planned for together, budgeted together, performed together, and undertaken for the same purpose are relevant to the inquiry."[29] Additionally, the court held the PSD program's demand growth exclusion is only available where a unit could have accommodated post-project emissions increases at baseline and where post-project increases are unrelated to the project itself. Emissions increases which could have been accommodated at baseline "are not per se 'unrelated'" to a project preceding the increases. On both the RMRR and demand growth issues, the court held Ameren carried the evidentiary burden of establishing its entitlement to the exclusions at trial.

Rejecting one of Ameren's motions, the court held that the EPA was entitled to bring a PSD enforcement action on both an "expectations theory" and an "actual increase theory" regardless of whether EPA's suit was filed after completion of the disputed projects or whether Ameren's pre-project modeling had predicted no emissions increase. Denying another Ameren motion, the court held the EPA was not required to articulate and prove a violation of any special standard of care for "a reasonable power plant operator or owner" in order to show that Ameren should have expected project-related emissions increases above the PSD threshold: "The legal standards supplied by the PSD rules are sufficient to guide the analysis."[30] Finally, the district court rejected Ameren's argument that subject matter jurisdiction was lacking for EPA's Title V claims, finding that the administrative review-and-object process under section 7661d of the CAA is not the EPA's exclusive option for ensuring compliance with Title V.

In *Voigt v. Coyote Creek Mining Co., LLC*,[31] the district court granted the plaintiffs' motion to amend their complaint and denied the defendant's motion to dismiss. In that case, the plaintiff ranchers filed a citizen suit against Coyote Creek, alleging that the defendant initiated construction of a "major source" of PM without first securing a PSD permit. Coyote Creek had instead applied for and obtained a "minor source" permit from the state agency, which the agency issued without notice to the public and without creating a contemporaneous record supporting its decision. The district court denied defendant's motion to dismiss, finding that the minor source permit did not shield Coyote Creek from the requirement to obtain a PSD permit for major sources, if, in fact, plaintiffs could demonstrate the proposed mine would be a major source. The court also permitted the plaintiffs to amend their complaint in response to the defendant's alternative ground for dismissal, namely, that the facts alleged in the complaint failed to establish a basis for concluding the proposed mine is a major source. Finally, the district court declined to dismiss the complaint under the *Burford* abstention doctrine.

In *Global Cos., LLC v. New York State Department of Environmental Conservation*,[32] the New York Supreme Court, Albany County, granted an operator of a petroleum bulk storage and transfer facility partial relief relating to the New York State Department of Environmental Conservation's (NYSDEC's) failure to act on the operator's Title V application within the eighteen-month statutory time frame for processing permit

[28]No. 4:11CV77RWS, 2016 WL 728234 (E.D. Mo. Feb. 24, 2016).
[29]*Id.* at *8.
[30]*Id.* at *18.
[31]No. 1-15-ev-00109, 2016 WL3920045 (D.N.D. July 15, 2016).
[32]35 N.Y.S.3d 830 (N.Y. Sup. 2016).

applications. The court remanded the matter to NYSDEC to take final action on the permit application. The court declined to grant extraordinary relief of requiring NYSDEC to take any specific action on the Title V permit application.

D. Hazardous Air Pollutants

In *United States Sugar Corp. v. EPA*,[33] the D.C. Circuit reviewed several industry and environmental plaintiff challenges to EPA's Boiler MACT rules, which regulate emissions of hazardous air pollutants (HAPs) from certain boilers, process heaters and solid waste incinerators. The court rejected all of industry petitioners' challenges to the rules. First, the court held the EPA's interpretations of the CAA were reasonable, including: (1) the EPA's decision to exclude malfunctions when setting emissions limits for boiler HAPs; (2) the EPA's decision to use a pollutant-by-pollutant approach in setting MACT floors for HAP emissions from boilers and incinerators; (3) the EPA's presumption that incinerator operators who fail to maintain adequate records are burning solid waste; (4) the EPA's decision not to modify HAP emissions limits for certain incinerators to account for periods of start-up, shut-down and malfunction; and (5) the EPA's MACT standards for small, remote incinerators.[34] Second, the court held the EPA's required energy assessment for certain existing boilers was a valid exercise of the agency's statutory authority under the CAA, a valid beyond-the-floor MACT standard and a valid GACT management practice.

The court accepted some of environmental petitioners' challenges and rejected others, finding that: (1) the EPA's decision to use carbon monoxide as a surrogate for other HAPs was arbitrary and capricious; (2) the EPA acted unreasonably when it excluded certain units in calculating MACT floors for various subcategories of boilers; (3) the EPA violated a non-discretionary statutory duty by failing to set emissions standards for certain incinerators; (4) the EPA's use of a statistically-generated Upper Prediction Limit to set MACT floors for sources covered by the rules was reasonable; (5) the EPA acted reasonably in failing to set beyond-the-floor MACT standards for certain solid waste incinerators; (6) the EPA's decision not to delist certain area source subcategories from MACT regulation before issuing less stringent GACT standards was reasonable, but EPA should have explained why it chose GACT rather than MACT standards for non-mercury (Hg) HAP emissions from coal-fired boilers; (7) the EPA did not impermissibly change its definition of a "modified" solid waste incinerator; (8) the EPA's decision to exclude temporary boilers from HAP emissions standards was not arbitrary and capricious; and finally, (9) the EPA's chosen work practice standards for both small and large coal-fired boilers were reasonable. The court vacated the EPA's MACT standards for all boiler subcategories that "would have been affected had the EPA considered all sources included in the subcategories," and remanded to the EPA for reconsideration or explanation (without vacatur) the remaining environmental petitioner challenges upheld by the court.[35]

In *Sierra Club v. McCarthy*,[36] the district court held the EPA could feasibly meet its rulemaking obligations with respect to reviewing, and if necessary, revising HAP standards for pulp mills and nutritional yeast manufacturers within the presumptive two-year compliance deadline required by the CAA. The EPA and environmental petitioners both agreed on cross-motions for summary judgment the EPA had failed to fulfill its non-discretionary duty to perform the necessary rulemakings with regard to pulp mills and yeast manufacturers; the only question before the court was the amount of time the EPA should be granted to fulfill its statutory obligations. The court held the appropriate amount of time was twenty-two months for pulp mills and twenty-four months for yeast manufacturers.

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[33] 830 F.3d 579 (2016).
[34] *Id.*
[35] *Id.* at 667.
[36] No. 15-cv-01165-HSG, 2016 WL 1055120, at *6. (N.D. Cal. Mar. 15, 2016).

E. Civil & Criminal Enforcement

In *United States v. Sawyer*,[37] the Sixth Circuit held the owner of a business who knowingly failed to comply with the handling and disposal requirements of the national emission standards for hazardous air pollutants (NESHAP) for asbestos-containing materials was subject to the mandatory restitution provision of the Mandatory Victim Restitution Act (MVRA). The court held the EPA was a victim under MVRA even though the EPA did not have a possessory interest in the land that was contaminated. The court also held failing to comply with the asbestos NESHAP qualified as an offense against property under the MVRA. Accordingly, the defendant was liable for the costs the EPA incurred in cleaning up the asbestos.

In *United States v. J. R. Simplot Co.*,[38] the district court granted the United States' unopposed motion for an order approving a consent decree. According to the decree, Simplot must "meet strict emission rates at all five of its sulfuric acid production plants," which were made the subject of this suit due to Simplot's failure to obtain CAA permits for modifications to five of its facilities. The decree also requires Simplot to contribute to a San Joaquin Valley mitigation project as well as pay a civil penalty.

In *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, the district court entered a consent decree which partially resolved CAA claims by the United States and California against Volkswagen for injunctive relief related to installation of defeat devices on certain 2.0 liter diesel vehicles.[39] The defeat devices rendered the emission controls on the vehicles inoperable unless the vehicles were undergoing emissions testing. Under the consent decree, Volkswagen must (1) invest $2.7 billion in a mitigation trust supporting state and tribal projects to reduce nitrogen oxide ("NO_x") emissions; (2) invest $2 billion in projects to support zero emission vehicles; and (3) remove or fix at least 85% of the noncompliant vehicles, or pay additional funds into the mitigation trust.

F. Citizen Suits

In *Environment Texas Citizen Lobby, Inc., v. ExxonMobil Corp.*,[40] the Fifth Circuit vacated a district court judgment in a citizen suit brought by environmental groups against the operator of a refinery, olefins plant, and chemical plant alleging thousands of CAA violations. The district court found only ninety-four actionable CAA violations among thousands alleged and failed to order any relief. The Fifth Circuit held the district court erred in finding only ninety-four actionable permit violations, abused its discretion in weighing less lengthy/less serious violations against more lengthy/more serious violations in assessing the CAA penalty factors, and erred in failing to consider certain evidence of the economic benefit to the operator from noncompliance. The Fifth Circuit vacated the district court's judgment and remanded the case for assessment of penalties based on the actionable violations.

In *Natural Resources Defense Council v. Illinois Power Resources, LLC*,[41] the district court granted in part and denied in part the parties' cross-motions for partial summary judgment filed in a citizen suit under the CAA. After concluding the plaintiff had established standing to bring the suit, the court granted plaintiff's motion for partial summary judgment on all opacity exceedances during self-reported occasions of opacity

[37]825 F.3d 287 (6th Cir. 2016).
[38]No. 1:15-CV-562-BLW, 2016 WL 1446132, at *1 (D. Idaho Apr. 12, 2016).
[39]MDL No. 2672 CRB (JSC), 2016 WL 6442227, at *2 (N.D Cal. Oct. 25, 2016).
[40]824 F.3d 507 (5th Cir. 2016).
[41]No. 13-CV-1181, 2016 WL 4468552 (C.D. Ill. Aug. 23, 2016), *appeal docketed*, No. 16-8030 (7th Cir. Nov. 14, 2016).

violations during which the Edwards facility was or may have been in a state of startup, malfunction, or breakdown and on all [particulate matter] exceedances with respect to Count Three except for those opacity exceedances which occurred while the relevant unit was off-line.[42] In excepting the opacity exceedances that occurred while Edwards was off-line from Count Three, the court granted defendant's motion for partial summary judgment with respect to those exceedances, but otherwise denied it.

In *Murray Energy Corp. v. McCarthy*,[43] the district court denied the EPA's motion for summary judgment and instead granted summary judgment in favor of non-movant plaintiffs in a notable use of Rule 56(f)(1),[44] asserting that the EPA had waived notice and opportunity to respond based on statements the EPA made in its supporting brief. Upon the EPA's request for reconsideration, the court affirmed two prior decisions: one holding that the EPA has a non-discretionary duty under section 321(a) of the CAA to continuously evaluate potential changes in employment due to the EPA's regulatory action, and the other hold that plaintiffs had standing to bring the suit. In so holding, the court rejected the EPA's contention that Regulatory Impact Analyses (RIA) and Economic Impact Analyses (EIA) were sufficient to fulfill the "continuing evaluation" requirement due to the ephemeral nature of such analyses, and because many of the documents were created pursuant to other statutes or executive orders. The court ordered the EPA to file a plan and schedule for compliance with section 321(a).

In *Nguyen ex rel. United States v. City of Cleveland, Ohio*,[45] the district court held the plaintiff lacked standing to bring a citizen suit for an airport's alleged failure to obtain a Title V permit. The court rejected the plaintiff's claim that the "public trust doctrine" relieved him of the need to allege the elements of Article III standing. The court further held that any injury the plaintiff might have suffered could not be redressed by the court because whether the airport must obtain a Title V permit depends on the independent judgment of the Ohio EPA, which had previously determined that no such permit was necessary. Without any information suggesting that Ohio EPA might change course, the prospect of redressability was too speculative to support Article III standing.

In *Ohio Valley Environmental Coalition v. River Cities Disposal, LLC*,[46] the district court applied the Burford abstention doctrine to decline to hear a CAA citizen suit alleging numerous SIP violations by a solid waste facility that had been the subject of numerous state-issued notices of violation. The court cited Sixth Circuit precedent holding Burford's abstention can apply to CAA citizen suits, and found all four elements were met in this instance: (1) timely and adequate state-court review was available; (2) the citizen group had requested equitable relief; (3) the state's SIP program was a complex regulatory regime; and (4) a ruling by the court had the potential to disrupt state efforts to establish a coherent policy regarding a matter of substantial public concern. On the fourth element, the court relied on record evidence of a "flurry of activity" at the state agency suggesting the state was actively involved, and expressed concern that federal court involvement would preempt or second-guess the state's assessment of an appropriate remedy.

In *Sierra Club v. Oklahoma Gas & Electric Co.*,[47] the Tenth Circuit held, for purposes of the default five-year statute of limitations, a civil penalty claim for failure to obtain a PSD permit "first accrues" on the day the source commences construction without a PSD permit. Even if the cause of action continues for additional time, the statute of

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[42] *Id.* at *2, *22.

[43] No. 5:14-CV-39, 2016 WL 6083946 at *1, *27 (N.D.W. Va. Oct. 17, 2016), *appeal docketed*, No. 16-2432 (4th Cir. Dec. 21, 2016).

[44] Fed. R. Civ. P. 56(f)(1).

[45] No. 1:09 CV 452, 2016 WL 1031096 (N.D. Ohio Mar. 15, 2016), *appeal docketed*, No. 16-3420 (6th Cir. Apr. 27, 2016).

[46] No. CV 15-47-DLB-EBA, 2016 WL 1255717 (E.D. Ky. Mar. 29, 2016).

[47] 816 F.3d 666 (10th Cir. 2016)

limitations runs from the first day the plaintiffs could have filed suit and is not tolled. Accordingly, Sierra Club's claim for civil penalties was time-barred. The Tenth Circuit further held Sierra Club's claims for injunctive relief were also time-barred because of the concurrent remedy doctrine, which bars equitable claims when the accompanying legal claim is time-barred.

In *Consolidated Environmental Management, Inc. v. McCarthy*, the district court granted the EPA's motion to dismiss for lack of jurisdiction in a challenge by plaintiff companies that had obtained Title V and PSD permits to which the EPA objected after citizen suit litigation. The district court held it lacked jurisdiction over plaintiffs' claim that in failing to "modify, terminate, or revoke" the objected-to permits under 42 U.S.C. section 7661d(b)(3), "the EPA has (1) failed to take nondiscretionary action, and (2) has unreasonably delayed in taking mandatory action."[48] The court noted the EPA's duty to "modify, terminate, or revoke" is discretionary and that the CAA citizen suit provision authorizes no relief beyond ordering EPA to perform a non-discretionary duty or compelling an unreasonably delayed agency action. Additionally, regarding review of the EPA's objections to plaintiffs' permits, the court found it did not have jurisdiction to vacate the EPA's objections, or to order the EPA to take discretionary actions in relation to the permits. Finally, because the EPA's objections are not final agency actions, the court noted they are not reviewable by a district court under the CAA or Administrative Procedure Act.

G. Procedural Issues

In *Medical Advocates for Healthy Air v. EPA*,[49] the Ninth Circuit dismissed a petition for review of a final EPA action on the grounds that the petitioners failed to satisfy the redressability requirement to establish standing. Petitioners argued the EPA's determination that two areas in California did not attain the one-hour ozone pollution standard should have been issued under CAA section 179(c), which would require attainment planning under section 179(d). However, the court held petitioners had failed to show how requiring section 179(d) planning would cause the nonattainment areas to meet the standard faster than under the state's existing attainment plans.

In *Group Against Smog and Pollution, Inc. v. Shenango Inc.*,[50] the Third Circuit affirmed the district court's dismissal of a citizen suit against a coke plant for SIP violations. The State had already prosecuted a civil suit against the coke plant culminating in a consent order and agreement, which required compliance with the SIP. The State was therefore "diligently prosecuting" the plant's alleged SIP violations, so a citizen suit was barred under 42 U.S.C. section 7604(b)(1). The court rejected a "literal, inflexible, or grammatical interpretation" of the statutory phrase "has commenced and is diligently prosecuting," concluding the diligent prosecution bar blocks a citizen suit even though the State's enforcement case had already proceeded to a final judgment, because the state court retained jurisdiction to enforce the consent decree.

In *Nucor Steel-Arkansas v. EPA*,[51] the district court denied the Sierra Club's Motion to Intervene as of right, or in the alternative, motion for permissive intervention, in Nucor Steel's challenge to EPA's Arkansas FIP as *ultra vires* activity. The court held because the EPA and Sierra Club both sought to prevent Nucor from having the EPA's FIP declared *ultra vires*, the Sierra Club had failed to show the EPA would not adequately represent its interests in the litigation. The court acknowledged Sierra Club's interests in the substance of the FIP might be narrower than the EPA's by virtue of the fact that the court's ruling could potentially cause Sierra Club to lose the judgment it won in a separate

[48]No. CV 16-1432, 2016 WL 6876647, at *4 (E.D. La. Nov. 22, 2016).
[49]No. 12-70630, 2016 WL 4207968 (9th Cir. Aug. 10, 2016).
[50]810 F.3d 116 (3d Cir. 2016).
[51]No. 3:15CV00333JLH, 2016 WL 4045425 (E.D. Ark. Apr. 13, 2016).

lawsuit. Nonetheless, the court found Sierra Club sought the same remedy as EPA, and thus, was not entitled to intervene as of right. Similarly, the court denied the motion for permissive intervention because the interests of the Sierra Club and EPA were "exactly the same."

In *Louisiana Environmental Action Network v. McCarthy*,[52] the district court denied a motion filed by Yuhuang Chemical, Inc. (YCI) to intervene in a citizen suit filed by Louisiana Environmental Action Network (LEAN) challenging the EPA's failure to grant or deny LEAN's petition objecting to the CAA permit issued to YCI for operation of a methanol plant. YCI argued it would be injured if the EPA granted LEAN's petition, but the court determined that YCI did not have an interest in the litigation for purposes of Rule 24(a) of the Federal Rules of Civil Procedure because "[t]he subject matter does not pertain to whether [the] EPA will ultimately grant Plaintiff's Petition or some aspect of it" and "simply involves whether and when the EPA must act."[53] The court also determined allowing intervention would unduly delay or prejudice the litigation by disrupting a settlement between LEAN and the EPA.

In *Humane Society of the United States v. McCarthy*,[54] the district court dismissed an action seeking declaratory and injunctive relief pursuant to the APA on the grounds the EPA's sovereign immunity was not waived with respect to the plaintiffs' claims. The plaintiffs had filed an action seeking declaratory and injunctive relief under the APA to compel the EPA to provide a response to their 2009 petition for rulemaking requesting EPA to regulate Concentrated Animal Feeding Operations under the CAA as a source of air pollution. The court noted the APA's waiver of immunity does not apply if any other statute grants consent to suit, and the CAA's citizen suit provision gave district courts jurisdiction over unreasonable delay claims when 180 days' advance notice was provided to EPA. Thus, the court concluded it lacked jurisdiction over the current action because the plaintiffs had failed to provide such notice.

H. Greenhouse Gas Emissions

In *Kain v. Department of Environmental Protection*,[55] the Massachusetts Supreme Judicial Court vacated the Superior Court's decision denying citizen plaintiffs' claim that the Massachusetts Department of Environmental Protection (DEP) had failed to comply with the requirements of the state Global Warming Solutions Act of 2008. Specifically, plaintiffs argued that the 2008 Act required DEP to issue regulations requiring declining annual aggregate emissions limits on greenhouse gas emissions from specific source categories in the state. The court agreed, finding: (1) the plain language of the 2008 Act required DEP to issue such regulations to achieve "actual, measurable, and permanent emissions reductions;"[56] and (2) DEP regulations addressing sulfur hexafluoride emissions from electric power plants, low emission vehicles, and state participation in the Regional Greenhouse Gas Initiative fell short of compliance with the unambiguous language of section 3(d) of the 2008 Act.

I. Criteria Air Pollutants

In *Kansas v. EPA*,[57] the D.C. Circuit dismissed a lawsuit filed by Kansas and Nebraska challenging the Motor Vehicle Emissions Simulator for 2014 (MOVES2014) for

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[52] No. 15-858-JJB-RLB, 2016 WL 4408994 (M.D. La. Aug. 17, 2016).
[53] *Id.* at *4.
[54] No. 15-cv-00141 (TSC), 2016 WL 5107003 (D.D.C. Sept. 19, 2016).
[55] 49 N.E.3d 1124, 1129 (Mass. 2016).
[56] *Id.* at 1142.
[57] 638 F. App'x 11 (D.C. Cir. 2016).

lack of the standing. The states alleged they would be harmed by having to develop nonattainment plans for the ozone NAAQS, relying on the allegedly flawed MOVES2014 model. The court held harm to states from the MOVES2014 model was too speculative because the states had not yet been designated as nonattainment areas for the ozone NAAQS and, consequently, had no obligation to submit a nonattainment plan.

J. Title II−Mobile Sources & Fuels

In *National Biodiesel Board v. EPA*,[58] the D.C. Circuit addressed challenges made by petitioner trade association for the domestic biofuels industry to the EPA's decision to allow biofuel producers to certify compliance with the Renewable Fuel Standard (RFS) program by using industry-funded compliance surveys. After finding the trade association had standing to sue, the court ruled that the petitioner's challenge to the EPA regulation itself was untimely because the regulation authorizing the use of such surveys had been in effect for more than five years and petitioner's action fell well beyond the sixty-day period allowed for in the Clean Air Act.[59] Regarding petitioner's challenge to the EPA's decision to allow a group of Argentine biofuel producers to use such surveys to certify compliance with the RFS program under informal adjudication, as opposed to rulemaking, the court found such agency decision constituted informal adjudication. The court reasoned the EPA's approval took two-and-a-half-years and the EPA frequently asked for new information and modifications to the proposal, which indicated the process was one of "fact-specific, case-by-case" adjudication.[60] Finally, the court found the EPA's approval of the Argentine compliance plan at issue was not arbitrary and capricious, noting the EPA had approved the plan within the bounds of its discretion regarding petitioner's challenges as to the plan's use of satellite imagery and failure to track the fuel supply chain from farm through biodiesel production, but not thereafter.

II. REGULATORY DEVELOPMENTS

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

On March 14, 2016, the EPA issued a final rule affirming and making permanent (without change) interim amendments to compliance deadlines in Federal Implementation Plans addressing interstate transport of ozone and fine particulate matter under the Cross-State Air Pollution Rule.[61]

On March 18, 2016, the EPA issued a final notice finding that eleven (11) states failed to submit State Implementation Plans (SIPs) for sixteen areas that were designated as nonattainment for the 1-Hour Primary Sulfur Dioxide (SO2) National Ambient Air Quality Standard (NAAQS) in 2013. States included in the notice are Arizona, Iowa, Kentucky, Louisiana, Michigan, Montana, New Hampshire, Ohio, Pennsylvania, Tennessee, and West Virginia.[62]

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[58]843 F.3d 1010 (D.C. Cir. 2016).
[59]42 U.S.C.A. § 7607(b)(1) (West 2016).
[60]*Id.*; *Nat'l Biodiesel Bd.*, 843 F.3d at 1018.
[61]Rulemaking to Affirm Interim Amendments to Dates in Federal Implementation Plans Addressing Interstate Transport of Ozone and Fine Particulate Matter, 81 Fed. Reg. 13,275 (Mar. 14, 2016) (to be codified at 40 C.F.R. pts. 51, 52, and 97).
[62]Findings of Failure to Submit State Implementation Plans Required for Attainment of the 2010 1-Hour Primary Sulfur Dioxide National Ambient Air Quality Standard (NAAQS), 81 Fed. Reg. 14,736 (Mar. 18, 2016) (to be codified at 40 C.F.R. pt. 52).

On April 29, 2016, the EPA published a final federal plan, effective May 31, 2016, for regulating existing sewage sludge incineration (SSI) units. The federal plan implements SSI emissions guidelines (EG) adopted by EPA on March 21, 2011 for states that that do not have an approved state plan implementing the EG by the effective date of the SSI federal plan.[63]

On May 4, 2016, the EPA published a proposed rule which would revise requirements for state and tribal plans that must protect "visibility in mandatory Class I areas."[64]

On June 3, 2016, the EPA finalized a federal implementation plan which applies to new true minor sources and minor modifications at existing true minor sources in the oil and natural gas production and natural gas processing segments that are locating or expanding in Indian reservations or in other areas of Indian country over which an Indian tribe, or the EPA, has demonstrated the tribe's jurisdiction.[65]

On June 14, 2016, the EPA proposed to remove from the state and federal operating permit programs the affirmative defense currently available to sources that fail to comply with technology-based emission limitations during certain emergency circumstances.[66]

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

On June 3, 2016, the EPA finalized new standards for the oil and natural gas source category for both greenhouse gases (GHGs) and volatile organic compounds (VOCs).[67]

On June 3, 2016, the EPA finalized a rule which clarified the meaning of the term "adjacent" which is used to determine the scope of a "stationary source" for purposes of the Prevention of Significant Deterioration (PSD) and Nonattainment NSR (NNSR) preconstruction permitting programs and the scope of a "major source" in the title V operating permit program in the onshore oil and natural gas sector.[68]

On June 23, 2016, the EPA issued a final rule and notice of final action on reconsideration amending the NSPS for commercial and industrial solid waste incineration units. The amendments revise the definition of "CEMS data during startup and shutdown" to be subcategory-specific; revise particulate matter (PM) emission limits for existing and new waste-burning kilns; incorporate a fuel variability factor for coal-burning energy

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[63]Federal Plan Requirements for Sewage Sludge Incineration Units Constructed on or Before October 14, 2010, 81 Fed. Reg. 26,040 (Apr. 29, 2016) (to be codified at 40 C.F.R. pt. 62).

[64]Protection of Visibility: Amendments to Requirements for State Plans, 81 Fed. Reg. 26,942 (May 4, 2016) (to be codified at 40 C.F.R. pts. 51 and 52); *see also* Protection of Visibility: Amendments to Requirements for State Plans, 81 Fed. Reg. 43,180 (July 1, 2016) (to be codified at 40 C.F.R. pts. 51 and 52) (extending public comment period to Aug. 10, 2016).

[65]Federal Implementation Plan for True Minor Sources in Indian Country in the Oil and Natural Gas Production and Natural Gas Processing Segments of the Oil and Natural Gas Sector; Amendments to the Federal Minor New Source Review Program in Indian Country to Address Requirements for True Minor Sources in the Oil and Natural Gas Sector, 81 Fed. Reg. 35,944 (June 3, 2016) (to be codified at 40 C.F.R. pt. 49).

[66]Removal of Title V Emergency Affirmative Defense Provisions From State Operating Permit Programs and Federal Operating Permit Program, 81 Fed. Reg. 38,645 (June 14, 2016) (to be codified at 40 C.F.R. pts. 70 and 71).

[67]Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, 81 Fed. Reg. 35,824 (June 3, 2016) (to be codified at 40 C.F.R. pt. 60).

[68]Source Determination for Certain Emission Units in the Oil and Natural Gas Sector, 81 Fed. Reg. 35,622 (June 3, 2016) (to be codified at 40 C.F.R. pts. 51, 52, 70, and 71).

recovery units; and define "kiln" consistent with the definition in the Portland Cement NESHAP.[69]

On June 30, 2016, the EPA proposed design details for the Clean Energy Incentive Program (CEIP), which states may adopt to incentivize early emission reduction projects under the emission guidelines for existing electric utility generating units. The design details include matching allowances and early reduction credits to be issued by the EPA; requirements for participating states; and requirements for eligible projects.[70]

On July 7, 2016, the EPA amended the NSPS for stationary compression ignition internal combustion engines to allow engine manufacturers to include in the engine design an override of emission controls that can be activated in qualified emergency situations to prevent those controls from interfering with engine operation. Tier 1 emission standards will apply to the engine during the emergency situation.[71]

On August 24, 2016, the EPA proposed to streamline and clarify processes related to submission and review of Title V petitions. The notice covers five areas intended to increase stakeholder access to and understanding of the petition process. Specifically, the EPA: provides direction as to how petitions should be submitted; clarifies expected format and minimum content; clarifies that permitting authorities are required to respond to significant comments relating to draft Title V permits; sets forth recommended practices for complete administrative records for permits; and explains the post-petition process.[72]

On August 29, 2016, the EPA issued a final rule updating the emission guidelines and compliance times for municipal solid waste landfills. The updated guidelines reflect advances in technology and operating practices for reducing emissions of landfill gas, including methane, a potent GHG.[73]

On August 29, 2016, the EPA issued a final rule updating the standards of performance for municipal solid waste landfills. The updated standards reflect advances in technology and operating practices for reducing emissions of landfill gas, including methane, a potent GHG.[74]

On August 30, 2016, the EPA issued a final rule making technical and editorial corrections and revisions to regulations related to source testing of emissions. The rule revises Test Methods 5, 30A, 30B, 202, and various Performance Specifications, including Performance Specifications 1, 2, 3, 4A, and 11.[75]

On October 18, 2016, the EPA issued a final rule amending the public notice requirements for the NSR and Title V programs. The amended rule allows state permitting

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[69]Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units, 81 Fed. Reg. 40,956 (June 23, 2016) (to be codified at 40 C.F.R. pt. 60).

[70]Clean Energy Incentive Program Design Details, 81 Fed. Reg. 42,940 (June 30, 2016) (to be codified at 40 C.F.R. pts. 60 and 62).

[71]Standards of Performance for Stationary Compression Ignition Internal Combustion Engines, 81 Fed. Reg. 44,212 (July 7, 2016) (to be codified at 40 C.F.R. pt. 60).

[72]Revisions to the Petition Provisions of the Title V Permitting Program, 81 Fed. Reg. 57,822 (Aug. 24, 2016) (to be codified at 40 C.F.R. pt. 70).

[73]Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, 81 Fed. Reg. 59,276 (Aug. 29, 2016) (to be codified at 40 C.F.R. pt. 60).

[74]Standards of Performance for Municipal Solid Waste Landfills, 81 Fed. Reg. 59,332 (Aug. 29, 2016) (to be codified at 40 C.F.R. pt. 60).

[75]Revisions to Test Methods, Performance Specifications, and Testing Regulations for Air Emission Sources, 81 Fed. Reg. 59,800 (Aug. 30, 2016) (to be codified at 40 C.F.R. pts. 51, 60, 61, and 63).

agencies to publish major source permit notices electronically, rather than in newspapers, so long as they also provide electronic access to draft permits.[76]

On October 18, 2016, the EPA issued a proposed rule announcing it was granting petitions for reconsideration of the Refinery MACT 1 and Refinery MACT 2 regulations and the NSPS for petroleum refineries, with regard to five issues. The EPA also proposed amendments to address "overlapping requirements for equipment leaks" in the Refinery MACT 1 and the Refinery Equipment Leak NSPS and to correct an erroneous reference in the NSPS.[77]

On November 7, 2016, the EPA published a final rule amending the PSD regulations to remove a date restriction from the Permit Rescission provision of the PSD regulations, clarifying that a rescission of a PSD permit is not automatic, and adding a corresponding Permit Rescission provision in the regulations which apply to major sources in nonattainment areas of Indian country.[78]

On November 21, 2016, the EPA published a notice of proposed rulemaking amending the quality assurance procedure applicable to particulate matter continuous emissions monitoring systems (PM CEMS) required by NSPS.[79] On the same date, the EPA issued a corresponding direct final rule.[80]

C. Title II - Mobile Sources and Fuels

On April 22, 2016, the EPA issued a final rule to correct and clarify portions of its April 2014 Tier 3 Motor Vehicle Emission and Fuel Standards, as well as one aspect of the agency's July 2014 Quality Assurance Program rulemaking related to product transfer document requirements under the RFS. Corrections to and clarifications of these regulations were first published as a direct final rule in February 2015, but were later withdrawn after the EPA received adverse comments on that rulemaking.[81]

On May 31, 2016, the EPA issued a proposed rule[82] and on December 12, 2016, a final rule[83] establishing annual percentage standards for cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuel which would apply to all motor vehicle gasoline and diesel produced or imported in the year 2017 under the RFS program.

On July 27, 2016, the EPA and the National Highway Traffic Safety Authority (NHTSA) published notice of the availability of a Technical Assessment Report (TAR), published jointly with the California Air Resources Board (CARB), in the Midterm Evaluation of the 2022-2025 GHG Emissions and Corporate Average Fuel Economy

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[76]Revisions to Public Notice Provisions in Clean Air Act Permitting Programs, 81 Fed. Reg. 71,613 (Oct. 18, 2016) (to be codified at 40 C.F.R. pts. 51, 52, 55, 70, 71, and 124).

[77]National Emission Standards for Hazardous Air Pollutant Emissions: Petroleum Refinery Sector, 81 Fed. Reg. 71,661 (Oct. 18, 2016) (to be codified at 40 C.F.R. pt. 63, subpt. CC).

[78]Rescission of Preconstruction Permits Issued Under the Clean Air Act, 81 Fed. Reg. 78,043 (Nov. 7, 2016) (to be codified at 40 C.F.R. pts. 49 and 52).

[79]Revisions to Procedure 2–Quality Assurance Requirements for Particulate Matter Continuous Emission Monitoring Systems at Stationary Sources, 81 Fed. Reg. 83,189 (Nov. 21, 2016) (to be codified at 40 C.F.R. pt. 60).

[80]Revisions to Procedure 2–Quality Assurance Requirements for Particulate Matter Continuous Emission Monitoring Systems at Stationary Sources, 81 Fed. Reg. 83,160 (Nov. 21, 2016) (to be codified at 40 C.F.R. pt. 60).

[81]Amendments Related to: Tier 3 Motor Vehicle Emission and Fuel Standards, 81 Fed. Reg. 23,641 (Apr. 22, 2016) (to be codified at 40 C.F.R. pt. 80).

[82]Renewable Fuel Standard Program: Standards for 2017 and Biomass-Based Diesel Volume for 2018, 81 Fed. Reg. 34,778 (May 31, 2016) (to be codified at 40 C.F.R. pt. 80).

[83]Renewable Fuel Standard Program: Standards for 2017 and Biomass-Based Diesel Volume for 2018, 81 Fed. Reg. 89,746 (Dec. 12, 2016) (to be codified at 40 C.F.R. pt. 80).

(CAFE) standards for light-duty vehicles. The Draft TAR was intended to "inform, for the EPA, whether the MY 2022–2025 GHG standards adopted by the EPA in 2012 should remain in place or should change, and, for NHTSA, what MY 2022–2025 CAFE standards will be maximum feasible."[84]

On October 25, 2016, the EPA published a final rule establishing Phase 2 greenhouse gas emissions and fuel economy standards for new on-road, medium- and heavy-duty engines and vehicles, including combination tractors, buses, vocational vehicles, recreational vehicles, commercial trailers, and 3⁄4-ton and 1-ton pickup trucks and vans not covered by the Phase I standards.[85]

On November 16, 2016, the EPA published a proposed rule to update renewable fuels and other fuels regulations to promote use of both ethanol fuels, including higher-level ethanol blends such as E85, and non-ethanol advanced and cellulosic biofuels, and to make other changes to the RFS regulations and other fuel regulations.[86]

On December 6, 2016, the EPA issued a Proposed Determination on the appropriateness of the model year 2022-2025 light-duty vehicle GHG emission standards as part of its Midterm Evaluation, finding the model year 2022-2025 standards adopted in 2012 remain appropriate.[87]

D. Hazardous Air Pollutants

On February 9, 2016, the EPA proposed to extend the compliance dates for the NESHAP Refinery MACT 1 and Refinery MACT 2 to "no later than [eighteen] months after the effective date of the December 2015 rule" (i.e., August 1, 2017).[88] This extension would apply to "owners and operators of sources that were constructed or reconstructed on or before June 30, 2014."[89] Additionally, the proposed revisions do not apply to requirements applicable during normal operations, but are instead "limited to periods of maintenance, startup, and shutdown, . . . and hot standby for FCCU [only]."[90]

On March 14, 2016, the EPA issued a proposed rule amending the Accidental Release Prevention Requirements for Risk Management Programs (RMPs) under the CAA, Section 112(r)(7), in response to Executive Order 13650 on Improving Chemical Facility Safety and Security, issued August 1, 2013. The RMP amendments are intended to modernize the EPA's emergency response, prevention, and preparedness programs and improve the public's and local emergency responders' access to information on RMP facilities.[91]

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[84]Notice of Availability of Midterm Evaluation Draft Technical Assessment Report for Model Year 2022–2025 Light Duty Vehicle GHG Emissions and CAFE Standards, 81 Fed. Reg. 49,217, 49,220 (July 27, 2016).

[85]Greenhouse 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, 1037, 1039, 1042, 1043, 1065, 1066, and 1068).

[86]Renewables Enhancement and Growth Support Rule, 81 Fed. Reg. 80,828 (Nov. 16, 2016) (to be codified at 40 C.F.R. pts. 79 and 80).

[87]Proposed Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards Under the Midterm Evaluation, 81 Fed. Reg. 87,927 (Dec. 6, 2016) (notice of availability of a proposed order).

[88]National Emission Standards for Hazardous Air Pollutant Emissions: Petroleum Refinery Sector Amendments, 81 Fed. Reg. 6814 (Feb. 9, 2016) (to be codified at 40 C.F.R. pts. 60 and 63).

[89]*Id.* at 6818.

[90]*Id.* at 6817.

[91]Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, 81 Fed. Reg. 13,638 (Mar. 14, 2016) (to be codified at 40 C.F.R. pt. 68).

On April 20, 2016, after receiving timely adverse comments, the EPA withdrew a direct final rule for the Clarification of Requirements for Method 303 Certification Training, published on February 25, 2016.[92] The EPA said it would address the adverse comments in any subsequent final action.[93]

On April 25, 2016, the EPA issued a final supplemental finding it is necessary and appropriate to regulate coal- and oil-fired electric generating units (EGUs) under Section 112 of the CAA. The supplemental finding was in response to the Supreme Court's decision in *Michigan v. EPA*,[94] which held the EPA unreasonably failed to take costs into account when designing and promulgating its Mercury and Air Toxics Standards (MATS) for HAP emissions from power plants.[95]

On May 13, 2016, the EPA proposed to amend the Site Remediation NESHAP to remove the exemption for site remediation activities performed under CERCLA and RCRA.[96] Under the EPA's proposal, all site remediation conducted under the authority of CERCLA or RCRA would become subject to all applicable requirements of the Site Remediation NESHAP. These requirements include emission limitations and work practice standards for HAP emitted from site remediation activities.

On May 18, 2016, the EPA granted a petition to reconsider the NESHAP for Brick and Structural Clay Products Manufacturing to the extent it specifies the location for temperature measurement as an operating parameter for demonstrating compliance with the dioxin/furan emission limitations.[97]

On June 13, 2016, the EPA finalized a rule implementing numerous modifications, amendments, and corrections to the NESHAP for Secondary Aluminum Production.[98]

On June 13, 2016, the EPA published a proposed rule to amend the NESHAP for secondary aluminum production facilities to correct certain errors, clarify the limit on changing furnace operating mode, provide a compliance testing option for new round top furnaces to account for unmeasured emissions, and clarify performance test and malfunction report submittal requirements.[99]

On July 12, 2016, the EPA announced it was reconsidering aspects of its recently amended NESHAP for the Ferroalloys Production source category to give interested parties a chance to comment. Specifically, the EPA invited comment on the requirement of quarterly polycyclic aromatic hydrocarbons (PAH) compliance testing frequency for furnaces that produce ferromanganese (FeMn); the requirement of weekly use of the digital camera opacity technique (DCOT) for determining compliance with the shop building

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[92]Clarification of Requirements for Method 303 Certification Training, 81 Fed. Reg. 9350 (Feb. 25, 2016) (to be codified at 40 C.F.R. pt. 63).

[93]Clarification of Requirements for Method 303 Certification Training, 81 Fed. Reg. 23,187 (Apr. 20, 2016) (to be codified at 40 C.F.R. pt. 63) (withdrawal of direct final rule).

[94]135 S. Ct. 2699 (2015).

[95]Supplemental Finding That It Is Appropriate and Necessary To Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units, 81 Fed. Reg. 24,420 (Apr. 25, 2016) (to be codified at 40 C.F.R. pt. 63).

[96]National Emission Standards for Hazardous Air Pollutants: Site Remediation, 81 Fed. Reg. 29,821 (May 13, 2016) (to be codified at 40 C.F.R. pt. 63).

[97]NESHAP for Brick and Structural Clay Products Manufacturing; and NESHAP for Clay Ceramics Manufacturing, 81 Fed. Reg. 31,234 (May 18, 2016) (notice of action denying in part and granting in part petitions for reconsideration).

[98]National Emission Standards for Hazardous Air Pollutants for Secondary Aluminum Production, 81 Fed. Reg. 38,085 (June 13, 2016) (to be codified at 40 C.F.R. pt. 63).

[99]National Emission Standards for Hazardous Air Pollutants for Secondary Aluminum Production, 81 Fed. Reg. 38,122 (June 13, 2016) (to be codified at 40 C.F.R. pt. 63).

opacity standards; and the requirement that positive pressure furnace baghouses be equipped with bag leak detection systems (BLDS).[100]

On July 13, 2016, the EPA amended the NESHAP for Petroleum Refineries in three respects. First, the EPA clarified the compliance date for certain maintenance vent requirements. Second, the EPA amended the compliance dates for the regulatory requirements that apply during startup, shutdown, or hot standby for certain fluid catalytic cracking units (FCCU) and startup and shutdown for sulfur recovery units (SRU). Third, the EPA finalized technical corrections and clarifications to the NESHAP and the New Source Performance Standards (NSPS) for Petroleum Refineries.[101]

On July 25, 2016, the EPA promulgated a direct final rule to amend the NESHAP for the Portland Cement Manufacturing Industry. The Rule provides a one-year compliance alternative for plants required to use a continuous emissions monitoring system (CEMS) for compliance with the hydrochloric acid (HCl) emissions limit, due to the unavailability of traceable calibration gases.[102]

On July 25, 2016, the EPA also proposed to amend the NESHAP for the Portland Cement Manufacturing Industry as described in the direct final rule above, in the event adverse comments were submitted in response to the direct final rule.[103]

On August 3, 2016, the EPA issued a direct final rule and proposed rule proposing to clarify the compliance date for the handling and storage of waste under the NESHAP for Aerospace Manufacturing and Rework Facilities. This action followed a prior amendment to the NESHAP under the EPA's Risk and Technology Review, at which time the EPA failed to identify the compliance date for sources subject to the requirements for handling and storage of waste set forth in 40 C.F.R. part 63, subpart GG. The compliance date is December 7, 2018.[104]

On September 14, 2016, the EPA issued a final rule and notice of final action on five issues raised in petitions for reconsideration related to the NESHAP for Industrial, Commercial, and Institutional Boilers. In this action, the EPA established a subcategory and separate requirements for limited-use boilers; created an alternative particulate matter standard for new oil-fired boilers which combust low-sulfur oil; eliminated further performance testing for particulate matter for certain boilers based on their initial compliance test; eliminated further fuel sampling for mercury for certain coal-fired boilers based on its initial compliance demonstration; made minor changes to the proposed

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[100]National Emissions Standards for Hazardous Air Pollutants: Ferroalloys Production, 81 Fed. Reg. 45,089 (July 12, 2016) (to be codified at 40 C.F.R. pt. 63).

[101]National Emission Standards for Hazardous Air Pollutant Emissions: Petroleum Refinery Sector Amendments, 81 Fed. Reg. 45,232 (July 13, 2016) (to be codified at 40 C.F.R. pts. 60 and 63).

[102]National Emission Standards for Hazardous Air Pollutants for the Portland Cement Manufacturing Industry, 81 Fed. Reg. 48,356 (July 25, 2016) (to be codified at 40 C.F.R. pt. 63).

[103]National Emission Standards for Hazardous Air Pollutants for the Portland Cement Manufacturing Industry, 81 Fed. Reg. 48,372 (July 25, 2016) (to be codified at 40 C.F.R. pt. 63).

[104]National Emission Standards for Aerospace Manufacturing and Rework Facilities Risk and Technology Review; Clarification, 81 Fed. Reg. 51,114 (Aug. 3, 2016) (to be codified at 40 C.F.R. pt. 63); National Emission Standards for Aerospace Manufacturing and Rework Facilities Risk and Technology Review; Clarification, 81 Fed. Reg. 51,145 (Aug. 3, 2016) (to be codified at 40 C.F.R. pt. 63).

definitions of startup and shutdown; and removed the affirmative defense for malfunction to be consistent with a recent court decision.[105]

On September 29, 2016, the EPA issued a proposed rule to amend and streamline the electronic reporting requirements for the NESHAP for Coal- and Oil-Fired electric utility steam generating units. Under the proposal, owners/operators of electric utility steam generating units would use one electronic reporting system to report data generated under the Mercury and Air Toxics Standards Rule.[106]

On November 22, 2016, the EPA issued a final rule to better define the requirements associated with conducting Method 303 training courses. Method 303 is an air pollution test method used to determine the visible emissions from coke ovens.[107]

On December 9, 2016, the EPA issued a proposed rule proposing amendments to the NESHAP for the Phosphoric Acid Manufacturing and Phosphate Fertilizer Production source categories in response to two petitions for reconsideration filed by industry stakeholders.[108]

On December 27, 2016, the EPA proposed amendments to the NESHAP for Publicly Owned Treatment Works (POTW) to include pretreatment requirements to limit emissions from collection systems and the POTW treatment plant; requirements for existing, new, or reconstructed industrial POTW; and HAP emission limits for existing, non-industrial POTW.[109]

On December 28, 2016, the EPA proposed amendments to the NESHAP for the Manufacturing of Nutritional Yeast source category to revise the form of the fermenter VOC emission limits, change the testing and monitoring requirements, and update the reporting and recordkeeping requirements.[110]

On December 30, 2016, the EPA proposed amendments to the NESHAP for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills to include revisions to the opacity monitoring provisions; addition of electrostatic precipitator parameter monitoring provisions; a requirement for 5-year periodic emissions testing; revisions to the SSM provisions; and other changes.[111]

E. Title VI - Stratospheric Ozone

On February 9, 2016, the EPA published a direct final rule regarding the stratospheric protection regulations and implementation of the International Trade Data System. This rule aids in the transition to paperless transactional data transmission between

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[105]National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers, 81 Fed. Reg. 63,112 (Sept. 14, 2016) (to be codified at 40 C.F.R. pt. 63) (final rule and notice of final action on reconsideration).

[106]Mercury and Air Toxics Standards (MATS) Completion of Electronic Reporting Requirements, 81 Fed. Reg. 67,062 (Sept. 29, 2016) (to be codified at 40 C.F.R. pt. 63).

[107]Clarification of Requirements for Method 303 Certification Training, 81 Fed. Reg. 83,701 (Nov. 22, 2016) (to be codified at 40 C.F.R. pt. 63).

[108]Phosphoric Acid Manufacturing and Phosphate Fertilizer Production Risk and Technology Review, 81 Fed. Reg. 89,674 (Dec. 9, 2016) (to be codified at 40 C.F.R. pt. 400).

[109]National Emission Standards for Hazardous Air Pollutants: Publicly Owned Treatment Works, 81 Fed. Reg. 95,352 (Dec. 27, 2017) (to be codified at 40 C.F.R. pt. 63).

[110]National Emission Standards for Hazardous Air Pollutants: Nutritional Yeast Manufacturing Risk and Technology Review, 81 Fed. Reg. 95,810 (Dec. 28, 2016) (to be codified at 40 C.F.R. pt. 63).

[111]National Emission Standards for Hazardous Air Pollutants for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills, 81 Fed. Reg. 97,046 (Dec. 30, 2016) (to be codified at 40 C.F.R. pt. 63).

businesses and federal agencies by eliminating "the requirement that the petition for used ozone-depleting substances accompany the shipment through U.S. Customs and [removing] references to Customs forms that are obsolete under the new system."[112]

On April 18, 2016, the EPA issued a proposed rule[113] and on December 1, 2016, the agency published a final rule pursuant to section 612 of the CAA and the EPA's Significant New Alternatives Policy (SNAP) program. The final rule lists certain substitutes for ozone-depleting substances as, "*acceptable, subject to use conditions*" or as "*unacceptable*" and modifies the listing status of other substances. The final rule also "exempts propane in certain refrigeration end-uses from the Clean Air Act section 608 prohibition on venting, release, or disposal."[114]

F. Greenhouse Gas Emissions

On January 15, 2016, the EPA proposed amendments to the Greenhouse Gas Reporting Rule in order to streamline implementation, improve data collection under the rule, and clarify the rule in response to questions from reporting agencies.[115]

On January 29, 2016, the EPA issued a proposed rule[116] and on November 30, 2016, a final rule[117] adding new monitoring methods for detecting leaks from oil and gas equipment in the petroleum and natural gas systems source category. The EPA also added emission factors for leaking equipment to be used in conjunction with the new monitoring methods.

On August 15, 2016, the EPA published a final "Endangerment Finding" related to aircraft GHGs under CAA section 231(a)(2)(A), finding that elevated concentrations of six well-mixed GHGs in the atmosphere (CO_2, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride) endanger the public health and welfare. The Endangerment Finding applies to "covered aircraft" including jet airliners, larger turboprops, and larger business jets.[118]

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[112]Protection of Stratospheric Ozone: Revisions to Reporting and Recordkeeping for Imports and Exports, 81 Fed. Reg. 6765 (Feb. 9, 2016) (to be codified at 40 C.F.R. pt. 82).

[113]Protection of Stratospheric Ozone: Proposed New Listings of Substitutes; Changes of Listing Status; and Reinterpretation of Unacceptability for Closed Cell Foam Products Under the Significant New Alternatives Policy Program; and Revision of Clean Air Act Section 608 Venting Prohibition for Propane, 81 Fed. Reg. 22,810 (Apr. 18, 2016) (to be codified at 40 C.F.R. pt. 82).

[114]Protection of Stratospheric Ozone: New Listings of Substitutes; Changes of Listing Status; and Reinterpretation of Unacceptability for Closed Cell Foam Products Under the Significant New Alternatives Policy Program; and Revision of Clean Air Act Section 608 Venting Prohibition for Propane, 81 Fed. Reg. 86,778 (Dec. 1, 2016) (to be codified at 40 C.F.R. pt. 82).

[115]2015 Revisions and Confidentiality Determinations for Data Elements Under the Greenhouse Gas Reporting Rule, 81 Fed. Reg. 2535 (Jan. 15, 2016) (to be codified at 40 C.F.R. pt. 98).

[116]Greenhouse Gas Reporting Rule: Leak Detection Methodology Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems, 81 Fed. Reg. 4987 (Jan. 29, 2016) (to be codified at 40 C.F.R. pt. 98).

[117]Greenhouse Gas Reporting Rule: Leak Detection Methodology Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems, 81 Fed. Reg. 86,490 (Nov. 30, 2016) (to be codified at 40 C.F.R. pt. 98).

[118]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. 54,422 (Aug. 15, 2016) (to be codified at 40 C.F.R. pts. 87 and 1068).

On October 3, 2016, the EPA proposed to amend its PSD and Title V regulations to, among other things, formally establish a 75,000 tons per year CO_2e (carbon dioxide equivalent) Significant Emission Rate for greenhouse gases.[119] The rulemaking follows on the Supreme Court's 2014 ruling in *Utility Air Regulatory Group v. EPA*,[120] which held the EPA may require a source that is otherwise required to obtain a PSD or Title V permit to install Best Available Control Technology (BACT) for greenhouse gases "if the source emits more than a *de minimis* amount."[121]

On November 18, 2016, the EPA issued a final rule amending and updating regulations governing refrigerant management by persons servicing, maintaining, repairing, or disposing of air-conditioning and refrigeration equipment. The final rule also extends management requirements to otherwise non-exempt non-ozone-depleting refrigerants, including hydroflourocarbons (HFCs), which the agency considers GHGs contributing to global climate change.[122]

G. Criteria Air Pollutants

On January 26, 2016, the EPA issued notice of designation of one new reference method for measuring concentrations of a new equivalent method for measuring pollutant concentrations of PM_{10} in the ambient air pursuant to 40 C.F.R. part 53.[123]

On February 25, 2016, the EPA issued a rule which amends the regulatory definition of volatile organic compounds (VOCs) under the CAA to remove the recordkeeping, emissions reporting, photochemical dispersion modeling, and inventory requirements related to the use of t-butyl acetate.[124]

On May 16, 2016, the EPA issued a proposed rule[125] and on December 30, 2016, a final rule[126] revising the minimum monitoring requirements for near-road nitrogen dioxide (NO_2) monitoring by removing the existing requirements for near-road NO_2 monitoring stations in so-called Core Based Statistical Areas (CBSAs) having populations between 500,000 and 1,000,000 persons.

On July 12, 2016, the EPA published a final rule promulgating initial area designations of nonattainment, unclassifiable/attainment, or unclassifiable for the 2010 primary sulfur dioxide NAAQS for 24 states, including areas of Indian country.[127]

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[119]Revisions 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, and 71).

[120]134 S. Ct. 2427 (2014).

[121]*Id.* at 2449.

[122]Protection of Stratospheric Ozone: Update to the Refrigerant Management Requirements Under the Clean Air Act, 81 Fed. Reg. 82,272 (Nov. 18, 2016) (to be codified at 40 C.F.R. pt. 82).

[123]Office of Research and Development; Ambient Air Monitoring Reference and Equivalent Methods: Designation of a New Equivalent Method, 81 Fed. Reg. 4294 (Jan. 26, 2016).

[124]Air Quality: Revision to the Regulatory Definition of Volatile Organic Compounds-Requirements for t-Butyl Acetate, 81 Fed. Reg. 9339 (Feb. 25, 2016) (to be codified at 40 C.F.R. pt. 51).

[125]Revision to the Near-Road NO_2 Minimum Monitoring Requirements, 81 Fed. Reg. 30,224 (May 16, 2016) (to be codified at 40 C.F.R. pt. 58).

[126]Revision to the Near-Road NO_2 Minimum Monitoring Requirements, 81 Fed. Reg. 96,381 (Dec. 30, 2016) (to be codified at 40 C.F.R. pt. 58).

[127]Air Quality Designations for the 2010 Sulfur Dioxide (SO2), 81 Fed. Reg. 45,039 (July 12, 2016) (to be codified at 40 C.F.R. pt. 81).

On August 1, 2016, the EPA issued a direct final rule[128] and parallel proposed rule[129] adding 1,1,2,2-Tetrafluoro-1-(2,2,2-trifluoroethoxy) ethane, also known as HFE-347pcf2, to the list of compounds excluded from the regulatory definition of a VOC. The basis for the deletion is that HFE-347pcf2, an industrial precision cleaning agent, makes a negligible contribution to tropospheric ozone formation (smog) due to low reactivity.

On August 24, 2016, the EPA finalized requirements for state, local, and tribal implementation of the current and future NAAQS for $PM_{2.5}$. The EPA also revoked the 1997 primary annual standard for areas designated as attainment because the primary annual standard was revised in 2012. The rule became effective on October 24, 2016.[130]

On October 3, 2016, the EPA finalized amendments to its Exceptional Events Rule.[131] The Exceptional Events Rule allows the EPA to exclude NAAQS exceedances from ambient air quality data when those exceedances are caused by either natural events or events caused by human activity that were "not reasonably controllable or preventable" and "unlikely to recur at a particular location." The amendments were intended to clarify the rule and respond to issues raised by state, local, and tribal regulators regarding the demonstration submittal process.[132]

On October 18, 2016, the EPA finalized a rule retaining the current NAAQS for lead. The EPA concluded the existing primary and secondary standards were "requisite to protect public health with an adequate margin of safety" and "requisite to protect public welfare from known or anticipated adverse effects."[133]

On October 26, 2016, the EPA published a final rule updating the Cross-State Air Pollution Rule for the 2008 Ozone NAAQS to reduce ozone season emissions of NO_x in twenty-two eastern states.[134]

On November 17, 2016, the EPA published a proposed rule proposing nonattainment area classification thresholds and implementation requirements for the 2015 ozone NAAQS, including the timing of attainment dates for each nonattainment area classification and a range of nonattainment area SIP requirements for meeting the 2015 ozone NAAQS.[135]

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[128]Air Quality: Revision to the Regulatory Definition of Volatile Organic Compounds—Exclusion of 1,1,2,2-Tetrafluoro-1-(2,2,2-trifluoroethoxy) Ethane (HFE-347pcf2), 71 Fed. Reg. 50,330 (Aug. 1, 2016) (to be codified at 40 C.F.R. pt. 51).

[129]*Id.*; Air Quality: Revision to the Regulatory Definition of Volatile Organic Compounds–Exclusion of 1,1,2,2-Tetrafluoro-1-(2,2,2-trifluoroethoxy) Ethane (HFE-347pcf2), 81 Fed. Reg. 50,408 (Aug. 1, 2016) (to be codified at 40 C.F.R. pt. 51).

[130]Fine Particulate Matter National Ambient Air Quality Standards: State Implementation Plan Requirements, 81 Fed. Reg. 58,010 (Aug. 24, 2016) (to be codified at 40 C.F.R. pts. 50, 51, and 93).

[131]40 C.F.R §§ 50.1, 50.14, 51.930 (2016).

[132]Treatment of Data Influenced by Exceptional Events, 81 Fed. Reg. 68,216, 68,217 (Oct. 3, 2016) (to be codified at 40 C.F.R. pts. 50 and 51).

[133]Review of the National Ambient Air Quality Standards for Lead, 81 Fed. Reg. 71,906 (Oct. 18, 2016) (to be codified at 40 C.F.R. pt. 50).

[134]Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 Fed. Reg. 74,504 (Oct. 26, 2016) (to be codified at 40 C.F.R. pts. 52, 78, and 97).

[135]Implementation of the 2015 National Ambient Air Quality Standards for Ozone: Nonattainment Area Classifications and State Implementation Plan Requirements, 81 Fed. Reg. 81,276 (Nov. 17, 2016) (to be codified at 40 C.F.R. pts. 50 and 51).

Chapter 3 • ENDANGERED SPECIES
2016 Annual Report[1]

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 2016.[2]

I. LEGISLATIVE DEVELOPMENTS

No developments of significance.

II. ADMINISTRATIVE DEVELOPMENTS[3]

FWS and NMFS continued their busy administrative reform agenda in 2016 with several final and proposed rules and policies. Of greatest significance is the set of final rules and policies the agencies adopted early in the year pertaining to critical habitat. One rule revises the criteria and process for designating critical habitat.[4] Of greatest potential impact are provisions regarding designation of unoccupied habitat. Another rule revises the definition of "destruction or adverse modification" and emphasizes that critical habitat imposes no affirmative conservation duties on the landowner.[5] Lastly, a final policy revises the agencies' approach for exclusions of areas from critical habitat designation.[6] Taken together, these three initiatives are significant in scope and are not covered comprehensively here. They are the subject of ongoing litigation eighteen states filed against FWS and NMFS seeking vacatur.[7]

FWS and NMFS adopted a Revised Interagency Cooperative Policy Regarding the Role of State Agencies in ESA Activities,[8] renewing the agencies' commitment to working

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[1]Compiled by J. B. Ruhl, David Daniels Allen Distinguished Chair in Law, Vanderbilt University Law School, and Sarah Wells, Associate, Nossaman LLP. The principal focus of this report is the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544. Please direct questions or comments to jb.ruhl@vanderbilt.edu.

[2]Developments 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.

[3]Specific listings of species, designations of critical habitat, development of recovery plans, interagency 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.

[4]Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat, 81 Fed. Reg. 7414 (Feb. 11, 2016) (to be codified at 50 C.F.R. pt. 424).

[5]Interagency Cooperation—Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat, 81 Fed. Reg. 7214 (Feb. 11, 2016) (to be codified at 50 C.F.R. pt. 402).

[6]Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, 81 Fed. Reg. 7226 (Feb. 11, 2016) (to be codified at 50 C.F.R. pt. 424).

[7]Complaint, Alabama v Nat'l Marine Fisheries Serv., No. 1:16-cv-00593 (S.D. Nov. 29, Ala. 2016).

[8]Revised Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities, 81 Fed. Reg. 8663 (Feb. 22, 2016) (to be codified at 50 C.F.R. ch. IV).

with the states and integrating the many conservation programs not yet in existence when the prior policy was adopted in 1994 (such as Habitat Conservation Plans and Safe Harbor Agreements).

On August 22, 2016, FWS issued a memorandum entitled "Peer Review Process," in which the agency updated its process for conducting independent peer reviews of species listing and recovery plan actions.[9] The revised policy requires, for example, that the field office initiating the action be different from the office conducting the peer reviewer selection and coordination.

FWS promulgated a set of rules and policies governing review and processing of petitions to list, delist, or reclassify species and petitions to revise a critical habitat designation. A final rule revises the regulations governing the requirements for petitions,[10] the main thrust being to define additional information requirements for petitions and to adopt a "credible scientific or commercial information" standard for making ninety-day findings on petitions. The agency also adopted a Final Methodology for Prioritizing Status Reviews and Accompanying 12-Month Findings on Petitions for Listing,[11] establishing a priority system for working through its workload on petitions. Lastly, in September 2016, FWS adopted a National Listing Workplan outlining its priorities and processes for working through 362 high-priority pending listings and critical habitat designations.[12]

A November 2015 Presidential Memorandum on natural resources mitigation required several resource management agencies to develop resource impact mitigation policies for their various programs, and specifically required FWS to develop a revised mitigation policy applicable to its responsibilities under the ESA—given the ESA's specific mitigation provisions—and to finalize a policy on credits for pre-listing conservation actions.[13] FWS fulfilled all three initiatives. First, FWS promulgated its revised FWS Mitigation Policy in November 2016,[14] which stresses the "avoid-minimize-mitigate" and "no net loss" approaches demanded by the Memorandum. For the ESA program, FWS adopted its Final ESA Compensatory Mitigation Policy in December 2016,[15] which addresses mitigation in both the Section 7 and Section 10 incidental take approval contexts and, like the general policy, incorporates the "avoid-minimize-mitigate" and "no net loss" approaches, potentially in conflict with the Section 10 permit issuance criteria. Finally, in January 2017 FWS issued Director's Order No. 218, which outlines the new Policy Regarding Voluntary Prelisting Agreements.[16] The pre-listing conservation credit program applies to "qualifying voluntary prelisting conservation actions" and may be used in both Section 7 and Section 10 offsets. Oddly, the actual "policy," attached to the cover memorandum, is the seventy-page document the agency had delivered to OMB-

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[9] Memorandum from James W. Kurth, Deputy Dir., U.S. Dep't of the Interior, Fish and Wildlife Serv., to Reg'l Dirs. 1-8, Peer Review Process (Aug. 22, 2016).

[10] Endangered and Threatened Wildlife and Plants; Revisions to the Regulations for Petitions, 81 Fed. Reg. 66,462 (Sept. 27, 2016) (to be codified at 50 C.F.R. pt. 424).

[11] Methodology for Prioritizing Status Reviews and Accompanying 12-Month Findings on Petitions for Listing Under the Endangered Species Act, 81 Fed. Reg. 49,248 (July 27, 2016).

[12] NATIONAL LISTING WORKPLAN, U.S. FISH AND WILDLIFE SERV. (Sept. 2016).

[13] Presidential Memorandum of Nov. 3, 2015, 80 Fed. Reg. 68,743 (Nov. 6, 2015); *see also* Press Release, The White House, Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment (Nov. 3, 2015).

[14] U.S. Fish and Wildlife Service Mitigation Policy, 81 Fed. Reg. 83,440 (Nov. 21, 2016).

[15] Endangered and Threatened Wildlife and Plants; Endangered Species Act Compensatory Mitigation Policy, 81 Fed. Reg. 95,316 (Dec. 27, 2016).

[16] Policy Regarding Voluntary Prelisting Conservation Actions, Director's Order No. 218 (U.S. Fish & Wildlife Serv. Jan. 18, 2017).

OIRA for regulatory review and publication in the Federal Register, but which OMB had not released prior to the end of the Obama Administration.

In December 2016, FWS and NMFS jointly adopted a revised Habitat Conservation Planning (HCP) Handbook, which substantially overhauls the prior version from the 1990s and focuses extensively on large-scale HCP initiatives.[17] In line with the ESA mitigation policy discussed above, the new HCP Handbook recommends that permit applicants demonstrate a "net gain" for the species, or at worst "no net loss," a directive which if mandated in practice could potentially conflict with the Section 10 permit issuance criteria. It also requires that HCP permits address climate change, though without explaining how this will factor into permit issuance review.

Also in December, FWS issued a final rule revising regulations governing the Candidate Conservation Agreements with Assurances (CCAA) program, introducing a "net conservation benefit" standard.[18] The agency also revised its CCAA policy to be consistent with the new rule and introducing the concept of "key threats" that must be addressed in a CCAA.[19] As a result of a January 20, 2017 White House memorandum directing federal agencies to delay the effective date of final rules that had not yet gone into effect,[20] FWS delayed the effective date of the CCAA rule and policy until March 2017, and further delays are possible based on procedures outlined in that memorandum.

III. JUDICIAL DEVELOPMENTS[21]

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

1. Listings

a. General

Several cases involved analysis of whether FWS's decision to list or not list a species was consistent with its Policy for Evaluation of Conservation Efforts When Making Listing Decisions (PECE). In a case of significance, the D.C. Circuit rejected the plaintiffs' many objections in upholding FWS's determination under PECE that a state plan to conserve habitat for the dunes sagebrush lizard was sufficiently certain to be implemented and effective to protect the lizard, such that species did not need to be listed.[22]

A Colorado district court found that FWS's decision not to list several plants as endangered based on future conservation actions that had been committed to by various federal, state, and private entities was improper.[23] The court agreed that the PECE is a

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[17]Joint U.S. Fish and Wildlife Service and National Marine Fisheries Service Habitat Conservation Planning Handbook, 81 Fed. Reg. 93,702 (Dec. 21, 2016).

[18]Endangered and Threatened Wildlife and Plants; Revisions to the Regulations for Candidate Conservation Agreements With Assurances, 81 Fed. Reg. 95,053 (Dec. 27, 2016) (to be codified at 50 C.F.R. pt. 17).

[19]Candidate Conservation Agreements With Assurances Policy, 81 Fed. Reg. 95,164 (Dec. 27, 2016).

[20]Presidential Memorandum of Jan. 20, 2017, 82 Fed. Reg. 8346 (Jan. 24, 2017).

[21]The 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 2016. All slip opinions are on file with the author. Some decisions from late in the calendar year 2015 are included if they were not included in the Committee's 2015 Year in Review Report.

[22]Defs. of Wildlife v. Jewell, 815 F.3d 1 (D.C. Cir. 2016).

[23]Rocky Mountain Wild v. Walsh, No. 15–cv–0615–WJM, 2016 WL 6651409 (D. Colo. Oct. 25, 2016).

permissible interpretation of the ESA's statutory provision requiring the agency to consider in the listing analysis "those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species."[24] The court ruled that as a matter of law the term "being made" does not require that the efforts have already been made. However, in this case, the court found that the agency had not adequately explained how the measures in issue, which were set to expire in fifteen years, would, in the foreseeable future, avoid threats to the species warranting listing.

The Montana District Court applied *Chevron*/*Brand X* deference to find that the FWS's 2014 "significant portion of range" policy is permissible under the ESA.[25]

b. Climate Change

The Ninth Circuit ruled NMFS's listing of the Pacific bearded seal subspecies as endangered, based principally on the finding that the seals would lose their habitat by the end of the century due to climate change, was not arbitrary and capricious.[26] In particular, the court found NMFS's decision to adopt a new foreseeability analysis—which was a change from prior practice of setting year 2050 as outer boundary of its foreseeable future analysis—was responsive to new, reliable research while accounting for species-, threat-, and habitat-specific factors and conformed to the ESA's "best data available" standard. Moreover, the court ruled that the ESA does not require an agency to quantify population losses, the magnitude of risk, a projected "extinction date," or "extinction threshold" to determine whether a species is "more likely than not" to become endangered in the foreseeable future.

The United States District Court for the District of Alaska held that it was not reasonable for NMFS to list the Arctic ringed seals as a "threatened species," even while the population is strong and healthy, based primarily upon what the court considered to be speculation as to what circumstances may or may not exist eighty to 100 years from now as a result of climate change.[27] The court meticulously analyzed the bases for listing, spelled out in the listing rule, and concluded: "It does not appear from the Listing Rule that any serious threat of a reduction in the population of the Arctic ringed seal, let alone extinction, exists prior to the last decade of the 21st century. This is troubling."[28]

The United States District Court for the District of Montana vacated the FWS's withdrawal of a proposed rule to list a Distinct Population Segment of the North American wolverine as threatened.[29] The court noted that the withdrawal was likely the result of immense political pressure by several western states (a number of which appeared in the case as intervenor-defendants), and emphatically stated, "[n]o greater level of certainty is needed to see the writing on the wall for this snow-dependent species standing squarely in the path of global climate change."[30] The FWS's decision-making with respect to the wolverine has been challenged at every stage of the ESA section 4 listing process, with much of the focus on whether anticipated impacts of climate change support a listing of the species. On October 18, 2016, FWS reopened the comment period on its February 4,

[24]*Id.* at *10.
[25]Ctr. for Biological Diversity v. Jewell, No. CV 15-4-BU-SEH, 2016 WL 4592199 (D. Mont. Sept. 2, 2016), *appeal docketed*, No. 16-35866 (9th Cir. Oct. 24, 2016).
[26]Alaska Oil & Gas Ass'n v. Pritzjer, 840 F.3d 671 (9th Cir. 2016).
[27]Alaska Oil & Gas Ass'n v. Nat'l Marine Fisheries Serv., Nos. 4:14-cv-00029-RRB et al., 2016 WL 1125744 (D. Alaska Mar. 12, 2016), *appeal docketed*, No. 16-35382 (9th Cir. May 5, 2016).
[28]*Id.* at *14.
[29]Defs. of Wildlife v. Jewell, 176 F. Supp. 3d 975 (D. Mont. 2016).
[30]*Id.* at 1011.

2013, proposed rule to list the DPS as threatened and is conducting a new status review of the species.

2. Critical Habitat Designations

The Ninth Circuit issued a blockbuster opinion regarding the critical habitat designation program (see Part H below for the Commerce Clause aspects of the case).[31] The case involved FWS's designation of critical habitat for the dusky gopher frog on private land that was not occupied by the frog but that contained the kind of ephemeral ponds FWS deemed a critical feature essential for its recovery. The court ruled that *Chevron* applied to the term "essential" in the definition of critical habitat, that the statute did not define the term, and that FWS's interpretation in regulations was reasonable. From there the court ruled that neither the statue nor the "FWS implementing regulations impose a habitability requirement for land not occupied by a species, nor did they require that such land currently support conservation of the species or be able to do so in the foreseeable future, or that private landowners would be willing to participate in species conservation."[32] In short, designation of unoccupied areas as critical habitat need not be based on a timeline for when the area will become occupied, if ever. It should be noted that Judge Priscilla Owen issued a blistering dissent based on the fact that, although the pond was present, other critical features were not and could only become present through significant human intervention (i.e., the forests in the areas upland from the ponds would need to be destroyed and the requisite vegetation, including a new forest, be planted and maintained).[33] Finding no reasonable probability that the area will be altered in this way, in Judge Owen's view it was not "essential."

Also, the court held that FWS did not act arbitrarily and capriciously in failing to exclude private land from the critical habitat designation, even given that the land was not occupied by the species and even if the land was not currently habitable by the species. The court agreed with FWS that once the agency has "fulfilled its statutory obligation to consider economic impacts, a decision to *not* exclude an area is discretionary and thus not reviewable in court."[34]

Lastly, emphasizing that "the ESA statutory scheme makes clear that [the Service] has no authority to force private landowners to maintain or improve the habitat existing on their land," the court ruled that "inclusion of privately owned land … in the critical habitat designation … did not effect changes to the physical environment or require private landowners to take action to maintain or improve the habitat existing on their land, and thus an environmental impact statement (EIS) under … NEPA was not required."[35]

The Ninth Circuit upheld the FWS's designation of critical habitat for the polar bear.[36] Of particular noteworthiness is the court's ruling that FWS was not required to identify where each component part of each primary constituent element was located within each habitat by using scientific data establishing current use by existing polar bears. The court also ruled that compliance with the *procedural* requirement that FWS provide written justification to the state regarding reasons for not accepting the state's comments on the proposed designation is a judicially reviewable agency action, but the substance of the reasons is not judicially reviewable because the statute provides no standards.

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[31]Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv., 827 F.3d 452 (5th Cir. 2016).
[32]*Id.* at 467.
[33]*Id.* at 480-81 (Owen, J., dissenting).
[34]*Id.* at 473.
[35]*Id.* at 479, 480.
[36]Alaska Oil & Gas Ass'n v. Jewell, 815 F.3d 544 (9th Cir. 2016), *appeal docketed*, No. 16-596 (U.S. Nov. 7, 2016).

The United States District Court for the District of Montana ruled that "in determining whether occupied habitat constitutes critical habitat, the ESA contemplates the inclusion of areas that contain primary constituent elements (PCE) essential for occupation by the particular species, even if there is no available evidence documenting current activity", and thus it was error for FWS to substitute current occupancy as a proxy for PCEs when designating critical habitat for the Canada lynx.[37]

3. Recovery Plans

No developments of importance.

4. Five-Year Reviews

No developments of importance.

B. Section 5: Habitat Acquisition

No developments of importance.

C. Section 6: State Cooperative Programs

The Middle District of Florida issued a rare and important decision under Section 6.[38] The case involved the novel claim that Collier County's "policies and regulations relating to the clearing of agricultural land, the issuance of building permits for single family residences, … and … [a] planned future [road] extension … [were] pre-empted by [Section] 6(f) of the ESA because they are less stringent than the"[39] ESA's take prohibition, notwithstanding that the county's regulations included provisions stating that permittees must also comply with federal laws. The court rejected this theory on all grounds of preemption—Supremacy Clause, field preemption, and conflict preemption. One passage in particular captures the court's perspective:

> The Court holds that 16 U.S.C. [section] 1535(f) does not pre-empt CCME Policy 6.1.5 because CCME Policy 6.1.5 is not less restrictive than the ESA and its implementing regulations. CCME Policy 6.1.5 requires the landowner to obtain all other federal and state agency permits and provide copies to Collier County prior to clearing the land. It imposes additional requirements such as submitting an Application to the County, payment of a fee, and submission of certain documents. In appropriate circumstances the landowner will need to comply with the ESA prior to land clearing, but nothing in the ESA requires that the county authorization be withheld until after the federal requirements are satisfied. Obtaining Collier County authorization for agricultural land clearing is an additional requirement, not a replacement of a federal requirement.[40]

[37]WildEarth Guardians v. U.S. Dep't of the Interior, No. 14–272–M–DLC, 2016 WL 4688080, at *3 (D. Mont. Sept. 9, 2016).
[38]Fl. Panthers v. Collier Cty., No. 2:13-cv-612-FtM-29DNF, 2016 WL 1394328 (M.D. Fla. Apr. 8, 2016).
[39]*Id.* at *1.
[40]*Id.* at *18.

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

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

No developments of importance.

2. Section 7(a)(2) Consultation Standards and Procedures

A Northern District of California court held that the California Department of Transportation, which had been assigned federal agency status for purposes of highway development, was required to reinitiate consultation with FWS regarding a highway project "after learning that project's net effect on endangered species would be greater than the agency had previously determined."[41] Caltrans learned that a 5.14-acre parcel, which was proposed to be preserved as "compensatory mitigation for the fact that … [widening the highway] would have adverse impacts on habitat for California red-legged frogs and San Francisco garter snakes, both of which were listed species, … was already required to be preserved"[42] by a local city, and therefore, the project's net effect on endangered species would be greater than the agency had previously determined. The court also held that, regardless of that defect, the mitigation plans for the parcel improperly relied on vague and speculative mitigation measures.

In an opinion running over seventy pages of extensive, detailed analysis of an NMFS finding that operation of the Federal Columbia River Power System did not jeopardize listed salmonid populations, the United States District Court for the District of Oregon issued more pronouncements regarding the law of the jeopardy and adverse modification standards and consultation processes than can be covered here.[43] Of particular noteworthiness is the court's ruling that the NMFS's "trending toward recovery" standard, which uses three population metrics to determine whether the population is increasing in size (in which case a finding of no jeopardy is warranted), is invalid for populations that are precariously low in abundance.

The D.C. District Court held that FWS may amend an incidental take statement through an addendum, but it must use the environmental baseline at the time of the addendum rather than as existed at the time of the original incidental take statement.[44]

When considering an application to approve the marketing of three genetically modified salmon species, the FDA initiated informal consultation with FWS by delivering a "may effect" finding, but FWS sent a letter to the FDA advising the FDA that FWS believed the proper finding was "no take." The FDA withdrew its "may affect" determination, submitted a "no take" letter, and the FWS agreed in a return letter and concluded its informal consultation. The United States District Court for the Northern District of California held that the FWS concurrence letter was merely advisory and thus not final agency action reviewable under the APA, meaning the plaintiff could not challenge the FWS concurrence and could only challenge the FDA's decision not to pursue consultation.[45]

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[41]Pacificans for a Scenic Coast v. Cal. Dep't Trans., No. 15-cv-02090-VC, 2016 WL 4585768 (N.D. Cal. Sept. 2, 2016).
[42]*Id.* at *11.
[43]Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 184 F. Supp. 3d 861 (D. Or. 2016).
[44]Mayo v. Jarvis, 177 F. Supp. 3d 91 (D.D.C. 2016).
[45]Inst. for Fisheries Res. v. Burwell, No. 16-cv-01574-VC, 2016 WL 4529517 (N.D. Cal. Aug. 30, 2016).

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

No developments of importance.

4. Incidental Take Statements

The Ninth Circuit held that the term "species" as used in the Incidental Take Statement provision of Section 7, in cases when a "Biological Opinion concludes that no jeopardy to listed species will result from the proposed action but the action is likely to result in incidental taking, applied only to animals, not to plants."[46] The court reasoned that, because the provisions of Section 9 "prohibiting taking applied only to fish and wildlife [and the] separate provision of … [Section 9] protecting plants did not use term 'take.'"[47] The Section 7 provision governing incidental take does not apply to plants. In such cases where only plants are involved, therefore, a Biological Opinion does not include an ITS.

E. Section 9: Take Prohibition

The United States District Court for the Middle District of Florida issued an important decision regarding the "vicarious liability" of local land use authorities that grant building and other permits for activities that could constitute take under the ESA.[48] The case involved a claim that Collier County's land use regulations constitute take violations because they could authorize land clearing and home building activities that cause prohibited takes. The county's regulations included provisions, however, stating that permittees must also comply with federal laws. The court flatly rejected the theory that the county violates the ESA when granting such permits:

> Collier County's land clearing authorizations and single family home building permits simply authorize the clearing and building if the landowner otherwise complies with federal law. In order for a take to occur, a third party must violate Collier County's regulations and the ESA. Defendants cannot be held liable for such conduct. As previously stated, plaintiffs essentially want Collier County to enforce the ESA by withholding its approvals until the ESA requirements have been satisfied. Enforcement of the ESA, however, is the responsibility of federal agencies, not local governments.[49]

The United States District Court for the Southern District of Florida held that the long-standing NMFS and FWS policies regarding application of the take prohibition (specifically, the terms "harm" and "harass") to captive individuals of listed species are entitled to *Skidmore* deference and that their legal consequence is that a "licensed exhibitor 'take[s]' a captive animal in violation of the ESA … only when its conduct gravely threatens or has the potential to gravely threaten the animal's survival."[50] The court found that the owner of a marine animal park had not violated the policies with respect to a captive

[46]Ctr. for Biological Diversity v. Bureau of Land Mgmt., 833 F.3d 1136, 1145 (9th Cir. 2016).
[47]*Id.*
[48]Fl. Panthers v. Collier Cty., No. 2:13-cv-612-FtM-29DNF, 2016 WL 1394328 (M.D. Fla. Apr. 8, 2016).
[49]*Id.* at *22.
[50]People for Ethical Treatment of Animals, Inc. v. Miami Seaquarium and Festival Fun Parks, L.L.C., 189 F. Supp. 3d 1327, 1355 (S.D. Fla. 2016).

killer whale. By contrast, without discussing the FWS and NMFS captive species policies or the "gravely threaten" standard, an Idaho district court held that a zoo had taken captive lemurs and tigers because of inadequate sanitation and care.[51]

Demonstrating the impact of the Ninth Circuit's 2015 opinion regarding preliminary injunction claims under the ESA,[52] the United States District Court for Oregon enjoined a logging clear-cut project because "serious questions" as to the merits of whether an endangered seabird was present in the area and "in cases brought under the ESA, the balance of hardships automatically tips in favor of the endangered species."[53]

In vigorously rejecting claims that the National Park Service's operation of a dam caused take of listed fish species, the United States District Court for the Eastern District of California provided an excellent, concise summary of Ninth Circuit law on take claims:

> To prevail on a Section 9 claim, a plaintiff must prove by a preponderance of the evidence that a 'reasonably certain threat of imminent harm to a protected species' exists. *Marbled Murrelet v. Babbitt*. Thus, Plaintiffs have the burden of proving that the City's diversions will harm one of the five listed fish species identified in the complaint 'by killing or injuring it.' *Protect Our Water v. Flowers* (citing *Defenders of Wildlife v. Bernal*). Habitat modification may constitute 'harm' to a listed species, but only if it 'actually kills or injures wildlife.' *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* (quoting and affirming the definition in 50 C.F.R. section 17.3). A 'potential' injury to the species is 'inadequate to establish Section 9 liability.' *Swinomish Indian Tribal Community v. Skagit County Dike District No. 22* (quoting *Forest Conservation Council v. Rosboro Lumber Co.*).
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> Take can result from *direct* harm to a single, individual animal. *See, e.g.*, *United States v. Nuesca* (affirming criminal convictions under the ESA for the direct take by hunting of a single Hawaiian monk seal and two green sea turtles). In contrast, 'the balance of the authority suggests that a population level effect is necessary for harm resulting from habitat modification to be considered a take.' *Coalition for a Sustainable Delta v. McCamman* (collecting cases).[54]

F. Section 10: Permits and Experimental Populations

1. Habitat Conservation Plans (HCP) Permits

The D.C. Circuit held that the ESA requirement in Section 10 that, prior to issuing an incidental take HCP permit, FWS must find that the "applicant will 'minimize and mitigate' impacts of tak[e] of endangered species to maximum extent practicable creates a single duty and does not require [a] finding that applicant will first minimize [the] number of individual members of species taken to maximum extent practicable, then mitigate the

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[51]Kuehl v. Sellner, 161 F. Supp. 3d 678 (N.D. Iowa 2016), *appeal docketed*, No. 16-3147 (8th Cir. July 20, 2016).

[52]Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv., 789 F.3d 1075, 1091 (9th Cir. 2015) ("when evaluating a request for injunctive relief to remedy an ESA procedural violation, the equities and public interest factors always tip in favor of the protected species.").

[53]Cascadia Wildlands v. Scott Timber Co., 190 F. Supp. 3d 1024, 1035 (D. Or. 2016), *appeal docketed*, No. 17-35038 (9th Cir. Jan. 17, 2017).

[54]Ctr. for Envtl. Sci. Accuracy & Reliability v. Nat'l Park Serv., No. 1:14-cv-02063-LJO-MJS, 2016 WL 4524758, at *26 (E.D. Cal. Aug. 29, 2016).

taking to maximum extent practicable".[55] The court ruled that FWS met this requirement in finding that the combined minimization and mitigation of take of Indiana bats proposed by a wind energy facility HCP fully offset the impact of the take, concluding that, "if combined minimization and mitigation fully offset the take, it does not matter whether …[the permittee] could do more; … [the permittee] has already satisfied what is required under the ESA."[56]

2. Experimental and Reintroduced Populations

New Mexico state law requires "all persons who import and release non-domesticated animals to obtain a permit before doing so",[57] and federal law requires FWS to "comply with state permit requirements … [(except in instances where the DOI] Secretary determines that [such] compliance would prevent him [or her] from carrying out statutory … [duties)]." [58] FWS applied for, but was denied, the state release permits for release of endangered Mexican wolves. FWS went on to release wolves without the permits, and the state sued to prevent future releases. The United States District Court for the District of New Mexico court preliminarily enjoined FWS from releasing endangered Mexican wolves in New Mexico without first obtaining the necessary permits from the state's game and wildlife agency. The grant of preliminary injunction is on appeal to the Tenth Circuit, which heard oral arguments in January 2017.

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

An environmental interest group claimed that it had standing to challenge the FWS's failure to reach a twelve-month listing petition finding by the deadline because it suffered informational injury as a consequence of the agency's failure to publish the twelve-month finding in the Federal Register. The D.C. Circuit ruled that the organization had not suffered informational injury, however, because the statutory provision places the agency under "no obligation to publish any information in the Federal Register until *after* making a [twelve]-month finding."[59]

The Federal Power Act requires the Federal Energy Regulatory Commission (FERC) to comply with the ESA and the APA, but requires claims for judicial review of FERC licensing decisions to be brought in the Courts of Appeals.[60] The United States District Court for the District of Maine held that, as a result, it lacked subject matter jurisdiction over a challenge to a biological opinion prepared in the course of a FERC licensing proceeding, reasoning that the "only means of challenging the substantive validity of the biological opinion is on review of FERC's decision in the Court of Appeals."[61]

[55]Union Neighbors United, Inc. v. Jewell, 831 F.3d 564 (D.C. Cir. 2016).
[56]*Id.* at 583.
[57]N.M. Dept. of Game and Fish v. U.S. Dep't of the Interior, No. CV 16-00462 WJ/KBM, 2016 WL 4536465, at *7 (D.N.M. June 10, 2016).
[58]*Id.*
[59]Friends of Animals v. Jewell, 828 F.3d 989, 993 (D.C. Cir. 2016).
[60]*See* 16 U.S.C. § 825*l*(b).
[61]Me. Council of the Atl. Salmon Fed'n v. Nat'l Marine Fisheries Serv., No. 2:15-cv-00261-JAW, 2016 WL 4401987, at *20 (D. Me. Aug. 18, 2016).

H. Miscellaneous ESA Topics and Related Federal and State Laws

1. Commerce Clause

The Fifth Circuit held that when determining whether intrastate activity associated with private land that had been included within the FWS's critical habitat designation for an endangered frog substantially affected interstate commerce for purposes of the Commerce Clause, it was appropriate to "aggregate the effect of designating the private land in Louisiana with the effect of all other critical-habitat designations *nationwide*."[62] The court reasoned that the ESA is an "economic regulatory scheme enacted to curb species extinction as a consequence of economic growth and development, and the process of designating critical habitat was an essential part of ESA's economic regulatory scheme."[63]

2. Takings

Landowners and irrigation districts in the Klamath River Basin claimed that the Bureau of Reclamation took their alleged water rights without just compensation by refusing to release water to irrigation canals in order to avoid impairing the habitat of three listed species of fish. The Court of Federal Claims agreed with plaintiffs that the claims should be analyzed as physical takings, not regulatory takings as the government argued.[64] The court reasoned that "refusal to release water that would have flowed into irrigation canals amounted to physical diversion of water."[65]

3. Migratory Bird Treaty Act (MBTA)

The Department of the Interior issued a Solicitor's Opinion in January 2017 defending the FWS's long-held position that the MBTA prohibits incidental take of protected birds, not merely direct take, and roundly critiquing recent judicial opinions concluding to the contrary.[66]

The Ninth Circuit rejected a claim that the Bureau of Land Management violated the MBTA take prohibition by authorizing the construction and operation of a wind power facility on public lands.[67] The court ruled that the MBTA does not contemplate imposing secondary liability on agencies like the BLM that act in a "purely regulatory capacity and whose regulatory acts [do] not directly or proximately cause the take of migratory birds."

4. Bald and Golden Eagle Protection Act (BGEPA)

Under the same reasoning discussed above for the MBTA, the Ninth Circuit reached the same conclusion with respect to the BGEPA.[68]

FWS issued Revisions to Regulations for Eagle Incidental Take and Take of Eagle Nests, revising the eagle incidental take permit program, including issuance criteria,

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[62]Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv., 827 F.3d 452, 475 (5th Cir. 2016).
[63]*Id.*
[64]Klamath Irrigation v. United States, 129 Fed. Cl. 722 (Fed. Cl. 2016).
[65]*Id.* at 732.
[66]Memorandum from U.S. Dep't of the Interior, Office of the Solicitor, to Dir., Fish & Wildlife Serv., Incidental Take Under the Migratory Bird Treaty Act (Jan. 10, 2017).
[67]Protect Our Communities Found. v. Jewell, 825 F.3d 571 (9th Cir. 2016).
[68]See *id.*

duration, scope of five-year reviews, monitoring requirements, and compensatory mitigation standards.[69]

[69]Eagle Permits; Revisions to Regulations for Eagle Incidental Take and Take of Eagle Nests, 81 Fed. Reg. 91,494 (Dec. 16, 2016) (to be codified at 50 C.F.R. pts. 13 and 22).

Chapter 4 • ENVIRONMENTAL DISCLOSURE
2016 Annual Report[1]

I. OVERVIEW

In 2016, President-elect Trump promised to undo environmental policies and regulations issued by the Obama administration. But President-elect Trump has not articulated a detailed policy agenda in environmental law. Although President-elect Trump voiced broad themes regarding rolling back regulation, we do not know what specific policies a Trump administration would promote on environmental issues. The recent election's initial impact on many businesses is regulatory uncertainty. The legal framework governing the rulemaking process may affect disclosure and corporate governance considerations. Case in point, President-elect Trump's de-regulation policy objectives would face many legal standards applicable to the rulemaking process. These standards may restrict the Trump administration's ability to rescind or revise existing regulations or subject the process to lengthy and risky public notice and comment processes, and possibly litigation. It is unclear whether President-elect Trump would pursue his proposals and whether they will be subjected to lengthy rulemaking and litigation with an uncertain outcome. What seems reasonably certain is that the Trump administration will not break any new ground by proposing additional environmental regulations, including disclosure-related regulation. United States public and other reporting companies should consider the known facts surrounding President-elect Trump's potential environmental agenda and possible outcomes as they prepare for the upcoming annual or quarterly reporting season. Public companies should review their disclosure to consider necessary changes and should assess the need for disclosure of resulting risks, trends, and uncertainties that could materially affect their financial condition or operations.

II. GOVERNMENTAL ACTION

A. ExxonMobil Climate Change Investigation and Litigation

One of the most significant governmental actions of 2016 in the environmental disclosure space was the ongoing investigation of Exxon Mobil Corporation (ExxonMobil) by multiple authorities. The investigation began in November 2015 when New York State Attorney General Eric T. Schneiderman served a subpoena on ExxonMobil demanding the company produce extensive records related to climate change, including the disclosure of climate change impacts in public filings and reports.[2] The subpoena cited several legal bases for the information request, largely in "repeated fraud or illegality."[3] The subpoena relied heavily on New York State's 1921 shareholder protection statute, the Martin Act.[4]

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[1]This summary was prepared by Madison Condon, Postdoctoral Fellow at Columbia University; Jehmal Hudson, Federal Energy Regulatory Commission; Jenny McClister, HP Inc.; Carolyn McIntosh, Squire Patton Boggs; David Scott, Hunsucker Goodstein; John Rosengard, ERCI; Scott Shock, Exponent; Misty Sims, Sims & Sims Law; Tom Utzinger, Attorney at Law; Ivan Zdravkovic, Student at Vermont Law.

[2]Subpoena for Prod. of Documents, Exxon Mobil Corp. v. Schneiderman, No. 4:16-CV-00469-K (N.D. Tex. Nov. 17, 2016).

[3]*Id.*

[4]N.Y. GEN. BUS. LAW § 352 (McKinney 1921). A securities fraud action under the Martin Act generally requires a material misrepresentation or omission and falsity, but does not require a prosecutor to demonstrate that a defendant consciously intended to defraud investors or regulators.

ExxonMobil's initial reaction to the subpoena (1) pointed out the company had included information related to climate change in its annual report, other reports, and multiple disclosures, and (2) rejected the allegation that climate change research had been suppressed.[5]

Following the New York subpoena and the increasing public pressure on ExxonMobil, other state Attorneys General focused their attention on the company. During a March 29, 2016 press conference led by Attorney General Schneiderman and joined by his counterparts and other representatives from fourteen states plus the District of Columbia and the United States Virgin Islands, Attorney General Schneiderman announced an alliance of states to urge climate action, focusing on whether fossil fuel companies misled their investors with respect to climate change risks.[6]

Notably, Attorney General Claude Walker of the Virgin Islands and Attorney General Maura Healey of Massachusetts disclosed they were investigating ExxonMobil. In fact, Attorney General Walker had issued a subpoena on March 15, 2016, and Attorney General Healey subsequently issued a civil investigative demand on April 19, 2016 requesting forty years of records.[7]

These actions ignited litigation against the Attorneys General of the Virgin Islands, Massachusetts, and later in the year, New York. On April 13, 2016, ExxonMobil sued Virgin Islands Attorney General Walker and his outside law firm in a Texas state court (later removed to federal court), based in part on a violation of ExxonMobil's First Amendment rights.[8] The parties later agreed to dismiss the subpoena and lawsuit.[9] Litigation against Attorney General Healey commenced on June 15, 2016, with ExxonMobil asserting the Massachusetts civil investigative demand, among other things, violated the company's constitutional rights.[10] The lawsuit continued through 2016.

ExxonMobil added Attorney General Schneiderman to the Attorney General Healey lawsuit on November 10, 2016 to stop New York State from moving forward with its investigation.[11] ExxonMobil stated that the two Attorneys General were conducting "improper and politically motivated investigations of ExxonMobil in a coordinated effort to silence and intimidate one side of the public policy debate on how to address climate change."[12] ExxonMobil seeks to bar enforcement of Attorney General Schneiderman's subpoena and Attorney General Healey's civil investigative demand.[13] ExxonMobil asserts that the New York investigation, originally understood to focus on ExxonMobil's climate

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[5]Bob Simison, *New York Attorney General Subpoenas Exxon on Climate Research*, INSIDECLIMATE NEWS (Nov. 5, 2015).

[6]David Hasemyer et al., *Climate Fraud Investigation of Exxon Draws Attention of 17 Attorneys General*, INSIDECLIMATE NEWS (Mar. 30, 3016); Press Release, N.Y. State Office Of The Att'y Gen., A.G. Schneiderman, Former Vice President Al Gore And A Coalition Of Attorneys General From Across The Country Announce Historic State-Based Effort To Combat Climate Change (Mar. 29, 2016).

[7]Subpoena, Exxon Mobil Corp. (Mar. 15, 2016); Civil Investigative Demand, Exxon Mobil Corp., No. 2016-EPD-36 (Apr. 19, 2016).

[8]Plaintiff's Original Petition for Declaratory Relief, Exxon Mobil Corp. v. Walker, No. 017-284890-16 (Dist. Ct. of Tarrant Cty., Tex. Apr. 13, 2016).

[9]Joint Stipulation of Dismissal, Exxon Mobil Corp. v. Walker, No. 4:16-CV-00364-K (N.D. Tex. June 29, 2016).

[10]ExxonMobil's Complaint for Declaratory and Injunctive Relief, Exxon Mobil Corp. v. Healey, No. 4:16-CV-00469 (N.D. Tex. June 15, 2016).

[11]ExxonMobil's First Amended Complaint for Declaratory and Injunctive Relief, Exxon Mobil Corp. v. Schneiderman, No. 4:16-CV-00469-K (N.D. Tex. Nov. 10, 2016).

[12]*Id.* at 1.

[13]*Id.*

research, has improperly evolved into an investor fraud case.[14] On November 17, 2016, United States District Court Judge Ed Kinkeade issued an order that Attorney General Healey was to appear for a deposition in Dallas on December 13, 2016, and that Attorney General Schneiderman should be available in Dallas as well.[15] On December 12, 2016, however, Judge Kinkeade reversed course and canceled Attorney General Healey's deposition.[16] On December 15, 2016, Judge Kinkeade ordered all parties to submit a brief by February 1, 2017 as to whether the court has personal jurisdiction over the Attorneys General.[17]

In a separate action, Attorney General Schneiderman moved on October 14, 2016 to compel production by PricewaterhouseCoopers LLP (PwC), ExxonMobil's auditor, to a subpoena submitted to PwC on August 19, 2016.[18] Exxon would not permit PwC to submit certain documents based on "accountant-client privilege" under Texas law.[19] Compliance with the subpoena was ordered by the Supreme Court of the State of New York on October 26, 2016 (the court found that New York law, which applied, did not support an "accountant-client privilege").[20]

In the throes of this litigation, the United States Securities and Exchange Commission (SEC) reportedly began an investigation of ExxonMobil related to the company's accounting methods valuing assets in a world of increasing climate change regulation.[21] As reported by the Wall Street Journal (WSJ) and other news outlets citing to the WSJ, the SEC is interested in how ExxonMobil estimates the value and commercial viability of its oil reserves given low market prices and curbs on carbon emissions.[22] By the date of this publication, there are no publicly available documents regarding this investigation or public statements by the SEC concerning it.

B. SEC Concept Release of Disclosure Reform under Regulation S-K

On April 13, 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.[23] As discussed in the Concept Release, Regulation S-K sets forth the disclosure requirements for when information, sustainability-related or otherwise, is material, and, therefore, important to the reasonable investor.[24] Although Regulation S-K requires material financial information be disclosed, there are no accounting standards, such as metrics, outlined to disclose comprehensive, comparable, and reliable sustainability information.[25] The Concept Release sought feedback from publicly-traded companies and the public whether

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[14] *Id.* at 2, 7.
[15] Order, *Exxon Mobil Corp.*, No. 4:16-CV-00469-K (N.D. Tex. Nov. 17, 2016).
[16] Order, *Exxon Mobil Corp.*, No. 4:16-CV-00469-K (N.D. Tex. Dec. 12, 2016).
[17] Order, *Exxon Mobil Corp.*, No. 4:16-CV-00469-K (N.D. Tex. Dec. 15, 2016).
[18] Subpoena Duces Tecum, People ex rel. Schneiderman v. PricewaterhouseCoopers LLP, No. 451962/2016 (N.Y. Sup. Ct. Aug. 19, 2016).
[19] *Id.*
[20] Decision & Order, People ex rel. Schneiderman v. PricewaterhouseCoopers LLP, No. 451962 (N.Y. Sup. Ct. Oct. 26, 2016).
[21] Bradley Olson & Aruna Viswanatha, *SEC Probes Exxon Over Accounting for Climate Change*, WALL STREET J. (Sept. 20, 2016).
[22] *Id.*
[23] Business and Financial Disclosure Required by Regulation S-K, Securities Act Release Nos. 33-10064, 34-77599, 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).
[24] *Id.*
[25] *Id.* at 23,916-17.

sustainability disclosures should be more proscriptive.[26] In response to the Concept Release, 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.[27] At the close of 2016, the SEC had issued no proposed changes to Regulation S-K regarding sustainability-related information. The incoming administration puts in doubt that any new regulations in this area for the foreseeable future.

C. Mining Disclosure Rules

The SEC did propose new requirements and best practices regarding disclosures for the mining industry in 2016.[28] The SEC's proposed rule on Modernization of Property Disclosures for Mining Registrants, issued June 16, 2016, will require more environmental risk disclosure.[29] The proposed rule appears to be a reaction to, at least in part, recent shareholder suits such as with Barrick Gold on Pascua Lama and with Vale and BHP on the Samarco dam failure (which are discussed later herein) that illustrate the hazards of insufficient disclosure of risks in the eyes of shareholders. Under the proposed rule, mining companies would be required to submit a "technical report summary" for each mineral resource or reserve that is significant enough of an asset to be considered material.[30] The technical report summary would include "the final identification and detailed analysis of environmental compliance and permitting requirements, including the finalized interests of agencies, NGOs, communities and other stakeholders, together with the completion of baseline studies and finalized plans for tailings disposal, reclamation and mitigation."[31] This information would originate from pre-feasibility or feasibility study documents.[32] SEC extended the comment period for the proposed rule through September 26, 2016[33] and comments on the proposed rule have been published.[34] However, the SEC had not issued the final rule and its promulgation is put in doubt by the incoming administration.

D. Energy Regulation

Two significant energy-related laws, which include robust environmental disclosure obligations, were put on hold by the courts in 2016. Implementation of the Obama administration's Clean Power Plan (CPP) was stayed by the United States Supreme Court in February 2016 in *West Virginia v. EPA*, also known as the Clean Power Plan (CPP) case, pending further review of the CPP by the United States Court of Appeals for

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[26] *Id.* at 23,916.

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

[28] Modernization of Property Disclosures for Mining Registrants, Securities Act Release Nos. 33-10098, 34-78086, 81 Fed. Reg. 41,652 (June 27, 2016) (to be codified at 17 C.F.R. pts. 229, 239, and 249).

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

[30] Modernization of Property Disclosures for Mining Registrants, 81 Fed. Reg. at 41,658.

[31] *Id.* at 41,682.

[32] *Id.*

[33] Extension of Comment Period for Modernization of Property Disclosures for Mining Registrants, Securities Act Release Nos. 33-10127, 34-78652, 81 Fed. Reg. 58,877 (Aug. 26, 2016) (to be codified at 17 C.F.R. pts. 229, 239, and 249).

[34] Email from Dana Willis to Brent J. Fields, Sec'y, SEC (Aug. 4, 2016).

the District of Columbia Circuit.[35] The CPP, if implemented, would require disclosure obligations for companies that build and operate power plants, principally in the coal industry.[36] Moreover, the CPP would require disclosure obligations for electric utilities, mining exploration and production companies, manufacturing companies, and large industrial electricity consumers.[37] On September 27, 2016, the United States Court of Appeals for the District of Columbia Circuit heard oral arguments in the Clean Power Plan (CPP) case regarding EPA's authority to promulgate the CPP.[38] The court did not rule by the close of the year.

In another energy-industry case, on June 21, 2016, a United States district judge held the Bureau of Land Management (BLM) does not have the authority to regulate hydraulic fracturing (fracking) on federal and Indian lands.[39] The proposed BLM rule, comprising several regulations, would provide public disclosure for chemicals used in hydraulic fracturing.[40] Nationally, fracking became controversial due to reported well and groundwater contaminations, chemical non-disclosures, fracking usage, and fracking fluid storage as well as disposal concerns.[41] The BLM is appealing the district court's ruling to the Tenth Circuit Court of Appeals.[42]

E. EPA Self-Audit Policy and the "eDisclosure" Portal

On December 9, 2015, the Environmental Protection Agency (EPA) announced the launch of a web-based "eDisclosure" portal as part of an initiative to modernize the agency's self-disclosure policy.[43] This change in the EPA's policy on "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations" (Audit Policy) creates a centralized location for entities to self-disclose civil violations of environmental law, replacing the prior process whereby entities would self-disclose to specific EPA regional offices.[44]

The EPA's Audit Policy encourages entities to voluntarily disclose violations by providing incentives, such as a reduction of 100% of gravity-based penalties and a recommendation that criminal charges not be pursued against the disclosing entity, to the entities who disclose violations of federal environmental laws and meet certain additional criteria.[45] If a violation is not discovered through an environmental audit or compliance

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[35] Order, West Virginia v. E.P.A., No. 15-1363 et al. (D.C. Cir. Aug. 7, 2016).
[36] Michael Mugmon & Nathaniel B. Custer, *Energy Sector Alert Series: Climate Change Disclosures in 2016*, WILMER HALE (Feb. 11, 2016).
[37] *Id.*
[38] Transcript of Oral Argument, West Virginia v. E.P.A., No. 15-1263 (D.D.C. Sept. 27, 2016).
[39] Wyoming v. U.S. Dep't of the Interior, Nos. 2:15-CV-043-SWS et al., 2016 WL 3509415, at *12 (D. Wyo. June 21, 2016).
[40] Oil and Gas: Hydraulic Fracturing on Federal and Indian Lands, 80 Fed. Reg. 16,128 (Mar. 26, 2015) (to be codified at 43 C.F.R. pt. 3160); Julie Applegate, *Federal Judge Strikes Down BLM Fracking Rule; Utah AG Comments*, ST. GEORGE NEWS (June 24, 2016).
[41] Applegate, *supra* note 40.
[42] Anna Y. Boureiko, Gary C. Johnson & Stephan D. Selinidis, *Court Rules BLM Had no Authority to Regulate Fracking on Federal and Native American Lands*, LEXOLOGY (July 5, 2016).
[43] Notice of eDisclosure Portal Launch: Modernizing Implementation of EPA's Self-Policing Incentive Policies, 80 Fed. Reg. 76,476 (Dec. 9, 2015).
[44] Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618 (Apr. 11, 2000).
[45] ENVTL. PROTECTION AGENCY, EPA'S AUDIT POLICY (last updated Oct. 27, 2016).

management system, the disclosing entity is still eligible for 75% penalty mitigation and a recommendation that there be no criminal prosecution for the violations.[46]

Entities who disclose potential violations through the eDisclosure portal are placed in one of two categories. Category 1 disclosures include EPCRA violations that meet all Audit Policy conditions and all Small Business Compliance conditions.[47] Entities who disclose Category 1 violations are automatically issued an electronic Notice of Determination, confirming that the EPA considers the violation resolved and that no civil penalties will be assessed.[48] All other disclosures fall within Category 2. Entities who disclose Category 2 violations are issued an Acknowledgement Letter recognizing that the EPA received the disclosure and confirming that EPA will determine the entity's eligibility for penalty mitigation if and when EPA decides to pursue any enforcement actions for environmental violations.[49]

III. PRIVATE ACTION

A. Shareholder Litigation

This past year was also a busy year in the realm of environmental disclosures for private actors. In 2016, the plaintiff securities bar brought or settled several class actions regarding misstatements of environmental risk and compliance. Volkswagen was a popular target with respect to its ongoing woes over its emission defeat-device scandal that surfaced in 2015. As of September 2016, a German court received 1,400 shareholder complaints against Volkswagen totaling $9.2 billion and plans to hold a bell-weather trial with a representative plaintiff next year.[50] Volkswagen moved to dismiss an investor class action filed in United States court arguing that the claims must be brought in Germany.[51] In another emissions case, a federal district judge approved a $9.1 million settlement in *Construction Workers Pension Trust Fund - Lake County and Vicinity v. Navistar International Corp.* between the truck-engine manufacturer Navistar and its shareholders.[52] The investors alleged that Navistar misrepresented its progress in developing a diesel engine technology that could comply with nitrogen oxide emission standards.[53]

In late 2015, an iron ore mine tailings dam collapsed in Mariana, Brazil, killing nineteen people and spilling a river of toxic mud that flowed more than 300 miles to the Atlantic Ocean.[54] Several shareholder lawsuits were filed in 2016 against mining companies Vale SA and BHP Billiton Ltd., whose joint venture, Samarco Mineração SA, owned and operated the dam.[55] The lead plaintiffs in a securities class action against

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[46] *Id.*

[47] Notice of eDisclosure Portal Launch: Modernizing Implementation of EPA's Self-Policing Incentive Policies, 80 Fed. Reg. at 76,477.

[48] *Id.*

[49] *Id.*

[50] Nicola Clark, *Volkswagen Shareholders Seek $9.2 Billion Over Diesel Scandal*, N.Y. TIMES (Sept. 21, 2016).

[51] Edward Taylor, *Volkswagen Seeks To Have U.S. Investor Class Action Suit Dismissed*, REUTERS (Aug. 2, 2016).

[52] Order and Final Judgment, Construction Workers Pension Tr. Fund Lake Cty. & Vicinity v. Navistar Int'l Corp., No. 1:13-cv-02111 (N.D. Ill. Nov. 1, 2016) (order approving settlement).

[53] *Id.*

[54] Dom Phillips, *Samarco Dam Collapse: One Year On From Brazil's Worst Environmental Disaster*, THE GUARDIAN (Oct. 15, 2016).

[55] *See* Consolidated Amended Class Action Complaint, *In Re*: Vale S.A. Sec. Litig., No.

Brazilian mining giant Vale filed a consolidated complaint in April alleging that Vale ignored multiple warnings about potential structural failings in the dam and declined to take safety measures recommended by experts.[56]

In *Jackson County Employees' Retirement System v. BHP Billiton Ltd.*, a similar set of allegations has been launched against Australian BHP, with investors alleging that the mining company made misstatements regarding the "implementation of safety and monitoring procedures."[57] Brazilian bank Banco Safra S.A. brought suit against both Vale and BHP over the same alleged misstatements.[58] The bank brought the case individually and on behalf of investors who had purchased bonds, set to mature between 2022 and 2024, some of which had lost more than half their value since the disaster.[59]

In another South American mining dispute, *In Re Barrick Gold Securities Litigation*, a United States federal district court approved the $140 million settlement of a shareholder class action alleging the mining company Barrick Gold had misrepresented its ability to comply with environmental regulations at its Pascua Lama mine in the Andes.[60] Chilean courts shut down the mine in 2013 after finding Barrick failed to effectively employ dust control measures to protect fragile glaciers and had modified its water management plan without the approval of Chilean regulators.[61]

Following on the heels of the investigations opened by several state attorneys general (discussed earlier herein), ExxonMobil shareholders commenced a lawsuit in the Northern District of Texas alleging that ExxonMobil misled investors by failing to disclose its internal understanding of the risks of climate change.[62] In the dispute, *Pedro Ramirez Jr. v. Exxon Mobil Corp.*, investors accuse ExxonMobil of making materially false statements regarding the predicted cost of complying with carbon regulations and the company's ability to exploit all of its hydrocarbon reserves.[63]

Years after the 2010 Deepwater Horizon disaster, oil giant BP agreed to pay $175 million to settle a case brought by a class of shareholders that had purchased stock immediately following the blowout.[64] The suit alleged that BP falsely reported the rate of

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1:15-cv-09539-GHW, 2016 WL 3125908 (S.D.N.Y. Apr. 29, 2016); Complaint, Jackson Cty. Emps.' Retirement Sys. v. BHP Billiton Ltd., No. 1:16-cv-1445-NRB, 2016 WL 734443 (S.D.N.Y. Feb. 24, 2016); Class Action Complaint for Violations of the Federal Securities Laws, Banco Safra S.A. - Cayman Islands Branch v. Samarco Mineracao S.A., No. 16-cv-08800, 2016 WL 6803379 (S.D.N.Y. Nov. 14, 2016).

[56]Consolidated Amended Class Action Complaint, *In Re: Vale S.A.*, 2016 WL 3125908.

[57]Complaint, *BHP Billiton Ltd.*, 2016 WL 734443.

[58]Class Action Complaint for Violations of the Federal Securities Laws, *Samarco Mineracao S.A.*, 2016 WL 6803379.

[59]Cara Mannion, *Bank Launches Noteholder Class Action Over Dam Burst*, LAW360 (Nov. 15, 2016, 4:02 PM).

[60]Final Judgment Approving Litigation Settlement, *In re* Barrick Gold Sec. Litig., No. 1:13-cv-05437-RMB (S.D.N.Y. Dec. 2, 2016).

[61]Stephanie Nolen, *Behind Barrick's Pascua-Lama Meltdown In The Atacama Desert*, THE GLOBE AND MAIL (Apr. 24, 2014).

[62]Keith Goldberg, *Climate Claims No Slam Dunk For Oil Co. Investors*, LAW360 (Nov. 14, 2016, 8:07 PM).

[63]Complaint, Ramirez Jr. v. Exxon Mobil Corp., No. 3:16-cv-03111 (N.D. Tex. Nov. 7, 2016).

[64]Sarah Kent, *BP Agrees to Pay $175 Million to Investors Over Deepwater Risks*, WALL STEET J. (June 3, 2016) (subscription). This settlement is in addition to the 2012 agreement reached between the Securities and Exchange Commission and BP for $525 million, the third largest penalty obtained in the Commission's history. Press Release, SEC, BP to Pay $525 Million Penalty to Settle SEC Charges of Securities Fraud During Deepwater Horizon Oil Spill (Nov. 15, 2012).

oil flowing from the Macondo well into the Gulf of Mexico by an order of magnitude, telling the public that it was 5,000 barrels per day, despite knowing that the actual rate was more than 50,000 barrels per day.[65] The federal judge overseeing the case preliminarily approved the settlement in November.[66]

B. Non-Governmental 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). In efforts to address the ambiguous nature of the GRI G4 Guidelines and the evolution of report regulation, the GRI Standards provide a set of delineated reporting requirements, and clearly defined optional reporting recommendations.[67] In order to effectively introduce a "common language" for sustainability reporting, the GRI Standards are composed of a modular series of documents.[68] Additionally, the Standards clarify the common misinterpreted objectives of the G4 Guidelines, such as the manner in which to report "material issues," if GRI does not offer an appropriate disclosure.[69] The GRI Standards define a climate "impact" as the manner an organization affects the environment, society, and the economy.[70] Therefore, a "climate impact" does not involve the impact on the reporting entity.[71] Furthermore, the GRI Standards articulate a new "referencing option" for reporters, and require reporters to notify GRI if the GRI Standards have been applied.[72]

CDP, formerly Carbon Disclosure Project, continues to motivate companies to disclose the environmental impacts of their activities. GRI and the CDP provided linked guidance to assist companies' reporting on climate-related activities and impacts.[73] Additionally, the dual guidance offers tips to generate reports and methods to reduce adverse effects of an entity's conduct. In furtherance of the CDP's objectives, the United States Navy this year began to require its 100 largest suppliers to disclose their greenhouse gas emissions and plans to reduce.[74]

Guided by the GRI Standards, PricewaterhouseCoopers conducted a survey to determine whether companies are disclosing the environmental, social, and governance (ESG) efforts investors want to know.[75] According to the report, 92% of investors surveyed state companies are not disclosing ESG information in a manner conducive to comparing and contrasting[76] (2016 marked a banner year for shareholder resolutions regarding

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[65]Third Amended Complaint, *In re* BP Sec. Litig., No. 4:10-MD-2185 (S.D. Tex. July 8, 2016).
[66]Stan Parker, *$175M BP Deal Gets Judge's OK With Opt-Out Method Intact*, LAW360 (Nov. 7, 2016).
[67]Angela Foulsham, *Everything you need to know about the GRI Standards for sustainability reporting*, CSR ASIA (Dec. 7, 2016).
[68]*Id.*
[69]*Id.*
[70]*Id.*
[71]*Id.*
[72]Foulsham, *supra* note 67.
[73]LEYLA BASACIK ET AL., CDP & BASTIAN BUCK ET AL., GRI, LINKING GRI AND CDP (2016).
[74]Jessica L. Harcastle, *US Navy Asks Largest Suppliers to Disclose GHG Emissions via CDP*, ENVTL. LEADER (Apr. 27, 2016).
[75]Jessica L. Hardcastle, *Corporate ESG Reporting: Are You Disclosing What Investors Want to Know?*, ENVT. LEADER (Oct. 27, 2016) [hereinafter Hardcastle].
[76]*Id.*

climate, sustainability and other social responsibility matters.).[77] In contrast, 60% of corporations assert the disclosure information is helpful.[78] Therefore, bridging the gap between corporations and investors in reference to ESG is essential.

In response to the lack of uniform ESG disclosures, the Financial Stability Board announced its establishment of an industry-led Task Force on Climate-Related Financial Disclosures (TCFD).[79] Led by Chair Michael R. Bloomberg, the TCFD will establish reliable and well-defined climate-related financial risk disclosures.[80] TCFD assessed the scope and objectives of the disclosures.[81] By the end of 2016, the TCFD will articulate detailed recommendations and best practices to draft clear and efficient ESG disclosures.[82]

There were also updates in 2016 regarding disclosures of more "traditional" environmental liabilities. The Government Accounting Standards Board (GASB) continues to align its standards with the Financial Accounting Standards Board (FASB).[83] In August 2016 the GASB staff completed a tenth anniversary post-implementation review of GASB Statement 49 - Pollution Remediation Obligations.[84] The report concludes that this portion of GAAP is providing decision-useful information and is operational among GASB preparers: States, counties, municipal and local government agencies.[85]

In November 2016, GASB concluded their three-year drafting project and issued GASB Statement 83 – Certain Asset Retirement Obligations, which is effective on June 15, 2018.[86] This Statement generally matches ASC 410-20 (and legacy FASB 143).[87] Notable new conditions include no time limits, no discounting to a present value (which is consistent with GASB 49) and interperiod equity (no time shifting costs and benefits between generations of taxpayers).[88]

ASTM International completed five-year reviews of E2137 (Standard Guide for Estimating Monetary Costs and Liabilities for Environmental Matters, and E2173 (Standard Guide for Disclosure of Environmental Liabilities).[89] These revisions incorporated changes to GAAP, new PCAOB rules for financial auditors, and observations from 10-K and 20-F reports to the SEC.[90]

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[77]ISS, *Proxy Season Preview: U.S. Environmental & Social Issues* (last visited Jan. 28, 2017).
[78]Hardcastle, *supra* note 75.
[79]Viktoriia De Las Casas et al., *Task Force to Develop Climate-Related Financial Disclosure Standards*, JDSUPRA BUS. ADVISOR (Mar. 3, 2016).
[80]*Id.*
[81]*Id.*
[82]*Id.*
[83]FIN. ACCOUNTING FOUND. ET AL., STRATEGIC PLAN (Apr. 2015).
[84]Press Release, Fin. Accounting Found., Post-Implementation Review Concludes GASB's Pollution Remediation Statement Achieves Purpose (Aug. 23, 2016).
[85]*Id.*
[86]GOVERNMENTAL ACCOUNTING STANDARDS BD., STATEMENT NO. 83 OF THE GOVERNMENTAL ACCOUNTING STANDARDS BOARD (Nov. 2016).
[87]Press Release, Gov't Accounting Standards Bd., GASB Issues Guidance on Certain Asset Retirement Obligations (Dec. 7, 2016).
[88]*Id.*
[89]ASTM INT'L, STANDARD GUIDE FOR ESTIMATING MONETARY COSTS AND LIABILITIES FOR ENVIRONMENTAL MATTERS.
[90]*Id.*

Chapter 5 • ENVIRONMENTAL ENFORCEMENT AND CRIMES
2016 Annual Report[1]

I. ENVIRONMENTAL ENFORCEMENT RESULTS FOR 2016

At the close of every fiscal year, the United States Environmental Protection Agency (EPA) publishes its annual enforcement and compliance results. Consistent with its 2014-2018 Strategic Plan,[2] the EPA's 2016 results reflect the Agency's commitment "'to enforce the law, protect our communities from pollution and help ensure a level playing field for responsible companies.'"[3]

The EPA initiated over 2,400 civil enforcement actions in 2016,[4] which was a slight increase—almost 1%—from the 2,380 initiated in 2015,[5] but a 30.15% decrease from the 3,436 filed in 2010.[6] Similarly, the EPA opened 170 environmental crimes cases in 2016,[7] which was a 20.2% decrease from the 213 opened last year[8] and a 50.87% decrease from the 346 opened in 2010.[9] The EPA also conducted 13,500 inspections and evaluations in 2016, a 12.34% decrease from the 15,400 conducted last year and a 35.71% decrease from the 21,000 in 2010.

In terms of results, the EPA's 2016 civil enforcement actions yielded penalties totaling approximately $5.79 billion and injunctive relief requiring companies to invest approximately $13.7 billion into equipment and programs for pollution control and contamination clean up.[10] The EPA's 2016 criminal cases also produced significant results, yielding approximately $207 million in fines and restitution, $775,000 in court-ordered environmental projects, and ninety-three combined years of incarceration for sentenced defendants.[11] Additionally, the EPA secured nearly $1.15 billion in CERCLA recovery funds from liable parties.[12] As for direct environmental impacts, enforcement actions concluded in 2016 led to approximately 324 million pounds of reduced, treated, or eliminated pollution, and another almost sixty-two billion pounds of minimized, treated, or properly disposed hazardous waste.[13]

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[1]Prepared by David B. Weinstein and Christopher Torres, shareholders with Greenberg Traurig, and Laura Bassini, Ryan Hopper, and Julie Girard, GT associates.

[2]ENVTL. PROT. AGENCY, FY 2014-2018 EPA STRATEGIC PLAN (2014).

[3]Press Release, Envtl. Prot. Agency, EPA Announces 2016 Annual Environmental Enforcement Results (Dec. 19, 2016).

[4]OFFICE OF ENFORCEMENT & COMPLIANCE ASSURANCE, ENVTL. PROT. AGENCY, FISCAL YEAR 2016 EPA ENFORCEMENT AND COMPLIANCE ANNUAL RESULTS 11 (Dec. 19, 2016) [hereinafter EPA FY 2016 RESULTS].

[5]OFFICE OF ENFORCEMENT & COMPLIANCE ASSURANCE, ENVTL. PROT. AGENCY, FISCAL YEAR 2015 EPA ENFORCEMENT AND COMPLIANCE ANNUAL RESULTS 11 (Dec. 16, 2015) [hereinafter EPA FY 2015 RESULTS].

[6]*Compliance and Enforcement Annual Results for Fiscal Year (FY) 2011*, ENVTL. PROT. AGENCY (last visited Jan. 28, 2016).

[7]*Enforcement Annual Results Numbers at a Glance for Fiscal Year (FY) 2016*, ENVTL. PROT. AGENCY (last updated Dec. 19, 2016).

[8]*Enforcement Annual Results Numbers at a Glance for Fiscal Year (FY) 2015*, ENVTL. PROT. AGENCY (last updated Dec. 28, 2015).

[9]*Compliance and Enforcement Annual Results for Fiscal Year (FY) 2011*, *supra* note 6.

[10]*Enforcement Annual Results Numbers at a Glance for Fiscal Year (FY) 2016*, *supra* note 7.

[11]*Id.*

[12]*Id.*

[13]*Id.*

Settlements with Volkswagen and BP "are among the most comprehensive and impactful environmental cases in United States history."[14] Also, "Volkswagen agreed to spend up to $14.7 billion to settle allegations of using 'defeat devices' to cheat emissions tests and deceive customers."[15] And, in "the largest penalty ever for a Clean Water Act settlement," BP agreed to pay $5.5 billion for violations resulting from the 2010 Deepwater Horizon spill.[16]

II. ENVIRONMENTAL ENFORCEMENT INITIATIVES FOR 2017

With input from the public, as well as state, local, and tribal agency partners, the EPA sets national enforcement initiatives every three years to focus compliance and enforcement resources on serious pollution concerns.[17] October 1, 2016 marked the beginning of a new three-year term of National Enforcement Initiatives.[18] The EPA retained four initiatives from the 2014-2016 term, expanded one to include a new area of focus, returned one to base program level, and added two new initiatives.[19] The priorities are listed below.

A. Reducing Air Pollution from the Largest Sources

The EPA retained this initiative for the 2017-2019 term. Under the initiative, the Agency intends to eliminate or minimize emissions from coal-fired power, acid, glass plants, and cement plants, which it has concluded are the largest source of air pollution.[20] To do so, it will focus on ensuring no under-controlled coal-fired electric generating units, cement, acid, or glass plants are in use.[21]

B. Cutting Hazardous Air Pollutants

This 2014-2016 initiative will be expanded in the upcoming term. The EPA concluded that facilities emit more hazardous air pollutants than are reported and that two large sources of these emissions are leaking equipment and improperly operated flares.[22] As a result, it will target emissions from these sources.[23] This is an expanded initiative for 2017-2019.

C. Ensuring Energy Extraction Activities Comply with Environmental Laws

The EPA retained this initiative for the 2017-2019 term. Natural gas extraction has been identified as a cleaner burning "bridge fuel" by the EPA, which will focus on certain extraction techniques that are believed to pose a significant risk to public health and the

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[14] EPA Announces 2016 Annual Environmental Enforcement Results, *supra* note 3.
[15] *Enforcement Annual Results Numbers at a Glance for Fiscal Year (FY) 2016*, *supra* note 7.
[16] *Id.*
[17] *National Enforcement Initiatives*, ENVTL. PROT. AGENCY (last updated June 13, 2016).
[18] *Id.*
[19] *Id.*
[20] *National Enforcement Initiative: Reducing Air Pollution from the Largest Sources*, ENVTL. PROT. AGENCY (last updated Dec. 19, 2016).
[21] *Id.*
[22] *National Enforcement Initiative: Cutting Hazardous Air Pollutants*, ENVTL. PROT.AGENCY (last updated Dec. 19, 2016).
[23] *Id.*

environment.[24] The EPA intends to use Next Generation, or NexGen, technologies and techniques to address incidences of noncompliance in extraction and production activities.[25]

D. Reducing Pollution from Mineral Processing Operations

This 2014-2016 initiative will return to base enforcement level in 2017. The EPA intends to take action under this initiative to minimize or eliminate risks related to mining and mineral processing facilities.[26]

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

Under this new initiative, the EPA will focus on reducing the risk of catastrophic accidents at industrial and chemical facilities through the use of accident prevention and improved response capabilities.[27]

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

This retained initiative concerns Clean Water Act (CWA) violations by municipal sewer systems.[28] The EPA will focus on raw sewage overflows and inadequately controlled stormwater discharges.[29]

G. Preventing Animal Waste from Contaminating Surface and Ground Water

This retained initiative will focus on concentrated animal feeding operations where feed is brought to animals for forty-five days or more during a twelve-month period.[30] These facilities generate significant amounts of animal waste, and the EPA will take action to reduce potential resulting pollution.[31]

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

This new initiative, which focuses on preventing industrial facilities from polluting water sources, will enable the EPA to build compliance with the Clean Water Act, reduce illegal pollution discharges, and improve water quality with this initiative.[32]

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[24] *National Enforcement Initiative: Ensuring Energy Extraction Activities Comply with Environmental Laws*, ENVTL. PROT. AGENCY (last updated Dec. 19, 2016).
[25] *Id.*
[26] *National Enforcement Initiative: Reducing Pollution from Mineral Processing Operations*, ENVTL. PROT. AGENCY (last updated Dec. 19, 2016).
[27] *National Enforcement Initiative: Reducing Risks of Accidental Releases at Industrial and Chemical Facilities*, ENVTL. PROT. AGENCY (last updated Jan. 8, 2017).
[28] *National Enforcement Initiative: Keeping Raw Sewage and Contaminated Stormwater Out of Our Nation's Waters*, ENVTL. PROT. AGENCY (last updated Dec. 19, 2016).
[29] *Id.*
[30] *National Enforcement Initiative: Preventing Animal Waste from Contaminating Surface and Ground Water*, ENVTL. PROT. AGENCY (last updated Dec. 19, 2016).
[31] *Id.*
[32] *National Enforcement Initiative: Keeping Industrial Pollutants Out of the Nation's Waters*, ENVTL. PROT. AGENCY (last updated Jan. 8, 2017).

A. Criminal Cases

1. United States v. Kevin P. Mason Builder, LLC

On November 30, 2016, a Florida Keys boat-lift installation company, Kevin P. Mason Builder, LLC (Mason), and its permitting agent, Jennifer Ashlee Davis, pled guilty to violations of the Rivers and Harbors Act.[33] Among other things, the Rivers and Harbors Act prohibits the building of any structures, including boat lifts, in the navigable waters of the United States without a valid permit issued by the United States Army Corps of Engineers (ACOE).[34] Mason built or began building twelve boat lifts without first obtaining the requisite ACOE General Permit 17, which covers "Minor Structures in Florida."[35] United States District Judge Jose Martinez of the United States District Court for the Southern District of Florida, Key West Division, sentenced Mason to five years of probation, imposed a $15,000 fine, and ordered Mason to implement a new Environmental Compliance Plan.[36] Judge Martinez sentenced Davis to one year of probation and imposed a $2,000 fine.[37] Major Procurement Fraud Unit Director Frank Robey of the United States Army Criminal Investigation Command announced: "[t]his resolution sends a clear message that preserving the environment of the Florida navigable waters is a priority for the United States Army."[38]

2. United States v. KTX LTD

On October 12, 2016, four Texas companies pled guilty to violations of the Clean Air Act based, in part, on falsifications of safety-inspection documents at two oil and chemical processing facilities.[39] Defendants, KTX LTD and KTX Properties, Inc., falsely represented in a "hot work" permit that a gasoline tank in need of repairs had been drained, isolated, and decontaminated.[40] It had not, and when two welders began repairs, the tank exploded, severely injuring the welders, killing a third contractor, and releasing hazardous air pollutants in the process.[41] Defendants, Crosby LP and Ramsey Properties LP, failed to conduct leak detection and repair (LDAR) monitoring at their facility, but they reported to EPA and the Texas Commission of Environmental Quality that they had done so.[42] The companies' plea agreements required payment of $3.3 million in fines and a $200,000

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[33]*See* Judgments, United States v. Kevin P. Mason Builder, LLC, No. 4:16-cr-10038-JEM (S.D. Fla. Dec. 2, 2016).
[34]*See* Rivers and Harbors Act, 33 U.S.C. §§ 403, 406.
[35]Joint Factual Statement, *Kevin P. Mason Builder, LLC*, No. 4:16-cr-10038-JEM, at 2–3 (S.D. Fla. Nov. 30, 2016).
[36]Judgment, *Kevin P. Mason Builder, LLC*, No. 4:16-cr-10038-JEM, at 2, 5.
[37]Judgment, United States v. Davis, No. 4:16-cr-10038-JEM, at 2, 4 (S.D. Fla. Dec. 2, 2016).
[38]Press Release, U.S. Dep't of Justice, U.S. Attorney's Office for the S. Dist. of Fla., Florida Keys Boat Lift Installation Company and South Florida Resident Sentenced in Connection with Rivers and Harbors Act Violations (Nov. 30, 2016).
[39]*See* Judgment, United States v. KTX, LTD, No. 1:16-cr-75-MAC-KFG (E.D. Tex. Oct. 13, 2016).
[40]Joint Factual Basis, *KTX, LTD*, No. 1:16-cr-75-MAC-KFG, at 5 (E.D. Tex. Oct. 12, 2016).
[41]*Id.*
[42]*Id.* at 6–8.

community service payment.[43] The prosecution was a joint effort by the United States Department of Justice, EPA, the Occupational Safety and Health Administration, and other agencies to ensure the safety of workers who come into contact with toxic or hazardous materials. "'Safety inspections involving toxic or hazardous materials are mandatory and vital to the safety of the worker and the surrounding communities,' said Acting U.S. Attorney Brit Featherston for the Eastern District of Texas. 'Non-performance is unacceptable and will not be tolerated, and offenders will be prosecuted.'"[44]

3. United States v. Davanzo

On November 7, 2016, Thomas Davanzo and Robert Fedyna were sentenced to 121 and 135 months in prison for their roles in a renewable-energy credit fraud scheme.[45] Davanzo and Fedyna had previously pled guilty to conspiracies to commit wire fraud and money laundering by using shell companies to help coconspirators generate and sell Renewable Identification Numbers (RINs).[46] RINs are serial numbers used to track batches of newly generated biofuels; traditional petroleum producers can purchase and "retire" RINs to meet annual renewable-fuel-use requirements imposed by the Energy Policy Act of 2005 and the Energy Independence and Security Act of 2007.[47] Davanzo, Fedyna, and their coconspirators fraudulently generated over sixty million RINs, from which they obtained at least $42 million in sales and approximately $4.3 million in tax-credit payments.[48] The United States Secret Service, EPA, and IRS conducted a joint investigation.[49] Assistant Administrator Cynthia Giles of EPA's Office of Enforcement and Compliance Assurance commented: "'[t]his case shows that EPA is committed to eliminating fraud in the renewable fuels market and ensuring a level playing field for businesses that play by the rules.'"[50]

4. United States v. Berkshire Power Co.

Marking the first ever criminal charges under the Federal Power Act,[51] the manager of a gas-fired power plant in Massachusetts, Power Plant Management Services, LLC (PPMS), pled guilty to charges that it had falsely reported to the regional power grid administrator that the plant was available to produce power when, in fact, ongoing repairs

[43]Plea Agreements, *KTX LTD*, No. 1:16-cr-75-MAC-KFG, at 3-4 (E.D. Tex. Oct. 12, 2016).
[44]Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Four Texas Companies Agree to Pay $3.5 Million for Criminal Violations of the Clean Air Act at Two Oil and Chemical Processing Facilities (Oct. 12, 2016).
[45]Judgment, United States v. Davanzo, No. 2:15-cr-141-FtM-38MRM, at 1-2 (M.D. Fla. Nov. 8, 2016).
[46]Plea Agreement, No. 2:15-cr-141-FtM-99MRM, at 26–27 (M.D. Fla. June 2, 2016).
[47]*Id.* at 27–31.
[48]*Id.* at 35–36.
[49]Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Two Florida Men Sentenced to Over Ten Years in Prison for Multi-State for Biofuel Fraud Scheme (Nov. 8, 2016).
[50]*Id.*
[51]Press Release, U.S. Dep't of Justice, U.S. Attorney's Office for the Dist. of Mass., Western Massachusetts Power Plant Owner and Management Companies Agree to Plead to Tampering and False Reporting; Operations & Maintenance Company Enters into Consent Judgment (Mar. 30, 2016).

had rendered the plant inoperable.[52] PPMS and the plant's owner, Berkshire Power Company, LLC (BPC), also pled guilty to charges that they had violated the Clean Air Act (CAA) by tampering with emissions monitoring devices and underreporting air pollutant emission levels.[53] Under their plea agreement, the companies agreed to pay a total of $4.25 million in fines and community-service payments, as well as additional civil penalties.[54] According to United States Attorney Carmen Ortiz, "'[t]he comprehensive resolution, including the first ever criminal charges for false statements to the Federal Energy Regulatory Commission, demonstrates the seriousness with which we take conduct which undermines environmental compliance and the fair regulation of energy markets.'"[55]

5. United States v. Freedom Industries, Inc.

Over the course of 2016, Freedom Industries, Inc. (Freedom), and six of its officials were sentenced for environmental crimes, including Clean Water Act (CWA) violations, arising out of the 2014 Elk River chemical spill.[56] A cleaning chemical used in the coal-mining industry, 4-methylcyclohexane methanol (MCHM), leaked from a tank at a Freedom storage facility into the Elk River, eventually contaminating a water-treatment facility in Charleston, West Virginia.[57] The now-bankrupt Freedom was sentenced to a term of probation and a $900,000 fine.[58] Two of Freedom's owners, Dennis Farrell and Gary Southern, were sentenced to thirty days imprisonment, a term of probation, and a $20,000 fine.[59] The remaining defendants—William Tis, Charles Herzing, Michael Burdette, and Robert Reynolds—were sentenced to terms of probation and fines ranging from $2,500 to $20,000.[60] Following entry of the final guilty plea last year, United States Attorney Booth Goodwin called the prosecution '"a wakeup call to those who operate chemical storage facilities near our precious water resources."'[61]

[52]*See* Minutes, United States v. Berkshire Power Co., No. 3:16-cr-30021-MGM (D. Mass. May 3, 2016); *see also* Information, United States v. Berkshire Power Co., No. 3:16-cr-30021-MGM, at 2, 9–12, 16–17 (D. Mass. Mar. 30, 2016).
[53]*See* Minutes, *supra* note 52; *see also* Information, *supra* note 52 at 2–8, 13–15.
[54]Press Release, U.S. Dep't of Justice, U.S. Attorney's Office for the Dist. of Mass., *supra* note 51.
[55]*Id.*
[56]Press Release, U.S. Dep't of Justice, U.S. Attorney's Office for the S. Dist. of Va., Former Freedom Owner Headed to Prison for Role in Chemical Spill (Feb. 11, 2016).
[57]*Id.*
[58]Judgment, United States v. Freedom Indus., Inc., No. 2:14-cr-275 (S.D. W. Va. Feb. 19, 2016).
[59]*See* Judgment, United States v. Farrell, No. 2:14-cr-264-1 (W.D. Va. Feb. 23, 2016); *See* Judgment, United States v. Southern, No. 2:14-cr-264-4 (W.D. Va. Feb. 23, 2016).
[60]*See* Judgment, United States v. Tis, No. 2:14-cr-264-1 (W.D. Va. Feb. 19, 2016); Judgment, United States v. Herzing, No. 2:14-cr-264-4 (W.D. Va. Feb. 8, 2016); Judgment, United States v. Burdette, No. 2:14-cr-276 (W.D. Va. Feb. 19, 2016); Judgment, United States v. Reynolds, No. 2:14-cr-277 (W.D. Va. Feb. 8, 2016).
[61]Press Release, U.S. Dep't of Justice, U.S. Attorney's Office for the S. Dist. of W. Va., Final Freedom Industries Defendant Plead Guilty (Aug. 19, 2015).

B. Civil Cases

1. In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation

The United States and California have filed actions against Volkswagen entities alleging violations of the CAA and California law because various vehicles contained prohibited defeat devices that caused the emissions control system of the vehicles to perform differently during emissions testing than normal vehicle operation. A partial consent decree was entered by the court on October 25, 2016,[62] and the United States and California filed a Second Partial Consent Decree on December 20, 2016. The first consent decree required Volkswagen to remove or modify at least 85% of the vehicles at issue by June 30, 2019, or face monetary penalties.[63] It also required Volkswagen to make $2 billion of investments in projects supporting increased use of zero-emissions vehicles over a period of ten years, and to pay $2.7 billion into an environmental mitigation trust.[64] The second consent decree requires Volkswagen to buy back or terminate the leases for certain vehicles and to offer an emissions compliant recall for certain vehicles.[65] Additionally, Volkswagen must pay $225 million to fund eligible mitigation actions that will reduce levels of oxides of nitrogen where the vehicles were, are, or will be operated.[66]

2. In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010[67]

Following the Deepwater Horizon incident in which hydrocarbons and other substances were discharged from the Macondo Well, the United States filed a complaint against BP Exploration & Production (BPXP), among others, for violations of the CWA and Oil Pollution Act (OPA), and the states of Alabama, Louisiana, Texas, Mississippi, and Florida (the Gulf States) filed complaints seeking civil penalties and removal costs under OPA and state laws, although Alabama's and Louisiana's state law claims were dismissed on preemption grounds.[68] The consent decree requires BPXP to pay a civil penalty of $5.5 billion to the United States pursuant to OPA in fifteen annual installments.[69] Additionally, BPXP must pay $7.1 billion in fifteen annual installments for natural resource damages,[70] as well as an amount not to exceed $700 million to address injuries and losses to natural resources unknown as of July 2, 2015, or to adapt, enhance, supplement, or replace restoration projects or approaches.[71] BPXP also must pay $350

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[62]*See generally* Order Granting the United States Motion to Enter Proposed Amended Consent Decree, *In re:* Volkswagen "Clean Diesel" Marketing, Sales Practices, And Products Liability Litigation, No. 2672 CRB (JSC) (N.D. Cal. Oct. 25, 2016).
[63]*Id.* at 3-4.
[64]*Id.* at 4.
[65]Second Partial Consent Decree, *In re:* Volkswagen "Clean Diesel" Marketing, Sales Practices, And Products Liability Litigation, No. 2672 CRB (JSC), at 4-5 (N.D. Cal. Dec. 20, 2016).
[66]*Id.* at 5.
[67]Consent Decree Among Defendant BP Exploration & Production Inc. (BPXP), The United States of America, and the States of Alabama, Florida, Louisiana, Mississippi, and Texas, *In re*: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, No. 2179 (E.D. La. Apr. 4, 2016) [hereinafter Consent Decree - BPXP].
[68]*Id.* at 1-4.
[69]*Id.* at 18-19.
[70]*Id.* at 20-21.
[71]*Id.* at 23.

million for previously unreimbursed natural resource damages assessment costs incurred prior to the effective date of the consent decree, although it will receive a $10 million credit for a prior payment.[72] Other payments due under the consent decree include a $250 million payment to the United States, $167.4 million of which is for unreimbursed removal costs incurred by the Oil Spill Liability Trust Fund or the United States, and $82.6 million to settle the United States' claims under the False Claims Act and Federal Oil and Gas Royalty Management Act.[73]

3. United States v. Chemoil Corp.[74]

On September 29, 2016, the United States filed a complaint for civil penalties and injunctive relief against Chemoil Corporation, and a consent decree was entered the same day.[75] In the complaint, the United States alleged Chemoil violated the CAA by exporting biodiesel from the United States from 2011-2013 without meeting reporting requirements to the EPA or acquiring and retiring sufficient D4 RINs.[76] Without admitting liability, Chemoil agreed to pay $27 million in civil penalties to the United States within 30 days of the effective date of the consent decree.[77] This is the largest civil penalty in the EPA's fuel-programs' history.[78] In addition, Chemoil agreed to retire at least ten million valid D4 RINs by December 31, 2016; 25 million by March 31, 2017; 40 million by June 30, 2017; and 65 million by September 30, 2017.[79] Chemoil was also required to submit RIN Retirement Reports to the United States within thirty days of retiring RINs.[80] Should Chemoil fail to comply with its obligations under the consent decree, it will be subject to penalties.[81] However, under the consent decree, Chemoil and the United States agreed to bear their own costs and attorneys' fees.[82]

4. United States v. Enbridge Energy, Ltd. Partnership[83]

Enbridge Energy and its related entities own and operate the Enbridge Mainline System, which is among the world's largest pipeline systems.[84] The United States filed a complaint against Enbridge claiming that it violated the CWA and OPA by unlawfully discharging at least 20,082 barrels of oil from two of its pipelines in 2010, which required a river to be closed over a three-year period for clean-up.[85] At the time of the consent decree, Enbridge had paid approximately $57.8 million to the United States Coast Guard, which constituted most of the costs incurred by the Oil Spill Liability Trust Fund.[86] In

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[72]Consent Decree - BPXP, *supra* note 67, at 24.
[73]*Id.* at 27.
[74]Consent Decree, United States v. Chemoil Corp., No. 16-5538 (N.D. Cal. Sept. 29, 2016).
[75]*Id.*; Complaint for Civil Penalties & Injunctive Relief, United States v. Chemoil Corp., No. 16-5538 (N.D. Cal. Sept. 29, 2016).
[76]Complaint for Civil Penalties & Injunctive Relief, No. 16-5538 *supra* note 75, at 10.
[77]Consent Decree, *supra* note 74, at 4, 9.
[78]*Chemoil Corporation Renewable Fuel Standard Settlement*, ENVTL. PROTECTION AGENCY (last updated Dec. 9, 2016).
[79]Consent Decree, *supra* note 74, at 10.
[80]*Id.* at 11.
[81]*Id.* at 13-16.
[82]*Id.* at 23.
[83]Consent Decree, United States v. Enbridge Energy, Ltd. P'ship, No. 1:16-cv-914 (W.D. Mich. July 20, 2016).
[84]*Id.* at 1.
[85]*Id.* at 1-2.
[86]*Id.* at 4.

addition, it had undertaken a number of steps to reduce the potential for future oil discharges and improve safety.[87] Under the consent decree, Enbridge agreed to pay a civil penalty of $61 million, plus interest, within thirty days.[88] Enbridge also agreed to pay for past removal costs of $5,438,222, as well as future removal costs.[89] The consent decree also provided for injunctive relief, including a permanent injunction prohibiting use of one of the lines for transportation of certain substances, and reporting requirements.[90]

5. United States v. Tesoro Refining & Marketing Co.[91]

The United States simultaneously filed a complaint and consent decree, in which Alaska, Hawaii, and the Northwest Clean Air Agency joined, against various Tesoro entities.[92] The complaint alleged violations of the CAA at certain Tesoro refineries, including the Prevention of Significant Deterioration provisions in Subchapter I, Part C, and the Nonattainment New Resource Review provisions of Subchapter I, Part D, as well as the Leak Detection and Repair requirements promulgated under the CAA.[93] The consent decree requires Tesoro to pay a civil penalty of $10.45 million,[94] expend approximately $403 million to install and operate pollution control equipment,[95] and provide approximately $12 million in funding for projects that will improve public health in local communities impacted by pollution.[96]

[87] *Id.* at 5-9.
[88] Consent Decree, *supra* note 83, at 20.
[89] *Id.* at 21-22.
[90] *Id.* at 25, 138-42.
[91] Consent Decree, United States v. Tesoro Refining & Mktg. Co., No. SA-16-cv-00722 (W.D. Tex. July 18, 2016).
[92] *Id.* at 1.
[93] *Id.* at 1-2.
[94] *Id.* at 107.
[95] Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Oil Refiners to Reduce Air pollution at Six Refineries Under Settlement with EPA and Department of Justice (July 18, 2016).
[96] *Id.*

Chapter 6 • ENVIRONMENTAL LITIGATION AND TOXIC TORTS
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I. Oil and Gas Development

As predicted in the 2015 Annual Report, toxic tort litigation related to oil and natural gas development has continued through 2016. Earthquakes in Oklahoma proved newsworthy this year. In *Felts v. Devon Energy Production Co.*,[2] twelve residents of Oklahoma City and its suburbs filed suit against oil and gas drillers and operators of wastewater injection wells following two earthquakes in central Oklahoma. Plaintiffs allege 4.3- and 4.2-magnitude earthquakes, on Dec. 29, 2015 and Jan. 1, 2016 respectively, caused substantial damage to Plaintiffs' homes and property. Plaintiffs' complaint sounds in negligence and strict liability, alleging Defendants' underground injection of wastewater from gas drilling operations are the proximate cause of "unnatural and unprecedented" earthquakes in the area. The suit comes as Oklahoma drilling regulators consider measures to address what the Oklahoma Geological Survey has identified as increased seismic activity in the area, and follows a 2015 Oklahoma Supreme Court holding that jurisdiction over cases alleging damage from wastewater injection-related earthquakes rests with the courts and not with the state oil and gas regulator.[3]

Proving a causal connection between oil and gas development and alleged injury continues to be a hurdle for plaintiffs bringing drilling-related tort suits. For example, in December 2015 and again in October 2016, the Commonwealth Court of Pennsylvania refused a landowner's request to revive his claims that chemicals from a natural gas drilling operation contaminated his well in December 2015[4] and, again, rejected his appeal on similar grounds in October 2016, when he failed to show a connection between his well and the defendants' drilling operations.[5] The court affirmed the conclusions of the Pennsylvania Environmental Hearing Board, finding the landowner presented insufficient evidence to show a connection between the drilling site and the landowner's well. Any attempt to connect drilling or wastewater injection activities to earthquakes is likely to face similar evidentiary challenges.

II. Admissibility of Expert Testimony

A. Adopting Daubert

In *Motorola, Inc. v. Murray*,[6] the District of Columbia became the most recent jurisdiction—following thirty-nine states—to abandon the nearly century-old *Frye* test for

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[2]Petition, Felts v. Devon Energy Production Co., No. CJ-2016-137 (Okla. Cty. Dist. Ct. Jan 11, 2016).

[3]Ladra v. New Dominion, L.L.C., 2015 OK 53, 353 P.3d 529 (Okla. 2015).

[4]*See* Kiskadden v. Penn. Dep't of Envtl. Prot., No. 1167 C.D. 2015 (Pa. Commw. Ct. Dec. 7, 2015); Kiskadden v. Penn. Dep't of Envtl. Prot., 149 A.3d 380 (Pa. Commw. Ct. 2016).

[5]*See* Kiskadden v. Penn. Dep't of Envtl. Prot., 149 A.3d 380 (Pa. Commw. Ct. 2016).

[6]147 A.3d 751 (D.C. Cir. 2016).

admitting expert testimony in favor of the *Daubert* approach as embodied in Rule 702 of the Federal Rules of Evidence. The litigation involved thirteen consolidated cases in which each plaintiff has a brain tumor, or represents the estate of someone who died with a brain tumor, allegedly caused by exposure to radiation emitted by mobile phones. Plaintiffs offered testimony from experts in various fields to support the causal connection between mobile phone use and brain tumors, although no court in the country has accepted that causal connection.

Under the District's *Frye* test, a qualified expert could offer opinion testimony based on generally accepted methodology. Once a court deemed a particular methodology "generally accepted," other courts were more likely to admit future testimony based on that same methodology without necessarily looking at the way the expert applied it. Rule 702 requires that an expert apply a reliable methodology, and also mandates a fresh look at the application of the methodology in each case. A novel methodology could be admissible under Rule 702 so long as the expert applies the methodology reliably.

D.C. Superior Court Judge Frederick Weisberg held a four-week evidentiary hearing on Defendants' motions to exclude plaintiffs' general causation experts.[7] Judge Weisberg concluded some of plaintiffs' expert testimony would be admissible under *Frye*, but most or all of it would probably be excluded under *Daubert*. The trial court certified for interlocutory appeal the question of which standard should apply. On appeal, the D.C. Court of Appeals adopted the federal approach.[8] The court concluded Rule 702's focus on reliability is preferable to *Frye*'s general acceptance standard. The court also considered but rejected a modified *Frye* approach, noting the advantages in interpretation and application that come with adopting a widely used rule. The newly adopted standard likely means an uphill battle for plaintiffs and their causation experts in that litigation, and otherwise represents a clean slate on the admissibility of expert testimony in cases still in pre-trial stages.

B. Applying a Modified Frye Test

In an opinion showing the application of a previously admitted methodology will not necessarily pass a *Frye*-based test, a New Jersey state court dismissed two suits, consolidated as *Carl v. Johnson & Johnson*, alleging talcum powder causes ovarian cancer after it found flaws in the methodology employed by Plaintiffs' causation experts.[9] Plaintiffs alleged their use of Defendants' talcum powder caused their ovarian cancer. To support their claims, they offered five experts to opine on the powder's ability to cause ovarian cancer, and the powder's connection to their specific cases. The court held a seven-day evidentiary hearing on Defendants' motions to bar Plaintiffs' expert testimony.

New Jersey courts have not adopted the federal *Daubert* approach to admissibility of expert opinions. In toxic tort cases, courts there rely instead on a modified *Frye* approach, under which new or developing theories of causation may be the basis of expert testimony if the expert employed reliable methods to formulate her opinion.

The court focused on two of Plaintiffs' five experts: Dr. Graham A. Colditz and Daniel W. Cramer. In evaluating those experts' methodology, the court noted several weaknesses that undermined reliability. First, the court was "disappointed" that Plaintiffs' experts were dismissive of anything but small retrospective epidemiological studies and all but ignored three large cohort studies that undermined their positions. The court was also troubled by the failure of Plaintiffs' experts to explain the biological mechanism by which

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[7] Order, Murray v. Motorola, Inc., Nos. 2001 CA 008479 B et al., 2014 WL 5817890 (D.C. Super. Aug. 8, 2014).

[8] *Motorola, Inc.*, 147 A.3d at 756-57.

[9] Order, Nos. ATL-L-6546-14, ATL-L-6540-14, 2016 WL 4580145 (N.J. Super. Ct. Law Div. Sept. 2, 2016).

exposure to talc could cause ovarian cancer generally or in these plaintiffs specifically. Plaintiffs' experts blamed the "inflammation" talc allegedly causes in ovarian tissue, but could not cite any study identifying talc's inflammatory properties, nor was any inflammation observed in Plaintiffs' tissues.[10] The court criticized the experts' attempts to use epidemiology to prove specific causation, too. Such a use, the court wrote, "is beyond the limits of epidemiology." The court found the experts also did not account for the significant risk factors each Plaintiff had for ovarian cancer. The court found that neither Dr. Colditz nor Dr. Cramer employed "reliable" scientific methodologies.

III. SOVEREIGNS AS TORT PLAINTIFFS

A. MTBE

Sovereign-led toxic tort cases garnered some attention in 2016. In the latest chapter of the methyl tertiary butyl ether (MTBE) saga, the Vermont Supreme Court in *Vermont v. Atlantic Richfield Co.*[11] upheld a trial court's decision that Vermont's claims of a "generalized injury" from MTBE groundwater contamination were time-barred under Vermont law. The State brought the suit in 2014, alleging gasoline refiners and marketers were liable for knowingly distributing gasoline containing the oxygenate, which then leaked into groundwater across the state. Unlike other recent MTBE litigation, the Vermont case is not part of the MTBE multi-district litigation.

Defendants argued in a motion to dismiss that the State was aware of any alleged injury to groundwater when it enacted its MTBE ban nine years prior to bringing the suit, and therefore the State's claims were outside of the six-year statute of limitations. The State claimed a 1785 statue that excludes claims relating to "lands belonging to the state" from the six-year limitations period applied here because the State holds groundwater in public trust. The State also argued that its general claims arising under a 2008 statute that establishes a state policy to protect groundwater resources are not time-barred because that statute became effective less than six years before Vermont filed its complaint.

In January 2015, the trial court rejected the State's arguments, and dismissed the State's claims to the extent they alleged a generalized injury to Vermont's groundwater system as a whole.[12] The Vermont Supreme Court affirmed, holding that the state lands exception has been consistently interpreted to apply only to claims of ownership of state property, not to claims of generalized injury. The Court also explained that, absent a showing of legislative intent, a statute cannot be read to include "unlimited retroactive application to conduct and injuries that occurred . . . decades prior to its enactment."[13] The State, the court found, could make no such showing here.

B. PCBs

Still, other MTBE cases brought by sovereign plaintiffs have been successful elsewhere, and that model of statutory claims mixed with common law tort claims is likely to be applied against other manufacturers of manmade substances released into the environment. Indeed, in December 2016, the State of Washington in *Washington v. Monsanto, Co.*[14] brought the first state-led lawsuit alleging widespread polychlorinated

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[10] *Id.* at *12-13.

[11] 2016 VT 61, 148 A.3d 559 (Vt. 2016).

[12] Motion to Dismiss, Vermont v. Atl. Richfield Co., No. 340-6-14-Wncv, 2015 WL 5176775 (Vt. Super. Jan. 15, 2015).

[13] 2016 VT 61, at ¶ 31, 148 A.3d at 567.

[14] Complaint for Damages, No. 16-2-29591-6, 2016 WL 7188606 (Wash. Super. Ct. Dec. 8, 2016).

biphenyl (PCB) contamination in waters of the state against Monsanto, the manufacturer. The suit, which follows actions brought by a number of municipalities, sounds in public nuisance, trespass, and strict products liability. It is noteworthy both because of the statewide scale of the case, and because it targets the manufacturer of PCBs rather than a downstream user or spiller.

IV. REMEDIES

A. New York

A New York federal court in *Plumbing Supply, LLC v. ExxonMobil Oil Corp.*[15] demonstrated that careful attention to pleading for relief can salvage an otherwise time-barred case. The Southern District of New York revived a landowner's nuisance claim related to gasoline contamination, to the extent the plaintiff sought injunctive relief.

Plaintiff owns a business located between two gasoline stations. Each station has had several gasoline releases over the last thirty years, which Plaintiff alleges have caused soil and groundwater contamination and hydrocarbon vapor intrusion at Plaintiff's business. Remediation activities related to those spills put Plaintiff on notice of petroleum contamination on Plaintiff's property as early as May 2008. Plaintiff brought suit in 2014 against the owners of both stations, alleging among other things common-law negligence, trespass, and nuisance. These claims are subject to a general three-year statute of limitations. Defendants moved to dismiss, arguing that Plaintiff knew or should have known of the contamination in 2008. In a March 2016 opinion, the court agreed and dismissed the common law and statutory claims.[16]

Plaintiff moved for reconsideration, arguing that the nuisance claim was not time barred to the extent plaintiff sought injunctive relief to abate a continuing nuisance. The court agreed and granted Plaintiff's motion to reinstate the nuisance claim for injunctive relief. It noted New York's statute of limitations applies only to claims for monetary damages, and found Plaintiff's complaint clearly alleges that "Defendants are liable, jointly and severally, to abate the nuisance at . . . [Plaintiff's] [s]ite."[17]

B. North Carolina

The North Carolina Court of Appeals illustrated the limits on damages available to landowners in contamination cases when the court upheld a trial court's order capping damages at the diminution in the value of the contaminated property.[18]

In a suit claiming nuisance, trespass, and violation of North Carolina's Oil Pollution and Hazardous Substances Control Act, Plaintiffs alleged that Defendant's leaking underground storage tanks contaminated the groundwater under Plaintiffs' property, a commercial warehouse and distribution facility. At trial the jury found the contamination resulted in a $108,500 diminution in the value of Plaintiffs' property. The jury also awarded $1.5 million in reparation damages for the cost of remediating the groundwater beneath Plaintiffs' property. The trial court, however, capped the damages at the diminished value of the property and refused to award reparation damages.

The court of appeals affirmed the trial court's cap. The court held that where the cost to restore the property is disproportionate to or greatly exceeds the diminution in value

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[15]Order, Plumbing Supply L.L.C. v. ExxonMobil Oil Corp., No. 14-cv-3674, 2016 WL 3034385 (S.D.N.Y. May 27, 2016).

[16]Plumbing Supply L.L.C. v. ExxonMobil Oil Corp., No. 14 CV 3674, 2016 WL 1249611 (S.D.N.Y. Mar. 29, 2016).

[17]Order, *Plumbing Supply L.L.C.*, 2016 WL 3034385, at *2 (internal quotation omitted).

[18]*See* BSK Enters., Inc. v. Beroth Oil Co., 783 S.E.2d 236 (N.C. Ct. App. 2016).

of the property, the proper calculation for damages is merely the diminution of the property's value.[19] The court noted the "personal use" exception to this doctrine, whereby a plaintiff may recover reparation damages in excess of the diminution of value if the plaintiff's property has a personal use, such as a home. Here, however, Plaintiffs were business entities that did not qualify for the exception.

V. CLASS ACTIONS

A. Eighth Circuit

The United States Court of Appeals for the Eighth Circuit highlighted the complexity of structuring an environmental class action when it reversed a trial court's decision to certify a class claiming damages from trichloroethylene (TCE) contamination.[20] The would-be class plaintiffs alleged that TCE vapor from a plume under defendant's former facility caused personal injury and diminished the value of nearby homes. After excluding class members with personal injury claims and bifurcating the action into liability and damages phases, the trial court certified two classes: a declaratory or injunctive relief class for the liability phase and a damages class for the damages phase.

The Eighth Circuit reversed, finding this structure impermissibly narrowed the issue for certification and artificially created a class that would satisfy the predominance requirement in Federal Rule of Civil Procedure 23(b)(3).[21] That structure, the court reasoned, left too many individual issues for trial and undid any efficiencies that could be gained by certifying a class.

B. Tenth Circuit

The United States Court of Appeals for the Tenth Circuit dismissed Oklahoma class claims that were based only on "reasonable concern" of future injury and a summary statement of alleged health effects.[22] Putative class plaintiffs alleged injuries relating to Defendants' disposal of coal combustion waste and wastewater generated in oil and gas drilling operations in Oklahoma. On Defendants' motion, the trial court dismissed with prejudice plaintiffs' strict liability, negligence, and negligence per se claims.

On appeal, the Tenth Circuit upheld the district court's decision, noting that Oklahoma law requires pleading an actual injury. Here, Plaintiffs' "reasonable concern" about possible exposure to fly ash particles and groundwater contamination from drilling wastewater was insufficient to state a claim: "[a]lleging reasonable concern about an injury occurring in the future is not sufficient to allege an actual injury in fact."[23] The court also noted that Plaintiffs did not plead any examples of injuries to specific plaintiffs: "[t]heir summary statement of health effects is nothing more than a rote recitation of general harms" and was therefore insufficient to satisfy the injury element of plaintiffs' claims.[24]

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[19] *Id.* at 249.
[20] *See* Ebert v. Gen Mills, Inc., 823 F.3d 472 (8th Cir. 2016).
[21] *Id.* at 479.
[22] *See* Reece v. AES Corp., No. 14-7010, 2016 U.S. App. LEXIS 2454 (10th Cir. 2016).
[23] *Id.* at 776.
[24] *Id.* at 778.

A. First Circuit

In a case underscoring the importance of reliable methodologies in proving causation, the United States Court of Appeals for the First Circuit upheld a trial court decision excluding specific causation testimony linking benzene exposure and acute promyelocytic leukemia (APL) because the expert could not properly support her conclusions.[25]

Plaintiff alleged he was exposed to benzene from Defendant's products during his work as a pipefitter and refrigerator technician, and that such exposures caused his APL. To support this contention, Plaintiff relied on the testimony of Dr. Sheila Butler, a physician specializing in occupational chemical exposures. The trial court found Dr. Butler's methodologies unreliable and excluded her causation testimony under Rule 702. With plaintiff unable to show specific causation, the trial court granted a defense motion for summary judgment.

On appeal, the First Circuit upheld the trial court's assessment[26] of Dr. Butler's relative risk analysis and differential diagnosis. In her relative risk analysis, Dr. Butler compared plaintiff's benzene exposure levels to those that had been found to be dangerous in other studies. The court found, however, that Dr. Butler had not accounted for studies that conflicted with her opinion, nor could she explain why she chose the studies she chose. Dr. Butler's "complete unwillingness to engage with the conflicting studies (irrespective of whether she was able to or not) made it impossible for the district court to ensure that her opinion was actually based on scientifically reliable evidence."[27] The First Circuit found this lack of reliability justified the trial court's exclusion of her testimony.

The First Circuit also found Dr. Butler's differential diagnosis unreliable. Dr. Butler ruled out all other causal factors associated with APL, including smoking, obesity, and idiopathic diagnosis (i.e. a diagnosis with no known cause). The court noted that Dr. Butler only "ruled out" idiopathic causes because she "ruled in" benzene as a cause of Plaintiff's APL. The court found that because the record did not contain a scientifically reliable basis to "rule in" benzene, Dr. Butler's dismissal of idiopathic causes was also unreliable. Therefore, while differential diagnosis can be a reliable methodology for showing specific causation, the First Circuit held that it was not reliably employed and upheld the trial court's decision excluding Dr. Butler's specific causation testimony.

B. Second Circuit

In the most recent case stemming from the 1984 chemical plant leak in Bhopal, India, the United States Court of Appeals for the Second Circuit explained the "substantial factor" causation standard by which an entity other than the owner or operator of a site may be liable at common law for a chemical release at that site.[28]

Plaintiffs claimed property damage from leaks from a waste storage facility at the Union Carbide India Limited (UCIL) plant in Bhopal, and sued Union Carbide Corporation (UCC), a majority stockholder in UCIL, for nuisance, trespass, strict liability, and negligence. The trial court granted Defendant's motion for summary judgment, and Plaintiffs argued on appeal that, in doing so, the trial court misapplied the Second Circuit's "substantial factor" causation standard. The Second Circuit held that proving UCC's

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[25] *See* Milward v. Rust-Oleum Corp., 820 F.3d 469 (1st Cir. 2016).
[26] Milward v. Acuity Specialty Prods. Grp. Inc., 969 F. Supp. 2d 101 (D. Mass. 2013).
[27] *Rust-Oleum Corp.*, 820 F.3d at 475.
[28] *See* Sahu v. Union Carbide Corp., No. 14-3087-cv, 2016 U.S. App. LEXIS 9467 (2d Cir. May 24, 2016).

conduct was a "substantial factor" contributing to an injury would require showing UCC had the requisite "knowledge" of the risk and "substantial certainty" of ultimate injury. The court noted there is no indication that UCC knew anything about UCIL's waste handling system or that it might leak, and found that "no reasonable juror could find that UCC participated in the creation of the injury on any theory of liability."[29]

C. Fifth Circuit

In another case that highlights the challenges of providing reliable expert testimony, the United States Court of Appeals for the Fifth Circuit upheld a trial court's decision to exclude expert testimony that exposure to gasoline caused acute myeloid leukemia (AML) in a former gas station attendant and mechanic.[30] The case turned on the distinction between a product and its component parts.

Plaintiff alleged that her late husband was exposed to benzene in gasoline during his work at various service stations from 1958 through 1971, and that such exposure caused his AML. Plaintiff relied on expert reports and testimony from a medical doctor and an epidemiologist. The trial court excluded the general causation testimony of both witnesses. It found the medical doctor's methodology unreliable because he did not demonstrate why studies specific to benzene exposure could reliably support his conclusion that gasoline exposure can cause AML. It found the epidemiologist's methodology unreliable because he also relied on benzene-exposure studies and otherwise relied on gasoline-exposure studies that provided an inadequate basis for his opinion.[31]

On appeal, the Fifth Circuit affirmed. The court found the trial court's opinion was "thorough and well-reasoned," with specific and detailed findings as to the deficiencies in the experts' testimony.[32] Therefore, the court held, the trial court did not abuse its discretion in excluding the experts' opinions.

D. New York

A New York appeals court illustrated the difficulty in proving a multiple chemical sensitivity (MCS) claim, upholding dismissal of plaintiffs for failure to establish a causal link between chemical exposure and his symptoms.[33] Plaintiff alleged personal injuries from exposure to fumes emanating from a flooring adhesive used in an adjacent apartment. In upholding the trial court's grant of defendants' motion for summary judgment, the court held that Plaintiff, by failing to identify his expert witnesses as required, was unable to prove general or specific causation linking the adhesive and his alleged injuries. The court also held that, even if Plaintiff had timely designated his expert witnesses, he still did not establish general causation connecting this adhesive to MCS, nor did he connect his exposure to the adhesive to his illness. Defendants, on the other hand, offered expert affidavits "stating that [MCS] is not a scientifically or medically recognized condition, that a causal connection between MCS and chemical exposure has not been accepted in the scientific community, and that [plaintiff's] level of exposure to chemicals in … [the adhesive] could not have caused his claimed illness."[34]

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[29] *Id.* at *11.
[30] *See* Burst v. Shell Oil Co., No. 15–30592, 2016 WL 2989261 (5th Cir. May 23, 2016).
[31] Burst v. Shell Oil Co., No. 14–109, 2015 WL 3755953 (E.D. La. June 16, 2015).
[32] *Burst*, 2016 WL 2989261, at *1.
[33] *See* Abrams v. Related, L.P., 28 N.Y.S.3d 366 (N.Y. App. Div. 2016).
[34] *Id.* at 656.

A federal district court dismissed as untimely a putative class action alleging workplace chemical exposure, highlighting the difficulty of sustaining a medical monitoring claim in Pennsylvania.[35] Plaintiffs alleged that their employer failed to warn them about alleged occupational exposures to various chemicals, including vinyl chloride (VC) and polyvinyl chloride (PVC).

Claims for medical monitoring in Pennsylvania have a two-year statute of limitations starting from the moment an individual was "placed at a significantly increased risk of contracting a serious latent disease."[36] Defendant's plant closed in 2012 but plaintiffs filed their complaint in 2015. Plaintiffs alleged that Defendant fraudulently concealed the workers' exposure, which tolled the statute of limitations.

Even accepting Plaintiffs' allegations as true, the Middle District of Pennsylvania concluded that Defendant's alleged activity did not give rise to the "affirmative independent act of concealment" required to toll the statute of limitations: "[m]ere non-disclosure is not a misleading act for purposes of tolling the statute of limitations."[37]

The court further noted that, by Plaintiffs' own admission, the harmful effects of VC, PVC, and other chemicals obviously used at Defendant's plant were "well-studied and well-documented" so as to place Plaintiffs on notice before the two-year limitations period expired.[38] The court therefore rejected Plaintiffs' tolling argument and granted a defense motion to dismiss Plaintiffs' medical monitoring claims.

VIII. MASS TORTS

A. Elk River MCHM Release

Litigation stemming from the 2014 spill of a coal processing chemical known as Crude MCHM into the Elk River near Charleston, West Virginia continues to produce developments with myriad toxic tort and environmental implications. It is a good example of how one event—albeit a significant event—can define the contours of a jurisdiction's case law on a number of issues. Among the opinions the United States District Court for the Southern District of West Virginia issued in 2016 are two rulings in favor of plaintiffs and against defendant Eastman Chemical Co., the supplier of the Crude MCHM, involving a *Daubert* challenge and the sophisticated user doctrine.

First, in a decision illustrating the limits of a *Daubert* challenge to expert testimony, the court denied the Crude MCHM manufacturer's motion to limit testimony from plaintiffs' expert as to the corrosive properties of Crude MCHM and denied a related motion for summary judgment.[39] Eastman challenged Plaintiffs' expert testimony that Crude MCHM corroded the inside of the leaking tank, which caused the tank to fail. Eastman argued the expert's testimony was neither scientifically sound nor consistent with the expert's laboratory results and therefore inadmissible under *Daubert*. The court, however, found no basis to conclude others in the field would not rely on the data gathered during the expert's testing; the methodology therefore was reliable. Eastman's challenge to the expert's findings based on those data was, the court wrote, "in essence a challenge to the correctness of [the expert's] conclusion, and as such is not a proper basis for a

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[35]Blanyar v. Genova Prods., Inc., No. 3:15-1303, 2016 WL 740941 (M.D. Pa. Feb. 25, 2016), *appeal docketed*, No. 16-1684 (3d Cir. Mar. 29, 2016).
[36]*Id.* at *7.
[37]*Id.* at *6.
[38]*Id.*
[39]*See* Good v. Am. Water Works Co., No. 2:14-01374, 2016 WL 5441517 (S.D.W. Va. Sept. 26, 2016) (Good I).

Daubert challenge."[40] Because Plaintiffs' expert raised a genuine issue of material fact as to whether corrosion was the cause of the tank leak, the court denied Eastman's motion for summary judgment.

Second, in a separate opinion on the same day, the court also rejected Eastman's arguments based on its Material Safety Data Sheet (MSDS) and the sophisticated user doctrine. The Court held that Eastman's compliance with federal law in connection with its MSDS for Crude MCHM did not preempt Plaintiffs' state tort law claims.[41] The court found that a jury must decide whether Eastman's MSDS should have more clearly described Crude MCHM's corrosiveness. The court also rejected Eastman's argument that the sophisticated user doctrine—whereby manufacturers of goods can reasonably rely on sophisticated buyers of those goods to pass any necessary warnings to the end-user—should apply here. Eastman argued it sold its Crude MCHM to a sophisticated customer, Freedom Industries. While recognizing West Virginia has not expressly adopted the sophisticated user rule, the Court noted application here would require the court to adopt Eastman's "novel characterization and treatment of members of the public involuntarily exposed to … [Crude MCHM], as if they were 'end-users' of the product."[42] Even if the court were to so apply the rule, it noted genuine issues of material fact as to the sufficiency of any warnings Eastman gave to its customer and the customers' understanding of Crude MCHM's hazards.

B. DuPont C-8 Products Liability Litigation

There was at least one noteworthy event in the long-running litigation against E.I. DuPont de Nemours and Co. (DuPont) over ammonium perfluorooctanoate (C-8) drinking water contamination in Ohio and West Virginia. In December 2016, in *Vigneron v. E.I. du Pont de Nemours and Co.*,[43] a federal jury awarded $2 million in compensatory damages to a plaintiff who alleged C-8 caused his cancer. The jury went on to find DuPont acted with actual malice, and awarded $10.5 million in punitive damages, plus attorney fees. This stands in contrast to the $1.6 million in compensatory damages and no finding of malice sent back by a jury in a 2015 C-8 trial.

C. Lead in Drinking Water

While Flint, Michigan drew attention for its lead-tainted drinking water, a District of Columbia trial court issued a decision in *Barkley v. D.C. Water & Sewer Authority* [44] that may have implications in other lead-in-water litigation. Plaintiffs were the remaining members of a failed class who claimed injuries stemming from their alleged exposure to lead in drinking water in the early 2000s.

The utility argued the public duty doctrine—which bars negligence claims against government entities regarding services provided to the public at large—bars claims regarding drinking water distribution and related public education. Under the District's public duty doctrine, the District and its agencies "'owe no duty to provide public services to particular citizens as individuals.'"[45] It is based on policy concerns, to protect

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[40] *Id.* at *8.

[41] Good v. Am. Water Works Co., No. 14-1374, 2016 WL 5402238 (S.D.W. Va. Sept. 26, 2016) (Good II).

[42] *Id.* at *5.

[43] No. 2:13-CV-00136 (S.D. Ohio Dec. 21, 2016).

[44] Order Granting in Part and Denying in Part Motion for Summary Judgment, Barkley v. D.C. Water & Sewer Auth., Nos. 2013 CA 003811 B et al., 2016 WL 184433 (D.C. Super. Ct. Jan. 13, 2016).

[45] *Id.* at *3 (citing Hines v. District of Columbia, 580 A.2d 133, 136 (D.C. 1990).

government funds from the drain of litigation costs and to safeguard the separation of powers. In granting summary judgment to defendant on Plaintiffs' negligence claims, the court found that D.C. Water, created by the District's legislative body, is part of the District government and is therefore entitled to the protection of the public duty doctrine.

IX. TAKE-HOME LIABILITY

In a case that may reshape the contours of so-called "take-home" toxic tort liability, even outside the asbestos context where it is often seen, New Jersey's Supreme Court in *Schwartz v. Accuratus Corp.*[46] held a company's liability for toxic substances brought home on a worker's clothing can extend beyond the spouse of the worker. Plaintiffs Brenda Ann and Paul Schwartz filed suit against Accuratus Ceramic Corporation alleging negligence, products liability and strict liability after Brenda was diagnosed with chronic beryllium disease. Paul had worked at the defendant's ceramics facility in 1978 and 1979. By 1979, Paul and Brenda were dating and Brenda often visited and stayed overnight at Paul's apartment, which he shared with a co-worker. Brenda did the laundry and other chores at the apartment, both before and after she and Paul were married in June 1980.

Plaintiffs filed their complaint in Pennsylvania state court claiming that Brenda was exposed to beryllium on Paul's and his roommate's work clothing, including during the time before she and Paul were married. The case was removed to the United States District Court for the Eastern District of Pennsylvania, which found that New Jersey has not recognized a duty for an employer to protect a worker's non-spouse roommate from take-home exposure to a toxic substance.[47] Plaintiffs appealed to the United States Court of Appeals for the Third Circuit, which submitted a petition to the New Jersey Supreme Court, asking that court to better define the extent of potential "take-home" liability under New Jersey law.[48]

In considering the question of law certified by the Third Circuit, New Jersey's Supreme Court held that the duty of care may extend, under certain circumstances, to a plaintiff who is not a spouse, but the court declined to create a bright-line rule "as to who's in and who's out." The court explained that the duty was based on the foreseeability of regular and close contact with the contaminated material and not exclusively on whether the injured person was a spouse or family member. The court set forth the following factors to be considered in take-home toxic tort actions: (1) the relationship of the parties, including not only that between the defendant's employee and the injured person, but also that between the defendant and the injured person; (2) the opportunity for exposure to the toxin and the nature of the exposure that causes the risk of injury; and (3) the employer's knowledge of the danger associated with exposure when the exposure occurred and not at a later time when more information may become available.[49]

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[46] 139 A.3d 84 (N.J. 2016).
[47] Schwartz v. Accuratus Corp., 7 F. Supp. 3d 490 (E.D. Pa. 2014).
[48] *Schwartz*, 139 A.3d at 85-86.
[49] *Id.* at 91-92.

I. BANKRUPTCY

In *Asarco, LLC v. Noranda Mining, Inc.*,[2] the Tenth Circuit reversed the United States District Court for District of Utah's grant of summary judgment that denied a contribution claim under Section 113(f) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[3] After Asarco emerged from bankruptcy in 2009, it filed a CERCLA contribution claim against Noranda for costs paid to the EPA under a settlement entered into during Asarco's bankruptcy proceedings.[4] The district court held that Asarco's contribution claim was judicially estopped since Asarco had previously represented to the Bankruptcy Court that the $7.4 million it paid to EPA represented its fair share of the response costs and Asarco's position was inconsistent with its district court claim that the settlement amount was an overpayment.[5] The Tenth Circuit elected not have the settlement be the bases for judicial estoppel because "no party would settle before a mini-trial was held to determine its exact share of environmental liability—and then there would never be need for a contribution action by a settling party."[6]

In *DMJ Associates, L.L.C. v. Capasso*,[7] third-party plaintiffs brought cost recovery and contribution claims under CERCLA against certain third-party defendants. One of the third-party defendants sought to dismiss the contribution claim through a summary judgment notion arguing that the claims were discharged in a prior bankruptcy since they arose out of environmental contamination which predated defendant's commencement of bankruptcy proceedings in 1982. The United States District Court for the Eastern District of New York denied the motion. CERCLA was enacted prior to 1982, but CERCLA section 113(f) was not enacted until after the confirmation order was issued in 1985. While the language of CERCLA section 107(a) contains similar language, the right of private parties to pursue contribution claims under that section did not exist until the *United States v. Atlantic Research Corp.*[8] decision in 2007. The third-party defendant also argued that *In re Chateaugay*[9] supported its assertion that the claims were pre-petition because they arose out of pre-petition releases, notwithstanding that the costs were incurred post-bankruptcy. However, the Court distinguished *Chateaugay* in that the EPA in that case had already incurred costs and sought reimbursement at the time of the bankruptcy confirmation, although it was unaware of the full scope of the claims. In this case, the court noted that the third-party plaintiffs "lacked knowledge as to the existence of any claim whatsoever at the time [third-party defendant] filed for bankruptcy protection",[10] and further noted that "CERCLA [section] 107(a) as interpreted by courts ... did not afford [the third party plaintiffs] an opportunity to pursue any contribution claims."[11] did not voluntarily incur

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[1]Given the breadth of the topics, this chapter discusses only a selection of cases and regulations issued during 2016. Connie Sue Martin and Eric Larson edited this chapter. This chapter's authors are Amy L. Edwards, Richard Fil, Aaron S. Heishman, David Roth, Elise Scott, Thomas Utzinger, and May Wall.
[2]844 F.3d 1201 (10th Cir. 2017).
[3]*Id.* at 1204.
[4]*Id.* at 1206-07.
[5]*Id.* at 1208.
[6]*Id.* at 1209.
[7]No. 97-CV-7285, 2016 U.S. Dist. LEXIS 130083 (E.D.N.Y. Sept. 22, 2016).
[8]551 U.S. 128 (2007).
[9]944 F.2d 997 (2d Cir. 1991).
[10]*DJM Assocs., L.L.C.*, 2016 U.S. Dist. LEXIS 130083, at *74.
[11]*Id.*

costs but were sued by a different entity under section 107(a), and under those circumstances they did not have the right to seek contribution prior to *Atlantic Research*.

In *G-I Holdings Inc. v. GAF Corp.*,[12] the Third Circuit Court of Appeals affirmed the granting of a motion to dismiss by the United States District Court for the District of New Jersey for a "repackaged" claim asserted by the New York City Housing Authority (NYCHA) as a regulatory action rather than a monetary claim.[13] NYCHA asserted that the defendant, as the successor to a manufacturer of asbestos-containing material (ACM), should remediate the ACM in NYCHA's buildings.[14] The Third Circuit held that this was a discharged "claim" as provided for under G-I Holding's approved reorganization plan.[15] NYCHA's proof of claim in the bankruptcy proceeding did not mention injunctive relief, nor did NYCHA appeal the order finalizing the plan. The court also distinguish *In re Towrico Electronics, Inc.*,[16] in that *Torwico* was limited to the right of a regulatory authority to force the debtor to prospectively comply with environmental laws, even if it had to expend money to do so.[17] Here, NYCHA was attempting to force G-I Holdings to pay for remediation for past harm. In addition, NYCHA had no authority to enforce New York's environmental laws.[18]

II. INSTITUTIONAL CONTROLS

Institutional Controls (ICs) are non-physical land use controls, such as deed restrictions and restrictive covenants, used to minimize the potential for exposure to contamination and to protect the integrity of previous response actions designed to remediate or isolate contamination.

In 2016, there was no significant federal or state legislation relating to ICs. No states adopted statutes modeled after the Uniform Environmental Covenant Act (UECA), keeping the number of UECA adoptees at twenty-three states, the District of Columbia, and the Virgin Islands. However, several states made efforts to clarify and streamline the process of implementing ICs, while the Interstate Technology and Regulatory Council (ITRC) published a comprehensive guidance document related to long-term monitoring and maintenance of ICs.

A. ITRC Guidance

ITRC's guidance document, *Long-Term Contaminant Management Using Institutional Controls*, is designed to assist state environmental agencies develop and improve mechanisms for monitoring and maintaining ICs.[19] ITRC surveyed state environmental agencies to determine how they track, monitor, and enforce ICs. ITRC concluded that, while ICs are becoming increasingly common throughout the country, many states lack effective programs to monitor and enforce ICs once they are in place. ITRC also developed a downloadable tool that allows state and local governments, environmental consultants, and obligated parties to document critical information about an IC and generate an editable long-term stewardship plan for the site.

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[12] 654 F. App'x 571 (3d Cir. 2016).
[13] *Id.* at 572.
[14] *Id.* at 573.
[15] *Id.*
[16] 8 F.3d 146 (3d Cir. 1993).
[17] *Id.* at 150.
[18] *Id.* at 151.
[19] *Long-Term Contaminant Management Using Institutional Controls*, INTERSTATE TECH. REG. COUNCIL (Dec. 2016).

B. State Efforts

Several states made efforts in 2016 to clarify and streamline the process for implementing ICs.

The Alabama Department of Environment Management published a guidance document explaining that a Final Report of Corrective Measures (FRCM) can be submitted at the end of the corrective action process for a site with ICs, but cannot be submitted when a site has engineering controls or requires periodic maintenance and environmental monitoring.[20]

The Florida Department of Environmental Protection updated the *Institutional Controls Procedures Guidance*, which provides instructions and form templates for establishing ICs.[21]

The Indiana Department of Environmental Management released form templates for modifying or terminating environmental restrictive covenants as site conditions evolve.[22]

The New Jersey Department of Environmental Protection published *Guidance for the Issuance of Response Action Outcomes ("RAO")*, which clarified that a RAO is appropriate when the agency has issued a remedial action permit that includes institutional or engineering controls.[23]

III. LENDER LIABILITY

One of the more interesting developments in the area of environmental lender liability occurred on the international front with the April 2016 release by the United Nations Environment Programme (UNEP) of an Inquiry Working Paper entitled *Lenders and Investors Environmental Liability: How Much is Too Much?*[24] (the UNEP Report). The UNEP Report "presents an overview of Lender Environmental Liability (LEL) and Investor Environmental Liability (IEL) regimes and issues" and "explores the conditions under which LEL/IEL can be effective tool to promote precaution."[25] By comparing various legal regimes—such as Argentina, Brazil, Colombia, Costa Rica, Germany, India, Mexico, Paraguay, Peru, Portugal, South Africa, Turkey, the United Kingdom, and the United States—the UNEP Report seeks to "creat[e] a common ground for a model that could be replicated in any legal tradition or system through minor adjustments in the general liability clause."[26] Based upon this comparative analysis and an application of game theory, the UNEP Report argues for, among other things, a broad application of environmental liability to "all stakeholders involved directly or indirectly in a polluting activity" including lenders.[27] The imposition of such potential exposure throughout the

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[20] ALA. DEP'T OF ENVTL. MGMT., FINAL REPORT OF CORRECTIVE MEASURES (July 2016).

[21] FLA. DEP'T OF ENVTL. PROT., INSTITUTIONAL CONTROLS PROCEDURES GUIDANCE (July 2016).

[22] *Institutional Controls*, IND. DEP'T ENVTL. MGMT. (last visited Feb 21, 2017).

[23] N.J. DEP'T OF ENVTL. PROT., GUIDANCE FOR THE ISSUANCE OF RESPONSE ACTION OUTCOMES (Apr. 2016).

[24] UNITED NATIONS ENV'T PROGRAMME, LENDERS AND INVESTORS ENVIRONMENTAL LIABILITY: HOW MUCH IS TOO MUCH? (Apr. 2016) [hereinafter 2016 UNEP REPORT].

[25] *Id.* at 4.

[26] *Id.* at 5.

[27] *Id.* at 26. "Therefore, the general rule lies with the degree of information (and therefore involvement) an indirect party has (or should have) about the project or activity of the direct or party with which the indirect party develops a commercial relationship. This commercial relationship is not limited to lender-borrower. It must include a wide range of indirect parties such as investors, managers and administrators of investment funds, or even

lifecycle of the loan, according to the UNEP Report, incentivizes "enhance[d] precautionary standards for environmental risk assessment."[28] Where the lending institution fails to meet the established legal expectations regarding environmental risk management, the UNEP Report proposes assessment of "fines and other administrative penalties such as a ban on engaging in similar financial operations for a specified period of time, for instance."[29] While the UNEP Report is obviously not binding, it represents a thoughtful analysis of the policy underpinnings of environmental lender liability.

In a related development announced in August 2016, seven Chinese state ministries, including the People's Bank of China, jointly issued *Guidelines for Establishing the Green Financial System* (the Guidelines).[30] Introduced in connection with the September G20 meeting in Hangzhou, China, the Guidelines set forth a range of policy measures intended to "vigorously develop green lending" including "explor[ing] ways to introduce lenders' environmental legal liability."[31] This effort appears to be designed, in part, to create disincentives to so-called "brown investments" – i.e., investments associated with higher polluting activities. Indeed, the People's Bank of China is reported to have stated: "The Guidelines stress that the primary purpose of establishing the green financial system is to mobilize and incentivize more social (or private) capital to invest in green sectors, while restricting investment in polluting sectors."[32]

On the litigation front, a brief mention of *Tingley v. PNC Financial Services Group, Inc.*[33] is warranted. While the issue before the court was a motion for sanctions, the court does address, albeit briefly, the issue of lender environmental liability. The opinion in *Tingley*, from the United States District Court for the Western District of Michigan, is the latest in what apparently is a lengthy and protracted False Claims Act[34] case arising from allegations that contaminated soil was improperly removed from a former industrial site in connection with a development project. Among other things, the court cited previous associated state court opinions for the proposition that the lender defendant "is not liable merely because it (or its predecessor/subsidiary) provided a development loan[.]"[35] The court also rejected an attempt to impose "arranger" liability on the lender under CERCLA[36], which plaintiff alleged was created by lender's instructions to developer "that

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enterprises exercising leverage power over their supply chain. If carefully implemented, LEL can and will be comprehensively applied." *Id.*

[28]*Id.* at 27.

[29]2016 UNEP REPORT, *supra* note 24, at 28.

[30]*Guidelines for Establishing the Green Financials System*, CHINA DAILY (Sept. 4, 2016); *see also Seven State Ministries Jointly Issue "Guidelines for Establishing a Green Financial System"*, DELOITTE (last visited Feb. 21, 2017). These guidelines were an outgrowth of a 2015 UNEP report. UNITED NATIONS ENV'T PROGRAMME ET AL., ESTABLISHING CHINA'S GREEN FINANCIAL SYSTEM (Apr. 2015) (making the recommendation to "Amend the Commercial Banking Law to further emphasize civil liabilities and include administrative sanctions along with criminal penalties as fallback recourse, and clearly specify the statutory obligations and liabilities of banks and other lending institutions in regards to the environmental assessment and environmental impacts of their investment.").

[31]*Guidelines for Establishing the Green Financials System*, *supra* note 30.

[32]Press Release, United Nations Env't Programme News Ctr., On Eve of G20 Summit, China Puts Green Finance Center Stage (Sept. 2, 2016).

[33]No. 1:14-cv-1097, 2016 WL 1637440 (W.D. Mich. Apr. 26, 2016).

[34]31 U.S.C. §§ 3729-3733.

[35]*Tingley*, 2016 WL 1637440, at *5.

[36]42 U.S.C. §§ 9601-9675.

it wanted a 'clean environmental' as a condition for providing a loan."[37] Specifically, the court held:

> Even accepting this allegation as true, however, such conduct is far removed from arranging for the improper disposal of hazardous substances. The developer was not required to accept Fifth Third's condition, and any decision to do so by removing contaminated soil from the B&G site is not attributable to Fifth Third. In the words of the state court, 'Fifth Third Bank [merely] did what virtually every commercial lender does in every brown field type case.'[38]

[37] *Tingley*, 2016 WL 1637440, at *6 (citation omitted).
[38] *Id.* (citation omitted).

Chapter 8 • PESTICIDES, CHEMICAL REGULATION, AND RIGHT-TO-KNOW
2016 Annual Report[1]

I. TOXIC SUBSTANCES CONTROL ACT (TSCA)

A. Frank R. Lautenberg Chemical Safety for the 21st Century Act

On June 22, 2016, President Obama signed into law the Frank R. Lautenberg Chemical Safety for the 21st Century Act (Lautenberg Act),[2] marking the first comprehensive overhaul of the Toxic Substances Control Act (TSCA) in its four-decade history. The Lautenberg Act amends nearly all major aspects of the TSCA, including regulation of existing chemicals in commerce, chemical testing authority, regulation of new chemicals and significant new chemical uses, partial reset of the TSCA Inventory, scrutiny of confidential business information claims, preemption of state laws, guidelines for using science in decision making, and user fees. The Lautenberg Act also establishes a number of deadlines to drive implementation of the amendments over the next five years and beyond.

1. Summary of Key Amendments to Core TSCA

The principal change with the Lautenberg Act is to give the Environmental Protection Agency (EPA) an affirmative mandate both to review the safety of all existing chemicals in active commerce in the United States, and to regulate them as necessary to prevent unreasonable risk under the circumstances of use. Coupled with this mandate are amendments that remove certain legal restrictions on the EPA's authority to regulate existing chemicals that previously hindered practical use. Where unreasonable chemical risks are identified, the EPA must now issue a section 6 risk management rule within two years.[3] In selecting risk management requirements, the EPA must consider the economic impacts of proposed control requirements, but those considerations are no longer controlling.[4] Prior to the Lautenberg Act, section 6 required the EPA to identify and adopt the "least burdensome requirements" that could achieve the regulatory objective.[5] The EPA stopped proposing control rules under section 6 in 1991 following the Fifth Circuit's invalidation of a section 6 ban on asbestos on grounds including that the EPA had not demonstrated that the ban was the least burdensome option.[6]

The Lautenberg Act requires the EPA to undertake a three step process to evaluate and regulate existing chemicals. The EPA must first establish a risk-based screening process to designate substances on the TSCA Inventory either as "high-priority" and warranting risk evaluation, or "low-priority," for which a risk evaluation is not currently required.[7] The EPA must complete its screening designation for a substance within nine to

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[1]Charles Franklin, Akin Gump Strauss Hauer & Feld LLP; Lynn L. Bergeson and Richard E. Engler, Ph.D., Bergeson & Campbell, P.C.; Mark N. Duvall, Sarah A. Kettenmann, Tim M. Serie, and Shengzhi Wang, Beveridge & Diamond, P.C.; Roger G. Hanshaw, Bowles Rice LLP; Warren U. Lehrenbaum, Crowell & Moring LLP; Michael Boucher, John Conner, Jr., and Amy Symonds, Dentons US LLP; James G. Votaw, Keller and Heckman LLP.

[2]Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-182, 130 Stat. 448 (2016).

[3]15 U.S.C. § 2605(c) (2016).

[4]*Id.* at § 2605(c)(2).

[5]15 U.S.C. § 2605(a) (2015).

[6]*See* Corrosion Proof Fittings v. Envtl. Prot. Agency, 947 F.2d 1201 (5th Cir. 1991).

[7]15 U.S.C. § 2605(b)(1).

twelve months from commencement of the process.[8] Second, chemicals designated as high-priority must undergo a formal risk evaluation to determine whether they "present an unreasonable risk" to health or the environment.[9] The EPA generally must reach a risk conclusion within three years from designation as "high-priority."[10] Third, for those chemicals found to present an unreasonable risk, the EPA must issue a final rule within two years imposing controls sufficient to reduce the risk to the point that it is no longer unreasonable.[11] The EPA must establish rules for both the screening and risk evaluation processes by June 22, 2017.[12]

The Lautenberg Act also provides for expedited action on a subset of substances identified as persistent, bioaccumulative, and toxic (PBT) in the EPA's 2014 TSCA Workplan for Chemical Assessments.[13] The EPA is permitted to skip the formal screening and risk evaluation processes for the covered PBT chemicals and is required to have proposed section 6(a) risk management rules for each of them by June 22, 2019. Control rules for covered PBT chemicals must go beyond mitigating risk to acceptable levels and must also reduce exposure to the covered PBT substances to the extent practicable.[14]

The second principal change in the Lautenberg Act is to streamline the process for the EPA to obtain chemical hazard and exposure information needed for chemical risk assessment. Prior to the Lautenberg Act, the EPA was in a "Catch-22" situation because it could not compel substance manufacturers and processors to develop health and environmental effects data for particular chemicals without first making a preliminary risk finding (and completing a rulemaking proceeding),[15] but it could not make and support the risk finding without the risk information it was trying to develop. The Lautenberg Act amendments to TSCA section 4 give the EPA new, broad testing authority and authorize the EPA to compel development of both hazard and exposure information by issuing a unilateral order, without a risk finding, where the information is needed for risk assessment of new or existing chemicals, or significant new uses of existing chemicals, where needed to implement significant new use rules (SNURs), new chemical orders, or control requirements for existing chemicals, or where requested by the EPA or another federal agency to meet exposure or toxicity information needs under other statutes.[16] The Lautenberg Act also codifies a policy against chemical testing on vertebrate animals unless necessary and requires the EPA to develop a plan to implement alternatives to invertebrate animal testing by June 2018.[17]

For review of new chemical premanufacture notices (PMNs) and significant new use notices (SNUNs), the Lautenberg Act largely codifies existing practice, but for the first time also requires the EPA to conclude its risk reviews with one of three affirmative risk determinations:[18] first, that the chemical or use is not likely to present an unreasonable risk under circumstances of use; or, second, that the chemical or use presents an unreasonable risk; or, third, that there is insufficient information to evaluate health or environmental

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[8] *Id.* § 2605(b)(1)(C).
[9] *Id.* § 2605(b)(4)(A), (C). Triggers for risk evaluation also include a statutory mandate on TSCA Work Plan chemicals and a request for risk evaluation from manufacturers. *Id.*
[10] *Id.* § 2605(b)(4)(G).
[11] *Id.* § 2605(a), (c).
[12] 15 U.S.C. § 2605(b)(1)(A), (b)(4)(B).
[13] *Id.* § 2605(h) (citing ENVT'L PROT. AGENCY, OFFICE OF POLLUTION PREVENTION AND TOXICS, TSCA WORK PLAN FOR CHEMICAL ASSESSMENTS: 2014 UPDATE (2014)) [hereinafter TSCA WORK PLAN].
[14] 15 U.S.C. § 2605(h).
[15] 15 U.S.C. § 2603(a) (2015).
[16] *Id.*
[17] *Id.* § 2603(h)(2)(A), (E).
[18] 15 U.S.C. § 2604(a)(3) (2016).

effects of the new chemical or use or that in the absence of sufficient information, the chemical or use may present an unreasonable risk, or that the chemical will be produced in substantial quantities and is anticipated to enter the environment in substantial quantities or may involve significant or substantial human exposure.[19] The EPA must take risk management action if it finds either unreasonable risk or that it has insufficient information to evaluate risk.[20] Notice submitters may commence manufacture or use before the expiration of the review period if the EPA determines that the chemical or use is not likely to present an unreasonable risk. [21]

Sometimes characterized as a partial reset of the TSCA Inventory, the Lautenberg Act requires the EPA in the future to distinguish between and track those substances on the Inventory that are in "active" use, and those that are "inactive," and no longer manufactured or processed. Once a substance is designated as "inactive" it cannot be manufactured or processed until it is reactivated by notice to the EPA.[22] In order for the EPA to make the initial "active" status designations, manufacturers (and potentially processors) will be required by rule to make a one-time report to the EPA of all chemical substances on the TSCA Inventory that they have manufactured or processed at any time or volume in the ten years prior to the amendments. Any claims for confidential treatment of the specific chemical identity of any substance on the Inventory will have to be renewed and substantiated or waived.[23] The EPA will designate chemical substances on the Inventory as active or inactive based on these reports.[24] The EPA must promulgate a reporting rule by June 22, 2017. Manufacturers will then have 180 days to submit reports.[25]

Confidential business information (CBI) claims will require greater due diligence and will face greater scrutiny under the Lautenberg Act. All new CBI claims must be accompanied by a particular certification as to facts demonstrating that CBI treatment is warranted.[26] The EPA must affirmatively approve or deny all new CBI claims to protect specific chemical identity within ninety days of submission and must review and similarly act on 25% of all other new CBI claims.[27] CBI claims for specific chemical identity must be renewed and re-substantiated at least every ten years.[28] The EPA also is required to establish by rule a process to review and make affirmative determinations on all current chemical identity CBI claims for "active" substances on the TSCA Inventory.[29]

The TSCA preemption provisions are in some respects expanded and amended to correspond to the new section 6 existing chemical prioritization and risk evaluation procedures. The Lautenberg Act preempts state information development requirements likely to be duplicative of federal requirements issued under TSCA sections 4, 5, or 6, state notice of use requirements for substances subject to a federal SNUR, and state restriction on manufacturing, processing, or use of a substance that has completed a section 6 risk evaluation and either found not to present an unreasonable risk, or made subject to section 6 risk management requirements.[30] However, this preemption extends only to state requirements directed at risks addressed in the federal risk evaluation process. [31] States are

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[19] *Id.* § 2604(a)(3).
[20] *Id.* § 2604(e), (f).
[21] *Id.* § 2604(g).
[22] 15 U.S.C. § 2607(b)(5) (2016).
[23] *Id.* § 2607(b)(4).
[24] *Id.* § 2607(b)(4)(A).
[25] *Id.*
[26] 15 U.S.C. § 2613(c) (2016).
[27] *Id.* § 2613(g).
[28] *Id.* § 2613(e).
[29] *Id.* § 2607(b)(4).
[30] 15 U.S.C. § 2617(a)(1) (2016).
[31] *Id.* § 2617(c).

also prevented from enforcing new state requirements applicable to a chemical undergoing formal section 6 risk evaluation; however, pre-existing state requirements continue in force until the risk evaluation is completed and the EPA takes final action.[32] And even the completion of a federal risk evaluation will not preempt state regulations issued under certain exempt "grandfathered" programs: existing chemical-specific requirements promulgated by a state prior to April 22, 2016, and both new and existing requirements taken under the authority of a state law that was in effect on August 31, 2003 (for example, California's Proposition 65).[33] States also may request preemption waivers in particular circumstances.[34]

The EPA's authority to collect fees is expanded to include manufacturers and processors of chemicals undergoing section 6 risk evaluation, in addition to section 4 data submitters and section 5 PMN and SNUN submitters that were previously subject to fees. The prior $2,500 cap on fees is removed, and, following new rulemaking, the EPA may set and collect up to $25 million a year in fees from industry for implementing these portions of TSCA, including the full cost of industry-requested risk evaluations.[35] The Lautenberg Act includes new affirmative obligations for the EPA to consider the "best available science" and to use weight of evidence analysis when making science-based decisions under sections 4, 5, and 6.[36]

2. Implementing the Lautenberg Act

The EPA wasted no time implementing the Lautenberg Act. The EPA's review of pending section 5 notices was immediately impacted. The EPA interpreted the amendments as effectively resetting the ninety-day review clock for hundreds of PMNs and SNUNs pending at the time the Lautenberg Act was signed,[37] a determination that is legally defensible but not the interpretation submitters had hoped the EPA would select. As required by the Lautenberg Act, the EPA commenced regularly publishing its affirmative determinations that particular PMN chemicals were not likely to present an unreasonable risk.[38]

The EPA promptly issued a Lautenberg Act First Year Implementation Plan,[39] outlining its key regulatory objectives, including five "framework actions" to be completed in 2016: (1) formally initiate risk evaluations on ten TSCA Work Plan chemicals; (2) propose a rule to establish procedures and the criteria for identifying high priority chemicals for risk evaluation and low priority chemicals; (3) propose a rule to establish the EPA's process for evaluating the risk of high priority chemicals; (4) propose a rule under its new fee authorities to establish the fees the EPA will collect to defray the cost of implementing TSCA sections 4, 5, and 6, and fully defray the cost of industry-requested risk evaluations; and (5) propose an Inventory reset rule requiring industry to report chemicals manufactured or processed in the previous ten years. Except for the fees rule, the Lautenberg Act requires each of these rules to be promulgated by June 2017. The fees

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[32] *Id.* § 2617(b).
[33] *Id.* § 2617(e).
[34] *Id.* § 2617(f).
[35] 15 U.S.C. § 2625(b)(3), (4) (2016).
[36] *Id.* § 2625(h), (i).
[37] *See* ENVT'L PROT. AGENCY, OFFICE OF POLLUTION PREVENTION AND TOXICS, THE FRANK R. LAUTENBERG CHEMICAL SAFETY FOR THE 21ST CENTURY ACT: FREQUENT QUESTIONS, Question 11 (2016) [hereinafter LAUTENBERG Q&A DOCUMENT].
[38] *See, e.g.*, Certain New Chemicals or Significant New Uses; Statements of Findings for September 2016, 81 Fed. Reg. 65,636 (Sept. 23, 2016).
[39] ENVTL. PROT. AGENCY, THE FRANK R. LAUTENBERG CHEMICAL SAFETY FOR THE 21ST CENTURY ACT: FIRST YEAR IMPLEMENTATION PLAN (2016).

rule was made a priority to hasten the arrival of additional the EPA funding needed to support its new TSCA obligations.

The EPA promptly convened a series of stakeholder workshops for a public dialogue on the framework actions and other implementation issues, including meetings on procedures for prioritization and risk evaluation,[40] and to consult on the new fee structure. The EPA also held a meeting to update the public on changes to the administration of the to the New Chemicals Review Program under the Lautenberg Act[41] to address concerns with the slow speed of the new chemicals review process and to provide more transparency concerning the EPA's implementation of the new section 5 affirmative findings requirement. The Agency also promptly issued new guidance for making successful CBI claims in PMN submissions and other TSCA contexts under the amended law.[42] The guidance clarifies what is required to meet the amended section 14(c) CBI certification requirements.

Both the proposed Section 6 prioritization rule and proposed Section 6 risk evaluation rule were published in early January 2017, keeping the Agency on track for timely publication of the final rules by the June 2017 statutory deadline.[43] Making way for the new procedures, the EPA issued a final rule without prior proposal to remove regulations prescribing the now obsolete general procedural requirements for rulemaking under TSCA section 6, including the former requirement for a hearing.[44]

The EPA also started work on some longer term rulemaking required by the Lautenberg Act. The EPA initiated a required review of standards for determining which companies qualify as "small" manufacturers and processors exempt or subject to lesser reporting under TSCA sections 8(a)(1) and 8(a)(3).[45] The EPA tentatively concluded that they should be updated in light of economic changes since current standards were adopted in the 1980s.[46] Any changes to the standards would be achieved by a subsequent rulemaking. EPA also initiated a negotiated rulemaking to limit section 8(a) chemical data reporting for inorganic byproduct chemical substances when subsequently recycled, reused, or reprocessed.[47] The Lautenberg Act requires the EPA to complete this rulemaking by December 2019 using the rarely used negotiated rulemaking procedural form.[48]

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[40]Processes for Risk Evaluation and Chemical Prioritization for Risk Evaluation under the Amended Toxic Substances Control Act, 81 Fed. Reg. 48,789 (July 26, 2016).

[41]New Chemicals Review Program Under the Amended Toxic Substances Control Act, 81 Fed. Reg. 86,713 (Dec. 1, 2016).

[42]*Changes to the requirements for making confidential business information (CBI) Claims Under The Frank R. Lautenberg Chemical Safety For The 21st Century Act*, ENVTL. PROTECTION AGENCY (last updated Sept. 28, 2016).

[43]Procedures for Prioritization of Chemicals for Risk Evaluation Under the Toxic Substances Control Act, 82 Fed. Reg. 4825 (Jan. 17, 2017) (to be codified at 40 C.F.R. pt. 702); Procedures for Chemical Risk Evaluation Under the Amended Toxic Substances Control Act, 82 Fed. Reg. 7562 (Jan. 19, 2017) (to be codified at 40 C.F.R. pt. 702).

[44]Procedures for Rulemaking Under Section 6 of the Toxic Substances Control Act; Amendment; Final rule, 81 Fed. Reg. 93,633 (Dec. 21, 2016) (to be codified at 40 C.F.R. pt. 750) (final rule).

[45]15 U.S.C. § 2607(a)(3)(C).

[46]TSCA Reporting and Recordkeeping Requirements; Standards for Small Manufacturers and Processors; Notice, 81 Fed. Reg. 90,840 (Dec. 15, 2016).

[47]Chemical Data Reporting; Requirements for Inorganic Byproduct Chemical Substances; Notice of Intent To Negotiate, 81 Fed. Reg. 90,843 (Dec. 15, 2016).

[48]15 U.S.C. § 2607(a)(6).

The Agency published a list of the mercury compounds[49] that, as a result of the Lautenberg Act and subject to certain exceptions, will be prohibited from export on or after January 1, 2020: Mercury (I) chloride or calomel; mercury (II) oxide; mercury (II) sulfate; mercury (II) nitrate; and cinnabar or mercury sulphide.[50] The EPA may expand this list in the future.

As required by the Lautenberg Act,[51] the EPA created a new Science Advisory Committee on Chemicals (SACC) to provide independent advice and expert consultation on the scientific and technical aspects of risk assessments, methodologies, and pollution prevention measures.[52] The SACC will be composed of approximately fourteen members, nine of which will be selected from the existing EPA Chemical Safety Advisory Committee. The EPA sought public comments on its initial slate of potential candidates.[53]

As required by the Lautenberg Act,[54] the EPA identified the first ten chemicals for which it commenced risk evaluations under the amended section 6 procedures: 1,4-Dioxane, 1-Bromopropane, Asbestos, Carbon Tetrachloride, Cyclic Aliphatic Bromide Cluster, Methylene Chloride, N-methylpyrrolidone, Pigment Violet 29, Tetrachloroethylene, and Trichloroethylene (TCE).[55] It also announced the five Workplan PBT chemicals for which the EPA is required to propose risk management controls using the expedited procedures of new section 6(h). Added by the Lautenberg Act, section 6(h) allows the EPA to skip full risk evaluation for certain PBTs and consider only the extent of human and environmental exposure before proposing section 6(a) risk management rules. Control rules for the five must be proposed by June 2019. The five chemicals are: decabromodiphenyl ethers (DecaBDE); hexachlorobutadiene (HCBD); pentachlorothiophenol (PCTP); tris (4-isopropylphenyl) phosphate, and 2,4,6-Tris(tert-butyl)phenol.[56] Two additional PBTs that would have been subject to expedited action will instead be evaluated by full risk assessment at the request of manufacturers, as permitted by section 6(h)(5).[57]

B. Other TSCA Developments

EPA issued final rules establishing emission standards and a framework for third-party certification for composite wood panels, hardwood plywood, particleboard, and medium-density fiberboard[58] as required by Title VI of TSCA, the Formaldehyde

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[49]Mercury Compounds; Prohibition of Export; Notice, 81 Fed. Reg. 58,926 (Aug. 26, 2016).

[50]15 U.S.C. § 2611(c)(7)(A) (2016).

[51]*See* 15 U.S.C. § 2625(e), (o). The SACC will be a federal advisory committee established consistent with section 9(a) of the Federal Advisory Committee Act.

[52]Science Advisory Committee on Chemicals; Establishment of a Federal Advisory Committee; Request for Nominations, 81 Fed. Reg. 58,925 (Aug. 26, 2016).

[53]Nominations to the Science Advisory Committee on Chemicals; Request for Comments, 81 Fed. Reg. 89,092 (Dec. 9, 2016).

[54]15 U.S.C. § 2605(b)(2)(A).

[55]Designation of Ten Chemical Substances for Initial Risk Evaluations Under the Toxic Substances Control Act, 81 Fed. Reg. 91,927 (Dec. 19, 2016).

[56]Press Release, EPA, Office of Chem. Safety and Pollution Prevention, EPA Acts on New Chemical Law to Fast-Track Five Chemicals (Oct. 11, 2016).

[57]15 U.S.C. § 2605(h) (The PBTs made subject to full risk evaluation are the fragrance components Ethanone, 1-(1,2,3,4,5,6,7,8-octahydro-2,3,5,5-tetramethyl-2-naphthalenyl) and Ethanone, 1-(1,2,3,4,5,6,7,8-octahydro-2,3,8,8-tetramethyl-2-naphthalenyl). *See also* LAUTENBERG Q&A DOCUMENT, *supra* note 37, at 9.

[58]Formaldehyde 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).

Standards for Composite Wood Products Act.[59] The Agency also amended the Chemical Data Reporting (CDR) rules to partially exempt a number of substances "of low current interest" from the obligation it submit detailed processing and use information: Fatty acids, C14–18 and C16–18 unsaturated, methyl esters (CASRN 67762–26–9); fatty acids, C16–18 and C–18 unsaturated, methyl esters (CASRN 67762–38–3); fatty acids, canola oil, methyl esters (CASRN 129828–16–6); fatty acids, corn oil, methyl esters (CASRN 515152–40–6); fatty acids, tallow, methyl esters (CASRN 61788–61–2); and soybean oil, methyl esters (CASRN 67784–80–9).[60]

The EPA issued a final SNUR for TCE, applicable to use in consumer products, except for use in cleaners, solvent degreasers, film cleaners, hoof polishes, lubricants, mirror edge sealants, and pepper spray.[61] The EPA issued proposed risk management rules under section 6(a) that would ban the use of TCE for commercial aerosol degreasing and for spot cleaning in dry cleaning facilities.[62] This represents the EPA's first attempt to issue a section 6(a) rule since its unsuccessful attempt to ban uses of asbestos in 1989.

The EPA proposed a SNUR for two alkylpyrrolidones: N-ethylpyrrolidone (NEP) and N-isopropylpyrrolidone (NiPP). The rule would require notice to the EPA before any use of NiPP or NEP other than ongoing uses as a reactant, in silicone seal remover, coatings, consumer and commercial paint primer, and adhesives.[63] The EPA continued to propose,[64] issue,[65] or modify[66] other SNURs for chemical substances that had been the subject of premanufacture notices and other forms of scrutiny.

The EPA proposed a number of amendments to the SNUR regulations, including changes to align SNUR terms with current Occupational Safety and Health Administration (OSHA) and National Institute for Occupational Safety and Health respiratory protection standards and OSHA hazard communication standards, to require consideration of engineering and administrative controls before using personal protective equipment to control SNUR substance exposures; and to consider the removal efficiency of wastewater treatment when determining compliance with SNUR surface water concentration limits.[67]

The EPA denied a section 21 rulemaking petition by the Biobased and Renewable Products Advocacy Group to establish a process for case-by-case amendments to the list

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[59]15 U.S.C. § 2697 (2016).

[60]Partial Exemption of Certain Chemical Substances From Reporting Additional Chemical Data, 81 Fed. Reg. 17,392 (Mar. 29, 2016) (to be codified at 40 C.F.R. pt. 711) (final rule).

[61]Trichloroethylene; Significant New Use Rule, 81 Fed. Reg. 20,535 (Apr. 8, 2016) (to be codified at 40 C.F.R. pts. 9 and 721) (final rule).

[62]Trichloroethylene; 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).

[63]Alkylpyrrolidones; Significant New Use Rule, 81 Fed Reg. 85,472 (Nov. 28, 2016) (to be codified at 40 C.F.R. pt. 721) (proposed rule).

[64]*See* Significant New Use Rule on Certain Chemical Substances, 81 Fed. Reg. 21,830 (Apr. 13, 2016); 81 Fed. Reg. 57,846 (Aug. 24, 2016); 81 Fed. Reg. 74,755 (Oct. 27, 2016) (to be codified at 40 C.F.R. pt. 721) (proposed rules).

[65]*See* Significant New Use Rules on Certain Chemical Substances, 81 Fed. Reg. 7455 (Feb. 12, 2016); 81 Fed. Reg. 30,452 (May 16, 2016); and 81 Fed. Reg. 81,250 (Nov. 17, 2016) (to be codified at 40 C.F.R. pts. 9 and 721) (direct final rules).

[66]*See* Significant New Use Rules on Certain Chemical Substances; Correction, 81 Fed. Reg. 44,797 (July 11, 2016) (to be codified at 40 C.F.R. pt. 721); Significant New Use Rules on Certain Chemical Substances; Withdrawal, 81 Fed. Reg. 45,416 (July 14, 2016) (to be codified at 40 C.F.R. pts. 9 and 721).

[67]Significant New Uses of Chemical Substances; Updates to the Hazard Communication Program and Regulatory Framework; Minor Amendments to Reporting Requirements for Premanufacture Notices, 81 Fed. Reg. 49,598 (July 28, 2016) (to be codified at 40 C.F.R. pts. 720, 721, and 723) (proposed rule).

of natural sources of oil and fat used in the Soap and Detergent Association (SDA) Nomenclature System, and indirectly by the TSCA Inventory, to identify Class 2 chemicals.[68]

The EPA completed work and issued a final rule under Section 8(a) of TSCA establishing significant new reporting obligations on current and future manufacturers, importers and processors of certain nanoscale materials with unique and novel size-dependent properties.[69]

II. PESTICIDES

A. Endangered Species

In 2016, the EPA released for public comment the first-ever draft biological evaluations analyzing the nationwide effects of three insecticides (chlorpyrifos, diazinon, and malathion) on endangered and threatened species and designated critical habitat.[70] The novel nationwide effects analysis was prepared pursuant to the terms of a 2014 settlement agreement between activists, the United States Fish and Wildlife Service (FWS), and the EPA.[71] On May 9, 2016, the Ninth Circuit heard oral arguments in the appeal of a U.S. district court's dismissal of activists' claims in the Endangered Species Act (ESA) "mega" suit, alleging that EPA violated section 7(a)(2) of the ESA by failing to consult with FWS and the National Marine Fisheries Service in reregistering fifty pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[72]

B. Pollinators

The EPA announced the availability of its draft pollinator-only ecological risk assessment for the registration review of the neonicotinoid insecticide imidacloprid.[73] The EPA prepared the assessment with California's Department of Pesticide Registration. The draft assessment identified a residue level of twenty-five parts per billion for imidacloprid, above which effects on pollinator hives are likely to be seen and below which effects are unlikely.[74] Following a 2015 decision of the Ninth Circuit to vacate the unconditional FIFRA registration of a new insecticide, sulfoxaflor, for failure to adequately assess

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[68]TSCA Inventory Equivalency Determinations for Certain Class 2 Substances; TSCA Section 21 Petition; Reasons for Agency Response, 81 Fed. Reg. 1365 (Jan. 12, 2016) (to be codified at 40 C.F.R. ch. I).

[69]Chemical Substances When Manufactured or Processed as Nanoscale Materials; TSCA Reporting and Recordkeeping Requirements, 81 Fed. Reg. 3641 (Jan. 12, 2017) (to be codified at 40 C.F.R. pt. 704) (final rule).

[70]Notice of Availability of Draft Biological Evaluations for Chlorpyrifos, Diazinon, and Malathion, 81 Fed. Reg. 21,341 (Apr. 11, 2016).

[71]Stipulated Settlement and Order, Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., No. 3:11-cv-5108-JSW (N.D. Cal. July 28, 2014).

[72]Ctr. for Biological Diversity v. EPA, No. 14-16977, 2017 WL 460659 (9th Cir. Feb. 2, 2017).

[73]Imidacloprid Registration Review; Draft Pollinator Ecological Risk Assessment; Notice of Availability, 81 Fed. Reg. 2212 (Jan. 15, 2016).

[74]Memorandum from Justin Housenger et al., Envtl. Risk Branch 5, to Kelly Ballard et al., Risk Mgmt. and Implementation Branch, Preliminary Pollinator Assessment to Support the Registration Review of Imidacloprid (Jan. 4, 2016).

potential effects on pollinators,[75] the EPA reevaluated the data supporting its use and approved a new registration, with fewer uses and additional requirements to protect bees.[76]

C. Application to Water

Each of the EPA's ten regions issued final 2016 National Pollutant Discharge Elimination System (NPDES) pesticide general permits, which took effect on October 31, 2016, replacing the existing 2011 general permits, and authorizing certain point source discharges from the application of pesticides to waters of the United States[77] The permits are effective for five years in all jurisdictions where the EPA is the NPDES permitting authority.

D. Synergism

The Ninth Circuit granted the EPA's unopposed motion to remand the FIFRA registration of Enlist Duo, a herbicide used on genetically modified corn and soybeans, to the Agency for reconsideration of whether the combination of 2,4-D choline and glyphosate in Enlist Duo was synergistic, as claimed by the registrant in patent applications discovered by the EPA after the initial registration of Enlist Duo and an amendment.[78] Following remand, the EPA collected additional data on potential synergistic effects of the mixture from the registrant and concluded in a proposed registration decision that the combination of 2,4-D choline and glyphosate in Enlist Duo does not show any increased toxicity to plants and is not of concern.[79]

E. Pesticide Guidance

The EPA released for public comment, two draft Pesticide Registration Notices (PRNs) that address pesticide resistance.[80] Draft PRN 2016-X applies to all conventional, agricultural pesticides and would improve label information on managing pest resistance, and would revise and update PRN 2001-5.[81] Draft PRN 2016-XX provides guidance on labeling, education, training, and stewardship for herbicides undergoing registration review

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[75]Pollinator Stewardship Council v. EPA, 806 F.3d 520 (9th Cir. 2015).

[76]OFFICE OF PESTICIDE PROGRAMS, ENVT'L. PROT. AGENCY, REGISTRATION OF SULFOXAFLOR FOR USE ON AGRICULTURAL CROPS, ORNAMENTALS AND TURF (Oct. 14, 2016).

[77]Final National Pollutant Discharge Elimination System (NPDES) Pesticide General Permit for Point Source Discharges From the Application of Pesticides; Reissuance, 81 Fed. Reg. 75,816 (Nov. 1, 2016).

[78]Petitioner Natural Resources Defense Council's Reply in Support of Motion to Stay Amended Registration Pending Review, Nat. Res. Def. Council, Inc. v. EPA, Nos. 14-73353 et al. (9th Cir. Jan. 25, 2016).

[79]Memorandum from Envtl. Prot. Agency, Response to Public Comments Received Regarding the Evaluation of Enlist DuoTM on Enlist Corn, Cotton, and Soybeans (Jan. 12, 2017).

[80]Draft Guidance for Pesticide Registrants on Pesticide Resistance Management Labeling, 81 Fed. Reg. 35,766 (June 3, 2016); Draft Guidance for Pesticide Registrants on Herbicide Resistance Management Labeling, Education, Training, and Stewardship, 81 Fed. Reg. 35,767 (June 3, 2016).

[81]ENVTL. PROT. AGENCY, DRAFT PESTICIDE REGISTRATION NOTICE 2016-X, GUIDANCE FOR PESTICIDE REGISTRANTS ON PESTICIDE RESISTANCE MANAGEMENT LABELING (2016).

or registration, to address herbicide-resistant weeds.[82] The Agency revised its claim guidance for registered disinfectant products intended to combat emerging viral pathogens.[83] A United States district court dismissed activists' claims that the 2013 EPA guidance that clarified application of FIFRA's treated articles exemption to pesticide-treated seeds was unlawful final agency action under the Administrative Procedure Act.[84]

F. Conditional Registration

The EPA's Environmental Appeals Board (EAB) upheld the Agency's cancellation of conditional registrations of the insecticide flubendiamide.[85] As a condition of their FIFRA section 3(c)(7)(c),[86] new chemical conditional registration, the registrants had agreed promptly to request voluntary cancellation if, after reviewing additional data, the Pesticide Program concluded that the pesticide causes unreasonable adverse effects. Acceptance of the condition provided the registrants with immediate registration and market access while additional data was developed, but limited their procedural protections in the event, as happened, the EPA concluded that the registration should be cancelled. The EAB rejected registrants' claim that it was unlawful for the EPA to include in a conditional registration a provision that arguably bypassed statutory due process requirements included in the FIFRA section 6(b) general cancellation provision[87] and affirmed the EPA's expedited cancellation hearing under section 6(e), limited to whether registrants complied with the conditions of registration and whether the EPA's order prohibiting continued sale and use of existing stocks was consistent with FIFRA.

G. State Preemption

The Ninth Circuit decided that a county ordinance that regulated both genetically engineered (GE) crops and pesticides is preempted by Hawaii state law.[88]

H. California Proposition 65

Monsanto Company filed a complaint against California's Office of Environmental Health Hazard Assessment (OEHHA) in California superior court to prevent the inclusion of the herbicide glyphosate on the Proposition 65 list of chemicals known to California to cause cancer.[89] Syngenta Crop Protection, LLC appealed a California superior court's

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[82]ENVTL. PROT. AGENCY, DRAFT PESTICIDE REGISTRATION NOTICE 2016-XX, GUIDANCE FOR HERBICIDE-RESISTANCE MANAGEMENT, LABELING, EDUCATION, TRAINING, AND STEWARDSHIP (2016).

[83]ENVTL. PROT. AGENCY, GUIDANCE TO REGISTRANTS: PROCESS FOR MAKING CLAIMS AGAINST EMERGING VIRAL PATHOGENS NOT ON EPA-REGISTERED DISINFECTANT LABELS (2016).

[84]Order Granting Defendants' Motion for Summary Judgment, Denying as Moot Defendant-Intervenors' Motion for Summary Judgment, and Denying Plaintiffs' Motion for Summary Judgment, Anderson v. McCarthy, No. 3:16-cv-68, 2016 WL 6834215 (N.D. Cal. Nov. 21, 2016).

[85]Final Decision and Order, *In re* Bayer CropScience LP, No. FIFRA-HQ-2016-0001, 2016 WL 4125892 (EAB July 29, 2016).

[86]7 U.S.C. § 136a(c)(7)(C) (2016).

[87]Final Decision and Order, *Bayer CropScience*, 2016 WL 4125892, at *38, *40, *57-61.

[88]Syngenta Seeds, Inc. v. Cty. of Kauai, 842 F.3d 669 (9th Cir. 2016).

[89]Monsanto Company's Verified Petition for Writ of Mandate and Complaint for Preliminary and Permanent Injunctive and Declaratory Relief, Monsanto Co. v. Office of

refusal to enjoin OEHHA's inclusion of the herbicide atrazine on the Proposition 65 list of chemicals known to California to cause reproductive toxicity.[90] Activists filed a complaint against Dow AgroSciences LLC in California Superior Court, alleging that the company exposed bystanders, passersby, and residents of farm communities to the soil fumigant 1,3-dichloropropene without having provided warnings allegedly required under Proposition 65.[91]

I. Applicator Protections

The EPA issued standards for applicators who apply restricted-use pesticides. Among other things, the new standards require enhanced training for certified applicators and their employees, set a minimum age for applicators, and establish application method specific applicator certification categories.[92]

J. Inert Pesticide Ingredients

The EPA announced that it would be removing from its approved inert ingredients lists seventy-two chemicals that are no longer used in any active pesticide product.[93] Pesticide product manufactures wishing to use these inerts in the future will need to demonstrate their safety before use. This action follows the 2014 denial of a petition to require disclosure of hazardous inerts on product labels as a partial alternative to that approach.[94]

III. EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW

October 17, 2016 marked the 30th anniversary of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA). EPCRA established much of the federal framework for chemical accident prevention, emergency response planning and preparedness, emergency release notification, and toxic chemical storage and release reporting.[95] In recognition of this milestone, the EPA published a thirty-year retrospective featuring key events in the implementation and evolution of the statute.[96] Despite its age, the statute continues to be an important component of the federal environmental framework.

The EPA added hexabromocyclododecane (HBCD), a flame retardant, to the list of Toxics Release Inventory (TRI)-reportable chemicals[97] and proposed adding a new

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Envtl. Health Hazard Assessment, No. 16CECG00183, 2016 WL 284549 (Cal. Super. Ct. Jan. 21, 2016).

[90]Appellant's Opening Brief, Syngenta Crop Prot., LLC v. Office of Envtl. Health Hazard Assessment, No. C082128, 2016 WL 7492584 (Cal. Ct. App. May 31, 2016).

[91]Ctr. for Envtl. Health v. Dow AgroSciences LLC, No. RG16831788 (Cal. Super. Ct. Sept. 20, 2016).

[92]Pesticides; Certification of Pesticide Applicators, 82 Fed. Reg. 952 (Jan. 4, 2017) (to be codified at 40 C.F.R. pt. 171) (final rule).

[93]Press Release, EPA, EPA Prohibits 72 Inert Ingredients from Use in Pesticides (Dec. 20, 2016).

[94]Letter from Jim Jones, Assistant Adm'r, Office of Chem. Safety and Pollution Prevention, EPA, to Kamala Harris, Attorney Gen., State of Cal. (May 22, 2014).

[95]42 U.S.C. §§ 11001-11050 (2016).

[96]*30 Years of EPCRA*, ENVTL. PROTECTION AGENCY (last updated Sept. 28, 2016).

[97]Addition of Hexabromocyclododecane (HBCD) Category; Community Right-to-Know Toxic Chemical Release Reporting, 81 Fed. Reg. 85,440 (Nov. 28, 2016) (to be codified at 40 C.F.R. pt. 372) (final rule).

chemical category to the list -- nonylphenol ethoxylates (NPEs).[98] NPEs are commonly used in commercial and industrial adhesives, wetting agents, emulsifiers, stabilizers, dispersants, defoamers, cleaners, paints, and coatings.

The EPA amended the EPCRA hazardous chemical reporting regulations to reflect changes to OSHA's Hazard Communication Standard (HCS).[99] The changes align the EPA's hazard categories for hazardous chemical inventory reporting under EPCRA section 312 and for list reporting under EPCRA section 311 with the United Nations Globally Harmonized System of Classification and Labeling of Chemicals (GHS).[100]

Responsibility for programmatic implementation of the TRI program was transferred from EPA's Office of Environmental Information (OEI) to the Office of Chemical Safety and Pollution Prevention (OCSPP) on February 7, 2016.[101]

IV. HYDRAULIC FRACTURING

The United States District Court for the District of Wyoming set aside a 2015 final rule[102] promulgated by the Bureau of Land Management (BLM) to regulate hydraulic fracturing on federal and tribal land.[103] The court explained that "Congress has not delegated to the Department of Interior the authority to regulate hydraulic fracturing."[104] The Justice Department promptly appealed the ruling to the United States Court of Appeals for the Tenth Circuit.[105]

The EPA issued a final rule to implement pretreatment standards for wastewater and other fluids used in hydraulic fracturing for unconventional oil and natural gas wells sent to publicly owned treatment works (POTWs).[106] The final rule required a zero discharge for wastewater from hydraulic fracturing operations flowing into POTWs. The EPA subsequently extended the compliance date to August 2019 for existing sources that were lawfully discharging to POTWs on or between April 7, 2015 and June 28, 2016.[107]

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[98]Addition of Nonylphenol Ethoxylates Category; Community Right-To-Know Toxic Chemical Release Reporting, 81 Fed. Reg. 80,624 (Nov. 16, 2016) (to be codified at 40 C.F.R. pt. 372) (proposed rule).

[99]Hazardous Chemical Reporting: Community Right-to-Know; Revisions to Hazard Categories and Minor Corrections, 81 Fed. Reg. 38,104 (June 13, 2016) (to be codified at 40 C.F.R. pt. 370) (final rule).

[100]*Id.*

[101]ENVTL. PROT. AGENCY, OFFICE OF CHEMICAL SAFETY AND POLLUTION PREVENTION FINAL FY 2017 ADDENDUM TO THE FY 2016-2017 NATIONAL PROGRAM MANAGER GUIDANCE 4 (2016).

[102]Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 80 Fed. Reg. 16,128 (Mar. 26, 2015) (to be codified at 43 C.F.R. pt. 3160) (final rule); Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 80 Fed. Reg. 16,577 (Mar. 30, 2015) (to be codified at 40 C.F.R. pt. 3160) (correction).

[103]Wyoming v. Dep't. of Interior, Nos. 2:15-CV-043-SWS, 2:15-CV-041-SWS, 2016 WL 3509415 (D. Wyo. June 21, 2016), *appeal docketed*, No. 16-8069 (10th Cir. June 29, 2016).

[104]*Id.* at *12.

[105]Wyoming v. Dep't of Interior, No. 16-8069 (10th Cir. June 29, 2016).

[106]Effluent Limitations Guidelines and Standards for the Oil and Gas Extraction Point Source Category, 81 Fed. Reg. 41,845 (June 28, 2016) (to be codified at 40 C.F.R. pt. 435) (final rule).

[107]Effluent Limitations Guidelines and Standards for the Oil and Gas Extraction Point Source Category, Implementation Date Extension, 81 Fed. Reg. 67,191 (Sept. 30, 2016) (to be codified at 40 C.F.R. pt. 435) (direct final rule).

In the latest chapter in *Robinson Township v. Commonwealth*[108] (a long running challenge to aspects of 2012 Pennsylvania legislation regulating the oil and gas industry in the state (Act 13[109]), the Pennsylvania Supreme Court struck down as unconstitutional provisions of Act 13, including one that prevented a well operator, service provider, or vendor from disclosing to health care providers the identity of fracking chemicals claimed to be confidential, except under the terms of a confidentiality agreement and certification that the information would be used for medical treatment for a person exposed to the chemicals.[110] The court also struck down a provision that required notice of fracking chemical spills to potentially affected public drinking water facilities but not privately operated facilities.[111]

V. BIOTECHNOLOGY DEVELOPMENTS

The United States Department of Agriculture (USDA), Animal and Plant Health Inspection Service (APHIS) announced plans to prepare a programmatic environmental impact statement (PEIS) as a first step in the review and potential overhaul of its regulations governing the release of genetically engineered plants and other organisms, pursuant to 7 C.F.R. Part 340.[112] APHIS also issued new guidance to assist technology developers in applying for "extensions" of non-regulated status (essentially a streamlined deregulation process) for engineered organisms that are similar to those that have previously been deregulated.[113] APHIS published interpretive letters to two technology developers confirming that their products (waxy corn and certain mushrooms), developed using CRISPR gene editing technology, are not regulated articles under 7 C.F.R. Part 340 because they each were developed without using genetic material from a plant pest.[114]

In response to Vermont's enactment of legislation requiring the labeling of foods produced with genetic engineering[115] and to avoid a patchwork of differing state labeling requirements, President Obama signed into law an amendment to the Agricultural Marketing Act of 1946 that directs the Secretary of Agriculture to establish a uniform national labeling standard for certain bioengineered foods.[116] The law, which requires the Secretary to promulgate regulations within two years of enactment (July 2018), anticipates three different options for disclosing genetically engineered food content: through on-package text, a USDA-created symbol, or a "QR" code that can be scanned by smart phones linking to online information. The new law specifically preempts state labeling requirements for bioengineered foods.

The White House Office of Science and Technology Policy (OSTP) issued a draft document updating the 1986 Coordinated Framework for the Regulation of Biotechnology

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[108]147 A.3d 536 (Pa. 2016).
[109]58 PA. CONS. STAT. §§ 2301–3504 (2016).
[110]*Robinson Township*, 147 A.3d at 588.
[111]*Id.* at 589.
[112]Environmental Impact Statement; Introduction of the Products of Biotechnology, 81 Fed. Reg. 6225 (Feb. 5, 2016).
[113]BIOTECHNOLOGY REGULATORY SERVS. ET AL., REQUEST TO EXTEND NONREGULATED STATUS FROM A PREVIOUS DETERMINATION: EXTENSION GUIDANCE FOR DEVELOPERS (2016).
[114]Letter from Michael Firko, APHIS Deputy Adm'r, Biotechnology Regulatory Servs., to Dr. Daria H. Schmidt, DuPont Pioneer (Apr. 18, 2016) (on file with APHIS); Letter from Michael Firko, APHIS Deputy Adm'r, Biotechnology Regulatory Servs., to Dr. Yinong Yang, The Pa. State Univ. (Apr. 13, 2016) (on file with APHIS).
[115]VT. STAT. ANN. tit. 9, §§ 3041-48 (2015).
[116]National Bioengineered Food Disclosure Standard, Pub. L. No. 114-216, 130 Stat. 834 (2016).

(the Coordinated Framework), which maps out the respective roles of the EPA, USDA, and the United States Food and Drug Administration (FDA) in regulating products of biotechnology.[117] A final version of the document will be issued after comments on the draft document are reviewed. OSTP also released a second document which outlines "a long-term strategy to ensure that the [f]ederal regulatory system is equipped to assess efficiently the risks, if any, of future products of biotechnology."[118]

As part of a project to update its 1997 guidance document for submitting pre-manufacture Microbial Commercial Activity Notices (MCANs) or TSCA Experimental Release Applications (TERA),[119] the EPA held the second of two public meetings on considerations for risk assessments for intergeneric cyanobacteria, eukaryotic microalgae, and their products by application of genetic engineering approaches, including public comment on a draft guidance for submitting MCANs and TERAs for algae products.[120]

The EPA's Office of Inspector General issued a report warning that the EPA needs to take steps to improve its Insect Resistance Management (IRM) program for *Bacillus thuringiensis* (Bt) as a plant incorporated protectant in corn.[121] At around the same time, the EPA initiated the registration review process for plant incorporated protectant products employing Bt.[122]

The United States Court of Appeals for the Ninth Circuit issued unanimous decisions striking down ordinances enacted by three Hawaii counties – the counties of Maui, Kauai, and Hawaii – that would have imposed bans or restrictions on the cultivation and testing of genetically engineered (GE) crops.[123] The court's decisions were based on findings of preemption under federal and Hawaii state law.

VI. GREEN CHEMISTRY

The United States Senate report on the bill that would become the Lautenberg Act (S.697) [124] was critical of the EPA's Safer Choice Program/Design for the Environment Program, noting potential consumer confusion if chemicals deemed safe after TSCA risk evaluation were not also recognized as safe under the Safer Choice Program. The report also suggested that if S.697 were enacted, the EPA should consider using a "private sector voluntary consensus standard" as an alternative to further expanding or utilizing "certain aspects" of the Safer Choice Program. In contrast, attendees at the Safer Choice Program

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[117]OFFICE OF SCI. & TECH. POLICY, MODERNIZING THE REGULATORY SYSTEM FOR BIOTECHNOLOGY PRODUCTS: AN UPDATE TO THE COORDINATED FRAMEWORK FOR THE REGULATION OF BIOTECHNOLOGY (2016).

[118]EMERGING TECHS. INTERAGENCY POLICY COORDINATION COMM., NATIONAL STRATEGY FOR MODERNIZING THE REGULATORY SYSTEM FOR BIOTECHNOLOGY PRODUCTS (2016).

[119]ENVTL. PROT. AGENCY, OFFICE OF POLLUTION PREVENTION AND TOXICS, POINTS TO CONSIDER IN THE PREPARATION OF TSCA BIOTECHNOLOGY SUBMISSIONS FOR MICROORGANISMS (1997).

[120]Notice of Public Meeting and Opportunity for Public Comment on EPA's Draft Algae Guidance for the Preparation of TSCA Biotechnology Submissions; Notice, 81 Fed. Reg. 70,419 (Oct. 12, 2016).

[121]ENVTL. PROT. AGENCY, OFFICE OF INSPECTOR GEN., EPA NEEDS BETTER DATA, PLANS AND TOOLS TO MANAGE INSECT RESISTANCE TO GENETICALLY ENGINEERED CORN, REPORT NO. 16-P-0194 (2016).

[122]Registration Review Proposed Decisions for Sulfonylureas and Certain Other Pesticides; Notice of Availability, 81 Fed. Reg. 45,477 (July 14, 2016).

[123]Atay v. Cty. of Maui, 842 F.3d 688 (9th Cir. 2016); Syngenta Seeds, Inc. v. Cty. of Kauai, 842 F.3d 669 (9th Cir. 2016); Hawai'i Papaya Indus. Ass'n v. Cty. of Hawaii, No. 14-17538, 2016 WL 6819700 (9th Cir. Nov. 18, 2016).

[124]S. REP. NO. 114-67, at 30 (2016).

summit meeting in November 2016 were strongly supportive of the program. They urged the EPA to expand the Safer Chemical Ingredient List, product categories eligible for recognition, and availability of Safer Choice information at point-of-sale.[125]

The California Department of Toxic Substances Control (DTSC) proposed the first regulation under the California Safer Consumer Products initiative: Children's foam-padded sleeping products containing TDCPP or TCEP.[126]

Through efforts such as Zero Discharge of Hazardous Chemicals (ZDHC), over twenty apparel brands are partnering with their suppliers to develop new apparel technologies that require less water and energy to produce and use less hazardous substances in the value chain.[127] ZDHC builds upon green chemistry efforts in other sectors, including building, automobile manufacturing, office furniture manufacturing, and electronics manufacturing, to "green" the supply chain by fostering collaboration between consumer brands, retailers, manufacturers, and suppliers.

[125]*Product Makers Urge EPA, Others to Grow 'Safer Choice'*, BNA DAILY ENV'T REPORT (Nov. 17, 2016).

[126]Safer Consumer Products Regulations – Listing Children's Foam-Padded Sleeping Products Containing TDCPP or TCEP as a Priority Product, Notice of Proposed Action, 2016 No. 29-Z Cal. Regulatory Notice Reg. 1212 (proposed July 15, 2016) (to be codified at 22 C.C.R., div. 4.5, ch. 55).

[127]*Leading the textile and footwear industries towards zero discharge of hazardous chemicals*, ZDHC FOUND. (last updated Dec. 16, 2016).

Chapter 9 • SUPERFUND AND NATURAL RESOURCE DAMAGES LITIGATION
2016 Annual Report[1]

I. SUPERFUND: ADMINISTRATIVE AND REGULATORY DEVELOPMENTS

Congress enacted no changes to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) during 2016. The key administrative rule changes were the:

(a) Addition by the EPA of fifteen new sites to the National Priorities List (NPL), deletion of one, and proposals to list sixteen sites;[2]
(b) Adoption of a rule to change of the Hazard Ranking System to add vapor intrusion as a contaminant pathway to evaluate in deciding whether a site belongs on the NPL;[3] and
(c) Big increases in potential financial penalties for CERCLA violations, including failures to respond to information requests under section 104(e) and violations of unilateral administrative orders issued under section 106.[4]

Acting to comply with court-ordered deadlines, the EPA also proposed a rule establishing financial responsibility requirements under section 108(b) of CERCLA for Classes of Facilities in the Hard Rock Mining Industry, with a December 1, 2017 deadline for final action.[5] In tandem with that proposal and its court-ordered schedule, the EPA also intends to require similar financial assurance for facilities in the Chemical, Petroleum and Coal Products, and Electric Power Industries, with proposals due July 2, 2019, December 4, 2019, and December 1, 2022, respectively. Final action on these three proposals is due on December 2, 2020, December 1, 2021, and December 4, 2024, respectively.[6]

The financial assurance rule proposals are more than thirty years past the statutory deadlines for action. Because of the lengthy past delays and current court supervision, the Presidential election result is not expected to delay that court-mandated schedule for the

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[1]Russell V. Randle, Squire Patton Boggs, LLP, Washington, DC; John Barkett, Shook Hardy & Bacon, LLP Miami, Fl. This chapter reviews significant 2016 CERCLA decisions and developments. The authors thank Gary L. Pasheilich of Squire, Patton Boggs, LLP, Columbus, OH, for his able editorial help.

[2]National Priorities List, 81 Fed. Reg. 62,397 (Sept. 9, 2016) (to be codified at 40 C.F.R. pt. 300, app. A); National Priorities List, 81 Fed. Reg. 20,252 (Apr. 7, 2016) (to be codified at 40 C.F.R. pt. 300, app. A); National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List: Deletion of the Jackson Steel Superfund Site, 81 Fed. Reg. 53,311 (Aug. 12, 2016) (to be codified at 40 C.F.R. pt. 300, app. A); National Priorities List, 81 Fed. Reg. 62,428 (Sept. 9, 2016) (to be codified at 40 C.F.R. pt. 300, app. A), National Priorities List, 81 Fed. Reg. 20,277 (Apr. 7, 2016) (to be codified at 40 C.F.R. pt. 300, app. A).

[3]Addition of a Subsurface Intrusion Component to the Hazard Ranking System, 81 Fed. Reg. 10,372 (Feb. 29, 2016) (to be codified at 40 C.F.R. pt. 300).

[4]Civil Monetary Penalty Inflation Adjustment Rule, 81 Fed. Reg. 43,091 (July 1, 2016) (codified at 40 C.F.R. pt. 19).

[5]*SBAR PANEL: CERCLA 108(b) Hard Rock Mining Financial Assurance Proposed Rule*, ENVTL. PROT. AGENCY (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)).

[6]Financial 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).

EPA action. The financial cost to affected hard rock mining industry sectors is estimated by the EPA to be between $111 and $171 million per year.[7]

II. SUPERFUND: JUDICIAL DEVELOPMENTS

A. Applicability and Constitutional Issues

The Supreme Court decided no CERCLA cases in 2016. There were no decisions addressing constitutional challenges to CERCLA. However, in *United States v. Sawyer*,[8] the Sixth Circuit affirmed the use of the criminal restitution statute[9] by the United States to recover response costs for asbestos cleanup after criminal violations of the EPA's asbestos abatement rules. In doing so, the court rejected Defendant's argument that the EPA's expenditures could only be recovered civilly under CERCLA.[10]

B. Jurisdiction

In *Land O'Lakes, Inc. v. United States*,[11] the EPA had issued a cost demand and a unilateral administrative order (UAO) to the plaintiff, which then carried out the work at the site under the UAO. The plaintiff filed a declaratory judgment action and a citizen suit under the Resource Conservation and Recovery Act (RCRA), seeking a determination that it was not liable for the EPA's costs or for the work it had completed at the site. The court dismissed the case, holding that the EPA's enforcement activities, such as the UAO and cost demand letter, fall within the statutory definition of "remedial action" under section 101(25), as well as under section 113(h), which bars challenges to the EPA remedial actions, except and until the United States brings an enforcement action in court against a party.[12] This bar applies to declaratory judgment claims and to citizen suits under RCRA.[13]

C. Standing

In the decision *In re Idaho Conservation League*,[14] the D.C. Circuit, over the objection of the mining industry, approved a schedule negotiated by environmental groups and the EPA for promulgating financial assurance rules for various industry sectors under section 108(b) of CERCLA.[15] At issue was whether the environmental groups had standing to object to the EPA's failure to act and whether the objecting industry associations had standing to intervene. The court confirmed the environmental groups' standing since the member's alleged injury is fairly traceable to the EPA's failure to act and is likely to be redressed through a favorable agency action.[16] As to the industry associations, they lacked standing since the consent order's schedule did not dictate whether the EPA would propose or adopt financial assurance rules, or the content of any such rules.[17]

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[7]Financial Responsibility Requirements Under CERCLA § 108(b) for Classes of Facilities in the Hardrock Mining Industry, 82 Fed. Reg. 3388 (Jan. 11, 2017) (to be codified at 40 C.F.R. pt. 320).
[8]825 F.3d 287 (6th Cir. 2016).
[9]18 U.S.C. § 3663(A) (2016).
[10]825 F.3d at 299.
[11]No. CIV-15-683-R, 2016 U.S. Dist. LEXIS 16157 (W.D. Okla. Feb. 10, 2016).
[12]*Id.* at *7-11.
[13]*Id.* at *9.
[14]811 F.3d 502 (D.C. Cir. 2016).
[15]*See* 42 U.S.C. § 9608(b) (2016).
[16]811 F.3d at 508-13.
[17]*Id.* at 514.

D. Elements of Liability

In *Garrett Day LLC v. International Paper Co.*,[18] the district court required plausible allegations of disposal of hazardous substances at the site during the defendant's tenure, such disposal being as a result of "active human conduct" and not simply passive migration.[19] In the absence of such allegations, the complaint was dismissed.

E. Liability of Particular Parties

1. Owners and Operators

In *Diamond X Ranch LLC v. Atlantic Richfield Co.*,[20] allegations as to third-party defendant PLC's operation of a flood irrigation system and maintenance of irrigation ditches were sufficient to constitute "disposal" under Section 107(a)(2).[21] Third-party plaintiff ARCO alleged that PLC's actions allowed contaminated waters to flow through irrigation ditches onto plaintiff Diamond X's property, and that hazardous substances were disposed of on Diamond X property. Because CERCLA was to be "broadly" interpreted, the court held that PLC's actions "specifically related to pollution,"[22] and the allegations were therefore sufficient to satisfy the definition of "disposal," which includes the "'placing of any … hazardous waste … on any land or water ….'"[23]

In *Department of Toxic Substances Control v. Technichem*,[24] the district court denied summary judgment against an individual as an operator of a facility because of ambiguity as to when the release of hazardous substances occurred, possibly after he stopped being an operator.

2. Generators, Transporters, Arrangers

In *Pakootas v. Teck Cominco Metals, Ltd.*, the Ninth Circuit addressed whether the air emissions of hazardous substances (i.e. lead, arsenic, cadmium and mercury) from a Canadian smelter constitutes "disposal" of hazardous substances when these substances are deposited downwind at a site located ten miles away in the United States.[25] Even as section 107(a)(3) of CERCLA imposes liability on those who arrange for the disposal of hazardous substances,[26] the court held that the term "disposal" did not include aerial deposition.[27] The court based this reading on earlier Ninth Circuit decisions which held that "disposal" in this context did not include the gradual and passive spread of hazardous substances by natural processes.[28]

3. Parent/Shareholder and Successors

Finding that the result of the asset sale in issue was the same as what would have occurred if a statutory merger had occurred, the district court applied the de facto merger

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[18]No. 3:15-cv-36, 2016 U.S. Dist. LEXIS 25494 (S.D. Ohio Feb. 29, 2016).
[19]*Id.* at *12-14.
[20]No. 3:2013cv00570, 2016 U.S. Dist. LEXIS 114799 (D. Nev. Aug. 26, 2016).
[21]*Id.* at *24.
[22]*Id.* at *31-32.
[23]*Id.* at *33-34 (citing 42 U.S.C. § 6903(3) (2016)).
[24]No. 12-cv-05845-VC, 2016 U.S. Dist. LEXIS 33379, at *8-11 (N.D. Cal. Mar. 15, 2016).
[25]830 F.3d 975 (9th Cir. 2016).
[26]*See* 42 U.S.C. § 9607(a)(3) (2016).
[27]830 F.3d at 985.
[28]*Id.*

doctrine in *AmeriPride Services v. Valley Industrial Services*[29] to establish successor liability. While the asset seller did not dissolve immediately, the court held that there was complete continuity of business operations and, more importantly, of shareholders, as well as a complete assumption of liabilities; hence the asset sale was a de facto merger.[30]

In *Florida Power Corp. v. FirstEnergy Corp.*,[31] the plaintiff sought, despite the passage of nearly eighty years, to pierce the corporate veil of a parent corporation to establish CERCLA liability for response costs incurred at two former manufactured gas sites. Applying Florida law, the court rejected the claim where plaintiff was unable to show by clear and convincing evidence that the corporate form was used fraudulently or for an improper purpose.[32]

F. Private Cost Recovery, Contribution and Contribution Protection

1. Contribution (section 113) v. Cost Recovery (section 107)

In *Whittaker Corp v. United States*,[33] the Ninth Circuit held that Whittaker could pursue a cost recovery claim and was not limited to a contribution action. Whittaker had earlier been found liable for response costs, both incurred by others and incurred directly, in connection with perchlorate contaminated groundwater. Whittaker sued the United States for the directly-incurred response costs. The district court dismissed the action finding that Whittaker was limited to a contribution claim due to an earlier suit in which Whittaker had paid response costs, even though Whittaker had not sought contribution for those costs.[34] The court of appeals reversed, stating that

> Whittaker was found liable to the Castaic Lake plaintiffs for the expenses specifically related to removing perchlorate from the plaintiffs' wells and replacing their water. Whittaker now seeks reimbursement from the government for a different set of expenses, for which Whittaker was not found liable in *Castaic Lake* . . . Whittaker was not required to bring its claims in this case in a [section] 113(f) contribution action after its liability was resolved in *Castaic Lake*.[35]

In *Allied Waste Transportation Inc. v. John Sexton Sand & Gravel Corp.*,[36] the district court held that the plaintiff could bring a cost recovery action since it had not resolved its liability to the state. A "final consent order" with the state, although executed by Plaintiff, conditioned release of liability upon completion of certain work and future payments, neither of which had yet occurred. Hence, Plaintiff could not bring a contribution action under section 113(f)(3)(B).[37] Because there was no prior civil action under sections 106 or 107 of CERCLA, a section 113(f)(1) contribution action did not lie.[38]

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[29]No. 2:00-cv-00113-MCE-EFB, 2016 U.S. Dist. LEXIS 91119, at *27-32 (E.D. Cal. July 12, 2016).
[30]*Id.*
[31]No. 1:12-cv-1839, 2016 U.S. Dist. LEXIS 171291 (N.D. Ohio Dec. 12, 2016).
[32]*Id.* at *24-27.
[33]825 F.3d 1002 (9th Cir. 2016).
[34]*Id.* at 1005.
[35]*Id.* at 1011 (referring to Castaic Lake Water Agency v. Whittaker Corp., 272 F. Supp. 2d 1053 (C.D. Cal. 2003)).
[36]No. 13 C 1029, 2016 U.S. Dist. LEXIS 82001 (N.D. Ill. June 23, 2016).
[37]*Id.* at *31-33.
[38]*Id.* at *33.

Diamond X Ranch LLC v. Atlantic Richfield Co.[39] includes a question of whether a CERCLA defendant can assert a cost-recovery counterclaim (instead of a contribution counterclaim) against a cost-recovery plaintiff. Because defendant ARCO sought to recover costs separate from those Diamond X sought to recover in its section 107(a) claim, ARCO was allowed to pursue its cost-recovery claim.[40] Diamond X alternatively argued that since ARCO incurred response costs under a section 106 Unilateral Administrative Order (UAO), ARCO was limited to a contribution claim under section 113(f)(1). The district court, however, followed the majority of cases holding that a UAO is not a "civil action" in part because a UAO does not have the preclusive effect of a judgment in a civil action and ARCO could not "appeal" the UAO or present meaningful defenses to it, procedural measures that would be available in a "civil action."[41]

In *DMJ Associates, L.L.C. v. Capasso*,[42] the district court denied the third-party Defendants' motion for summary judgment against third-party Plaintiffs' cost recovery claim. The third-party Defendants argued that the third-party Plaintiffs resolved their liability to the state of New York in an administrative order on consent (AOC). However, the AOC was terminated before the parties fulfilled their obligations and the AOC only provided for a release from liability once the New York Department of Environmental Conservation approved a final report. The court held that "[s]ince no final report was issued due to the AOC's termination prior to the completion of all remedial action, the third-party plaintiffs had not been released from liability. Accordingly, they cannot assert a contribution claim under [section] 113(f)(3)(B), but may pursue a cost recovery action under [section] 107(a)."[43] However, the court held that other costs sought by third-party plaintiffs were subject only to a contribution claim, observing that "[c]onsistent with the Supreme Court's holding in *Atlantic Research*, none of the listed costs are recoverable under both sections simultaneously . . . [and] the [third-party plaintiffs] should be permitted to maintain both [section] 107 and [section] 113 causes of action as the evidence supported the applicability of both statutes to their cost outlays."[44]

In *Confederated Tribes & Bands of the Yakama Nation v. United States*,[45] the district court rejected a magistrate judge's recommendation to deny Plaintiff's motion for summary judgment on future response costs. Plaintiff had incurred response costs, the court explained, and section 113(g) of CERCLA provides that the court "shall enter" a declaratory judgment on liability for future response costs so that a successful CERCLA plaintiff need not retry a defendant's liability when it incurs response costs in the future.[46] The court made clear, however, that a declaratory judgment on liability does not eliminate the need to demonstrate that future response costs are, in fact, recoverable under CERCLA.[47]

In *Next Millennium Realty, L.L.C. v. Adchem Corp.*,[48] the district court held that, consistent with New York law that a dissolved corporation does not have the capacity to be sued once its affairs were "fully adjusted and wound up," the dissolved corporation in the case did not have the capacity to be sued.[49] As the company's affairs had been "fully

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[39]No. 3:13-cv-00570-MMD-WGC, 2016 U.S. Dist. LEXIS 114799 (D. Nev. Aug. 26, 2016).
[40]*Id.* at *16.
[41]*Id.* at *19-23.
[42]181 F. Supp. 3d 162 (E.D.N.Y. 2016).
[43]*Id.* at 168.
[44]*Id.* at 169 (referring to United States v. Atl. Research, 551 U.S. 128 (2007)).
[45]No. 3:14-CV-01963-PK, 2016 U.S. Dist. LEXIS 11927 (D. Or. Feb. 1, 2016).
[46]*Id.* at *4.
[47]*Id.* at *5.
[48]No. CV 03-5985 (GRB), 2016 U.S. Dist. LEXIS 40735 (E.D.N.Y. Mar. 23, 2016).
[49]*Id.* at *90.

adjusted and wound up" by 1979 and suit was not brought until 2003, summary judgment was appropriate.[50]

In *Virginia Street Fidelco, L.L.C. v. Orbis Products Corp.*,[51] the district court dismissed a contribution claim because a settlement with a private party does not satisfy section 113(f)(3)(B)'s requirement that there be a resolution of liability to the United States or a state in order to trigger a right of contribution.[52] Plaintiff's cost recovery claim, however, withstood summary judgment motions because there were issues of material fact on whether five defendants were former operators or arrangers.[53]

The district court in *Hobart Corp. v. Dayton Power & Light Co.*[54] denied motions to dismiss contingent contribution crossclaims brought against third-party Defendants. The district court noted that while "the equitable allocation scheme of [section] 113 largely eliminates the need for counterclaims and crossclaims, . . . to the extent that a cross-claimant may ultimately disagree with the Court's allocation of response costs, a contingent crossclaim asserted under [section] 113(f) protects the parties' right to seek contribution from others."[55]

2. Approval and Effect of Settlements

In *United States v. Doe Run Resource Corp.*, the district court allowed intervention by a party who previously settled with the United States so that the party could object to a proposed consent decree with other parties, which would serve to cut off the intervenor's claims against the newly settling parties.[56] The district court did not allow discovery or an evidentiary hearing.[57]

G. Allocation, Indemnification and Subrogation.

AmeriPride Services v. Valley Industrial Services[58] illustrates the complex maze that Superfund allocation can create. AmeriPride paid $10.25 million to two other parties to settle its Superfund liability and then received $3.25 million in settlements from two other parties. After an allocation trial of the claim against Valley Industries, the district court applied the Uniform Contribution Among Tortfeasors Act to the $3.25 million payment, effectively reducing AmeriPride's claim pro tanto. The district court divided responsibility equally to AmeriPride and Valley Industries for allowable response costs which totaled $15.5 million (including the $10.25 million payment). Prejudgment interest was allowed from the date that costs were incurred rather from the date that payment was demanded in writing for a sum certain.

The Ninth Circuit vacated the judgment and remanded. On remand, the district court applied the Uniform Comparative Fault Act to the $3.25 million in settlement dollars received by AmeriPride and determined the equitable shares of the settling parties.[59] AmeriPride argued that neither settling party was liable so that it should keep the $3.25

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[50] *Id.* at *92-93.
[51] No. 11-2057 (KM), 2016 U.S. Dist. LEXIS 102641 (D.N.J. Aug. 3, 2016).
[52] *Id.* at *24-26.
[53] *Id.* at *12-24.
[54] No. 3:13-cv-115, 2016 U.S. Dist. LEXIS 134573 (S.D. Ohio Sept. 26, 2016).
[55] *Id.* at *75.
[56] No. 15-CV-0663-CVE-TLW, 2016 U.S. Dist. LEXIS 148959, at *6-8 (N.D. Okla. Oct. 27, 2016).
[57] *Id.* at *10.
[58] No. 2:00-cv-113-MCE-EFB, 2016 U.S. Dist. LEXIS 91119 (E.D. Cal. July 12, 2016).
[59] *Id.* at *12-13.

million without need for any setoff.[60] The district court disagreed, holding that both settling parties had liability, and it deferred to a second trial the determination of the equitable shares that would be attributed to them (and thus charged to AmeriPride).[61] The district court also reduced AmeriPride's claim by $10.25 million, equaling the amount it had paid to settle both CERCLA and non-CERCLA claims. Because the settlement agreements were silent as to the allocation of the payment towards CERCLA versus non-CERCLA claims, the court held that it could not determine whether the payments were made for response costs incurred consistent with the National Contingency Plan. AmeriPride's burden of proof was further complicated by a stipulation that no party "shall seek to admit evidence of the parties' intent in entering into those settlement agreements."[62]

In a buyer-seller dispute, *Trinity Industrial v. Greenlease Holding Co.*,[63] the district court conducted an equitable allocation of twenty "Impact Areas." Each area involving more than one hazardous substance was then further allocated by each hazardous substance resulting in a total of forty-five allocated areas.[64] Trinity and Greenlease were then allocated percentage shares of each of the forty-five areas based upon each party's contribution of each hazardous substance and the degree of involvement and care by the party.[65] The percentages were then multiplied by the square footage or cubic yardage represented by specific remediation activities.[66] The resulting figures were then added together and divided by the total square footage or cubic yards for all remediation activities. The resulting allocation was an 83% to Greenlease and 17% to Trinity. The court then further adjusted the allocation considering several factors:

- *Intervening Owner's Contaminants*. A six percent reduction was made to account for wastes attributable to an intervening owner;[67]
- *Cooperation*: No adjustment was made for Trinity's cooperation since Greenlease had too few resources to help in the remediation;[68]
- *Ability to Pay*: No adjustment was made for Greenlease's inability to pay argument since there was evidence that Greenlease had insurance coverage;[69]
- *Indemnity Agreement Language*: A five percent reduction was included to account for an indemnity in the sales agreement;[70]
- *Discount Sale Price*: No adjustment was made since the evidence did not support the discount price claim; and[71]
- *Value Increase*: A ten percent reduction was included based on the increased value of the property following remediation, which would only benefit Trinity.

Greenlease ultimately received a 62% allocation of all past and future response costs.

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[60] *Id.* at *17.
[61] *Id.* at *18-32.
[62] *Id.* at *41.
[63] 173 F. Supp. 3d 108 (W.D. Pa. 2016).
[64] *Id.* at 227-30.
[65] *Id.* at 228.
[66] *Id.* at 230.
[67] *Id.* at 232.
[68] *Trinity Indus.*, 173 F. Supp. 3d 108 at 232-33.
[69] *Id.* at 233.
[70] *Id.* at 235.
[71] *Id.* at 236.

H. Defenses

1. Necessary and Consistent with the National Contingency Plan (NCP)

In *Emhart Industrial v. New England Container Co.*, the district court allowed discovery concerning the EPA's decision to issue a UAO and allowed consideration of evidence beyond the administrative record to determine whether the EPA's remedy selection decision was arbitrary and capricious.[72] The court based its decision on the technical complexity of the case and the usefulness of such information towards determining whether the agency fully considered all the relevant factors or fully explained its course of conduct, or grounds of decision.[73]

In *Garrett Day L.L.C. v. International Paper*, the district court held that state supervision in connection with a state voluntary cleanup program was sufficient to satisfy requirements for substantial consistency with NCP requirements, and in particular the requirement to provide opportunity for public comment.[74]

In two cases, expert testimony was permitted to support cost recovery claims by private parties, in showing the "substantial" consistency of various remedial expenditures with the NCP. In *MPM Silicones, L.L.C. v. Union Carbide Corp.*,[75] the court allowed such testimony on what it regarded as a mixed question of law and fact, following *Town of Halfmoon v. General Electric Co.*,[76] turning back arguments that witnesses must cite specific NCP provisions in order to opine about substantial NCP compliance.

2. Act or Omission of Third Party; Innocent Landowner and BFPP Defenses

In *Borough of Edgewater v. Waterside Construction*, the district court held that although an "AS IS" clause can bar a claim for response costs, it does not bar a rescission claim where the fraud preceded the purchase agreement—in this case, an alleged concealment of two underground tanks of PCB-contaminated oil in a contract for sale of environmentally distressed property and allocation of payment for its remediation.[77]

In *MPM Silicones, LLC v. Union Carbide Corp.*,[78] the district court considered whether the Bona Fide Prospective Purchaser defense[79] applied where UCC claimed that MPM had failed to present evidence showing that it "exercise[d] appropriate care with respect to hazardous substances found at the facility . . .."[80] The court noted that "'due care would have required that they take some steps to ascertain the nature of any environmental threats associated with this disposal,'"[81] but the question was a factual one precluding summary judgment.

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[72]Nos. 06-218 S, 11-023 S, 2016 U.S. Dist. LEXIS 13688, at *45-48 (D.R.I. Feb. 2, 2016).
[73]*Id.* at *47-48.
[74]No. 3:15-cv-36, 2016 U.S. Dist. LEXIS 25494, at *17-18 (S.D. Ohio Mar. 1, 2016).
[75]No. 1:11-CV-1542 (BKS/ATB), 2016 U.S. Dist. LEXIS 98532, at *10-20 (N.D.N.Y. July 7, 2016).
[76]Nos. 1:09-CV-228 (LEAD), 1:11-CV6(MEMBER), 2016 U.S. Dist. LEXIS 26888, at *13-18, 42-43 (N.D.N.Y. Mar. 3, 2016).
[77]No. 14-5060, 2016 U.S. Dist. LEXIS 173261, at *7-8 (D.N.J. Dec. 14, 2016).
[78]No. 1:11-CV-1542 (BKS/ATB), 2016 U.S. Dist. LEXIS 98535 (N.D.N.Y. July 7, 2016).
[79]42 U.S.C. § 9607(r)(1) (2016).
[80]42 U.S.C. § 9601(40)(C), (D) (2016).
[81]*MPM Silicones, L.L.C.*, 2016 U.S. Dist. LEXIS 98535, at *100.

3. Statute of Limitations

In *Stahle v. CTS Corp.*, the Fourth Circuit held that the North Carolina statute of repose does not apply to disease claims, such as leukemia claimed to result from CTS' alleged discharge of trichloroethylene.[82] In the court's view, the United States Supreme Court's decision in *Waldburger v. CTS Corp.*,[83] did not affect this outcome because the present issue was whether the state statute applied at all, not whether section 309 of CERCLA preempted that state law.[84]

In *Allied Waste Transp., Inc. v. John Sexton Sand & Gravel Corp.*,[85] the district court explained that, "[a] removal action is not complete until a document has been issued which contains the final remedy selected for the site, or until the government ceases to evaluate, assess and monitor the land."[86] The court then rejected a statute of limitations defense to a removal action claim where a final remedy had not been selected.

The district court rejected a statute of limitations defense in *United States v. Boston & Maine Corp.*[87] The court first determined that a removal action had occurred where the United States removed hazardous substances by excavating contaminated soil and sediment.[88] That decision meant that the United States had to sue within three years of completion of the removal action.[89] The court held that the removal action was not complete until the Record of Decision for the site was issued in September 2015.[90] Since that date was *after* suit had been brought, the action was timely.

In *MPM Silicones, L.L.C. v. Union Carbide Corp.*, the district court considered the applicable six-year statute of limitations for remedial actions.[91] The court noted that CERCLA distinguishes between two kinds of response: longer-term "remedial" actions and "removal" actions for short term clean-up.[92] The court found that MPM's cleanup measures, which included an earthen cap, diversion ditch, and interceptor trench (items listed in the statutory definition for "remedial action"[93]), were a remedial action that triggered the statute of limitations since the corrective measures were not performed in response to an imminent public health hazard, but were part of a cleanup process designed to contain contamination at the release location.[94] However, the claim for remedial costs was time-barred because the statute of limitations began to run when the prior owners commenced physical on-site construction of the remedial action, and suit was not brought within six years of that event.[95]

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[82]817 F.3d 96, 103-04 (4th Cir. 2016).
[83]134 S. Ct. 2175 (2014).
[84]*Stahle*, 817 F.3d at 106 n.6, *but cf. In re* Camp Lejeune N.C. Water Contamination Litig., No. 1:11-MD-2218-TWT, 2016 U.S. Dist. LEXIS 167216, at *11-46. (N.D. Ga. Dec. 5, 2016) (a divergent result was reached concerning the same statute and similar illness claims asserted by military personnel under the Federal Tort Claims Act).
[85]No. 13 C 1029, 2016 U.S. Dist. LEXIS 82001 (N.D. Ill. June 23, 2016).
[86]*Id.* at *37 (citations omitted).
[87]No. 13-10087, 2016 U.S. Dist. LEXIS 129726, at *51-52 (D. Mass. Sept. 22, 2016).
[88]*Id.* at *30-42.
[89]*See* 42 U.S.C. § 9613(g)(2)(A) (2016).
[90]*Bos. & Me. Corp.*, 2016 U.S. Dist. LEXIS 129726, at *51-52.
[91]*MPM Silicones, L.L.C.*, 2016 U.S. Dist. LEXIS 98535; *See* § 9613(g)(2).
[92]*MPM Silicones, L.L.C.*, 2016 U.S. Dist. LEXIS 98535, at *34-35.
[93]*See* 42 U.S.C. § 9601(24) (2016).
[94]*MPM Silicones, L.L.C.*, 2016 U.S. Dist. LEXIS 98535, at *38-39.
[95]*Id.* at *46-57.

4. Other Defenses and Challenges

Commonwealth Department of Environmental Protection v. Trainer Custom Chemical LLC[96] answered the question of whether an owner of a site can be liable for response costs incurred before it became an owner. Relying on precedent from the Ninth Circuit,[97] the court's answer was "no."[98]

In *DMJ Associates, LLC v. Capasso*, the district court held that CERCLA response cost claims could be asserted against a party whose waste had allegedly been disposed of at the facility in the 1970s and which had entered bankruptcy in 1982.[99] The court reasoned that no CERCLA claim could have accrued until CERCLA's contribution provision was added in 1986, a year after confirmation of the reorganization plan.[100]

In *Garrett Day LLC v. International Paper Co.*, the purchase of assets from a state receiver was held not to be a bar to a successor liability claim arising from a de facto merger between the acquiring entity and the company whose assets are acquired, though there were too few other indicators of de facto merger to support the claim.[101]

I. Recoverable Response Costs (Including Attorneys' Fees)

In *United States v. Sterling Centrecorp Inc.*,[102] the district court rejected challenges to two categories of government-incurred response costs, a cap for a tailings pile and an extension of a water line instead of installing filters on residential wells. The district court did so based on the explanations provided by the EPA, noting that the EPA's approach eliminated the need to monitor the site and maintain the filters.[103]

In *Pakotas v. Teck Cominco Metals, Ltd.*, the district court held that Indian Tribes can recover their enforcement costs, including attorney's fees, under section 107(a)(4)(A).[104] The costs of scientific work performed in support of the Tribal enforcement efforts were also found to be recoverable response costs, even though they did not follow the NCP regulations for remedial investigations.[105]

In *Warren v. Johnson Matthey, Inc.*, the district court held that bottled water costs are not recoverable response costs under the NCP where an effective filtration system had been installed at the plaintiffs' home.[106]

In ruling on a claim for prejudgment interest, the district court in *AmeriPride Services v. Valley Industrial Services*.[107] held that a complaint that fails to set forth a specific monetary demand for a sum certain does not trigger the accrual of prejudgment interest.[108] Prejudgment interest was awarded in *Trinity Industrial v. Greenlease Holding*

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[96]No. 15-1232, 2016 U.S. Dist. LEXIS 116139 (E.D. Pa. Aug. 30, 2016).
[97]*See* Cal. Dep't of Toxic Substances Control v. Hearthside Residential Corp., 613 F.3d 910 (9th Cir. 2010).
[98]*Commonwealth Dep't of Envtl. Prot.*, 2016 U.S. Dist. LEXIS 116139, at *26.
[99]No. 97-CV-7285 (DLI)(RML), 2016 U.S. Dist. LEXIS 130083, at *75 (E.D.N.Y. Sept. 22, 2016).
[100]*Id.* at *71-72.
[101]No. 3:15-cv-36, 2016 U.S. Dist. LEXIS 17953, at * 11-14 (S.D. Ohio Feb. 12, 2016).
[102]No. 2:08-cv-02556-MCE-JFM, 2016 U.S. Dist. LEXIS 129993 (E.D. Cal. Sept. 22, 2016).
[103]*Id.* at *16-22 (cap), *23-25 (filters).
[104]No. CV-04-256-LRS, 2016 U.S. Dist. LEXIS 82610, at *12 (E.D. Wash. June 24, 2016).
[105]Pakootas v. Teck Cominco Metals, Ltd., No.CV-04-0256-LRS, 2016 U.S. Dist. LEXIS 107089, at *41-46 (E.D. Wash. Aug. 12, 2016).
[106]No. 15-01919, 2016 U.S. Dist. LEXIS 6065, at *11-16 (E.D. Pa. Jan. 19, 2016).
[107]No. 2:00-cv-113-MCE-EFB, 2016 U.S. Dist. LEXIS 91119 (E.D. Cal. July 13, 2016).
[108]*Id.* at *37-40.

Co.[109] from the date that Trinity provided Greenlease with a "computation of damages" and then thereafter from the date that costs were actually incurred.

In *Wilson Road Development Corp. v. Fronabarger Concreters*[110] the district court dismissed the case because the alleged response costs (for sampling) were unnecessary and inconsistent with the NCP. The sampling was for litigation support rather than cleanup or performance of a remedial investigation and was not conducted according a regulatory-agency-approved field sampling and quality assurance plans.[111]

In *Atlantic Richfield Co. v. United States*,[112] the district court dismissed the complaint since the alleged costs were time-barred, insufficiently related to cleanup efforts or PRP identification costs, and unrecoverable since the PRPs were already known to the Plaintiff.[113] The court concluded that Plaintiff failed to "make plausible allegations" that it had incurred necessary response costs.[114]

J. Claims against the Government, Including Section 106(b) Actions

In *Lockheed Martin Corp. v. United States*,[115] the D.C. Circuit considered whether indirect contract costs charged to a government contract barred recovery under CERCLA if those indirect costs included response costs for the cleanup of the same sites for which the contractor later obtained a judgment against the United States for future response costs.[116] The United States argued that the district court's equitable allocation meant that the government had overpaid its share when it paid the indirect costs, barring additional CERCLA recovery. The Court of Appeals for the D.C. Circuit determined that such indirect cost payments did not bar the CERCLA recovery of the government's percentage share of future response costs because the government voluntarily agreed to let the contractor pass through its share of past response costs.[117] In essence, the court viewed the United States as seeking to rewrite the unfavorable contractual terms for contractual overhead.

In *United States v. Sterling Centrecorp, Inc.*, the district court held that War Production Board orders requiring a gold mine to stop operations for two years during World War II did not make the United States an operator of the Site for response cost liability.[118] Much more active management of the mine by the federal government would have been required to impose operator liability.[119]

K. Preemption

In *North River Mews Associates, LLC v. Alcoa Corp.*, Plaintiff bought property that contained undisclosed contamination and sued the former owners for CERCLA cost recovery, but had its unjust enrichment claim dismissed because CERCLA preempts the unjust enrichment claim.[120]

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[109]173 F. Supp. 3d 108, 237-38 (W.D. Pa. 2016).
[110]Case No. 1:11-CV-84-CEJ, 2016 U.S. Dist. LEXIS 126237 (E.D. Mo. Sept. 16, 2016).
[111]*Id.* at *47-54, *63-66.
[112]181 F. Supp. 3d 898 (D.N.M. 2016).
[113]*Id.* at 913-18.
[114]*Id.* at 917.
[115]833 F.3d 225 (D.C. Cir. 2016).
[116]*See* 42 U.S.C. § 9614 (2016).
[117]833 F.3d at 238.
[118]No. 2:08-cv-02556-MCE-JFM, 2016 U.S. Dist. LEXIS 128371 (E.D. Cal. Sept. 20, 2016).
[119]*Id.* at *14-23.
[120]No. 1:2014cv08129, 2016 U.S. Dist. LEXIS 65918, at *12 (D.N.J. May 19, 2016).

In *New York v. Next Millennium Realty LLC*, the district court held that placement of a facility on the NPL gives the trustee three years from the completion of the remedial action in which to bring its natural resource damages claim. This is true even if the contamination had been discovered many years before that. New York was granted a declaratory judgment on liability because there was an identifiable injury (hazardous substance contamination in excess of drinking water standards) and was also allowed to recover its natural resource damages assessment costs, even though the State was not entitled to the rebuttable presumption of recoverability under 42 U.S.C. section 9607(f)(2)(C) since the State did not perform a natural resource assessment in accordance with Department of the Interior regulations.[121] Defendant's divisibility-of-harm defense, however, presented triable issues of fact.

In *San Diego Unified Port District v. Monsanto Co.*, the district court held that CERCLA did not preclude the Port District from asserting claims as the public trustee for natural resource damages in San Diego Bay under the terms of the California Port Act.[122]

[121]160 F. Supp. 3d 485, 523-26 (E.D.N.Y. 2016).

[122]No. 15-cv-578-WQH-JLB, 2016 U.S. Dist. LEXIS 134882 (S.D. Cal. Sept. 28, 2016).

Chapter 10 • WASTE AND RESOURCE RECOVERY
2016 Annual Report[1]

I. LITIGATION AND ENFORCEMENT DEVELOPMENTS

A. Organizations Have Standing under RCRA to Challenge Use of Lead Bullets by Hunters in National Forest

In *Center for Biological Diversity v. United States Forest Service*,[2] the Court of Appeals of the Ninth Circuit reversed a lower court's dismissal of a novel Resource Conservation and Recovery Act's (RCRA) citizen suit for lack of subject matter jurisdiction. The suit brought by environmental groups challenged the use of lead hunting ammunition in Arizona's Kaibab National Forest. In 2012, the environmentalists filed suit alleging the United States Forest Service's failure to regulate the disposal of spent lead ammunition in the national forest made the Forest Service liable as a "contributor" to an "'imminent and substantial endangerment to health or the environment'"[3] by allowing the poisoning of California condors, which consume the lead in animal carcasses. In a July 2, 2013 order,[4] the lower court dismissed the case on the grounds the environmental groups "failed to establish sufficient likelihood of redressability," because the Administrative Procedure Act precludes courts from forcing agencies to undertake discretionary actions. The court of appeals found the environmentalists had standing to sue under RCRA's citizen suit provision as the claim was not "'wholly insubstantial and frivolous,' such that it defeats standing."[5] However, the court noted "the question of whether there is a valid claim under RCRA is fairly debatable."[6]

B. Board Rejects EPA Policy on Hydrocarbon Injections into Furnaces

In a February 2, 2016 decision, the United States Environmental Protection Agency's (EPA) Environmental Appeals Board (Board) rejected the EPA's position that the injection of hydrocarbon materials into iron blast furnaces subjects the furnaces to RCRA's waste regulations.[7] From 2005 to 2008, Carbon Injection Systems, LLC supplied liquid hydrocarbon materials which allegedly included chemical by-products of use in an iron blast furnace located in Warren, Ohio. The EPA Region 5 initiated an enforcement action against the company and its owner and operators for storing and treating hazardous waste without a permit in violation of RCRA Section 3005 and Ohio's waste regulations. The Region contended the alleged chemical by-products were "wastes" which were being "recycled" and burned to recover both heat energy and chemical energy necessary to drive the chemical reactions in the production of iron. Relying on a 1985 agency policy, which limited the application of RCRA rules to heat energy, the Administrative Law Judge (ALJ) concluded the hydrocarbon materials were not RCRA "wastes" and dismissed the

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[1]This report was authored by Naeha Dixit, Esq.; Emily McKinney, Frost Brown Todd LLC; Peggy Otum, Arnold & Porter, 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.
[2]640 F. App'x 617 (9th Cir. 2016).
[3]*Id.* at 618.
[4]Ctr. for Biological Diversity v. U.S. Forest Serv., No. CV-12-8176, 2013 WL 3335234 (D. Ariz. July 3, 2015).
[5]*Ctr. for Biological Diversity*, 640 F. App'x at 619.
[6]*Id.* at *6.
[7]*In re* Carbon Injection Sys., LLC, No. RCRA-05-2011-0009, 2016 WL 593199 (E.A.B. Feb. 2, 2016).

enforcement action because the hydrocarbon materials had a cooling effect in a blast furnace and did not produce heat energy. The Board then took the case sua sponte and held the ALJ erred in dismissing the enforcement action. Specifically, in its ninety-two-page ruling, the Board indicated the agency's 1985 policy limiting enforcement to heat energy generation was erroneous, because "[t]he phrase 'burned to recover energy' was drafted with broad and expansive language" and that a plain reading of the phrase does not preclude the inclusion of chemical energy.[8] However, because the Region attempted to take a broader approach to enforcement that covered both types of energy (i.e., heat and chemical) rather than adhere to the agency's narrower 1985 Policy, which the agency had consistently articulated for over thirty years, without providing fair notice to the regulated community, the company "could not have ascertained the Region's new interpretation of the phrase 'burned to recover …' as including burning to recover chemical energy."[9] Accordingly, rather than remanding the case the Board opted to vacate the ALJ's decision and dismiss the case on other grounds. The case is particularly significant because it sets a potential precedent for future RCRA enforcement actions against injections of waste materials that generate chemical energy.

C. Methane Is Not a Solid Waste Under RCRA

In a February 10, 2016 decision, a federal court held a city cannot bring an action for improper solid waste disposal against a utility in connection with a methane gas leak near a city park because methane does not meet the definition of a solid waste under RCRA.[10] The methane at issue was attributed to two possible sources: an active natural gas pipeline in the area and waste oil created in previous years as part of the gas production process. The court determined the definition of solid waste in section 6903(26) of RCRA is ambiguous as to whether it would include an uncontained gas, such as methane. The court then looked to EPA guidance that excluded butane and carbon dioxide from regulation under RCRA and determined that the statutory exclusion applied in these guidance documents applies to methane as well. This decision is significant because it represents the first direct ruling that the operator of a natural gas pipeline is not liable under RCRA for an alleged leak.

D. EPA Region 6 Reaches Settlement with Whole Foods for RCRA Violations

On September 20, 2016, the United States Environmental Protection Agency announced a settlement with Whole Foods, Inc. concerning violations of hazardous waste regulations.[11] The EPA found, after a year-long investigation, that Whole Foods improperly identified or mishandled hazardous waste at facilities throughout EPA Region 6. As part of the settlement agreement, Whole Foods will correct the violations, pay penalties totaling more than $3.5 million, and implement a supplemental environmental project (SEP) promoting hazardous waste compliance among small businesses in the Texas retail industry.

Among other violations, Whole Foods was found to have improperly identified or mishandled typical retail products, such as nail polish remover, hand sanitizer, liquor, and vitamins, that are classified as hazardous waste when they can no longer be used for their

[8] *Id.* at *2.
[9] *Id.* at *21.
[10] N. Ill. Gas Co. v. City of Evanston, 162 F. Supp. 3d 654 (N.D. Ill. 2016).
[11] Consent and Final Order, In the Matter of: Whole Foods Market Rocky Mountain/Southwest LP, No. RCRA-06-2016-0904, 2016 WL 5347937 (E.P.A. Sept. 19, 2016).

intended purpose. This often occurs when the product is opened and returned by a customer, meaning it can no longer be resold on the stores' shelves.

Whole Foods must also implement standard operating procedures for each facility to ensure operation in compliance with RCRA hazardous waste requirements. The settlement agreement envisions Whole Foods accomplishing such compliance through the establishment of an electronic hazardous waste tracking system, which the settlement gives Whole Foods eighteen months to implement.

II. Regulatory Developments

A. Final Hazardous Waste Generator Improvements Rule Issued

On November 28, 2016, the EPA Administrator published the final Hazardous Waste Generator Improvements Rule (HWGIR) in the Federal Register.[12] The HWGIR sets forth more than sixty revisions and new provisions to the current RCRA hazardous waste generator regulatory program. Because the RCRA hazardous waste generator regulatory requirement is primarily administered by states, the new requirements do not take effect until they are adopted by states (except in Alaska, Iowa, and Puerto Rico, where the EPA enforces RCRA directly, and they will take effect on May 30, 2017). The earliest deadline for delegated states to adopt the HWGIR is July 2018. In addition, states are only required to adopt those revisions which are considered more stringent than existing regulations.

The final rule largely reflects the provisions of the EPA's proposed rule, described in detail in the 2015 edition of this publication, including revisions allowing for episodic waste generation and consolidation of waste among generators under common control, enhanced documentation and recordkeeping requirements, and contingency planning and personnel training requirements. However, the EPA did make some changes in response to commenters. Most significantly, the agency removed a proposed provision that would have required generators to maintain records of all determinations that wastes were *non*-hazardous.

B. EPA Seeks Remand of Provisions of Coal Combustion Residuals Rule

On June 14, 2016, a federal court granted the EPA's unopposed motion[13] to vacate a provision of its 2015 Final Rule on the Disposal of Coal Combustion Residuals from Electric Utilities,[14] allowing for "early closure" of inactive Coal Combustion Residuals (CCR) surface impoundments, i.e., those units that did not receive CCR after October 15, 2015, but still contain water and CCR. The final rule would have allowed owners and operators of inactive CCR surface impoundments to avoid groundwater monitoring and other post-closure care requirements if the units were closed under the rule's requirements by April 17, 2018. The effect of vacating this "early closure" provision is that all inactive surface impoundments must now comply with the same requirements applicable to existing CCR surface impoundments.

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[12]Hazardous Waste Generator Improvements Rule, 81 Fed. Reg. 85,732 (Nov. 28, 2016) (to be codified at 40 C.F.R. pts. 257, 258, 260–268, 270, 271, 273, and 279).

[13]Respondent EPA's Unopposed Motion for Voluntary Remand of Specific Regulatory Provisions, Utility Solid Waste Activities Grp. v. E.P.A., No. 15-1219 (D.C. Cir. Apr. 18, 2016).

[14]Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. 21,302 (Apr. 17, 2015) (to be codified at 40 C.F.R. pts. 257, 261) (direct final rule).

On August 5, 2016, the EPA published a direct final rule to extend certain deadlines and afford time to come into compliance with the substantive requirements of the rule for owners and operators of inactive surface impoundments that had placed an intent to initiate closure in the facility's written operating record by December 17, 2015, and complied with other notification requirements of the rule. [15]

C. Coal Ash Provisions in Water Infrastructure Bill

After months of uncertainty surrounding the fate of the Water Infrastructure Improvements for the Nation Act[16] (WIIN Act), President Obama signed the WIIN Act into law on December 16, 2016. Included among the many provisions of the WIIN Act addressing flood control, navigation, and drinking water emergencies (i.e., Flint, Michigan) are amendments to the RCRA.[2] These amendments permit new state permit programs for the management and closure of regulated CCR units to operate in lieu of the CCR Rule.

Previously, the CCR Rule was self-implementing and only subject to enforcement through citizen suits because it applied directly to regulated facilities with no permit program. States are now authorized to submit a permit program or alternative approval system for regulating CCR units to the EPA for approval. States may implement technical standards which differ from the CCR Rule as long as the standards are at least as protective as the federal rule. If the EPA denies a state's application or a state does not seek approval of a permit program, then the EPA will be required to adopt a permit program in lieu of the self-implementing rule, but only if Congress provides funding for the EPA to administer such a permit program. The CCR Rule will remain self-implementing in a state until a permit program is approved and implemented in a state.

The WIIN Act also provides the EPA with the authority to enforce the implementation of the CCR Rule and any approved state or federal permit program. The EPA's new-found enforcement authority is in addition to the ability of environmental groups or states to bring citizen suits.

D. Groups Seek Deadline for EPA to Develop RCRA Rules for Oil & Gas Waste

In a May 4, 2016 Complaint filed in the District Court for the District of Columbia,[17] environmental advocacy groups sued the EPA to force a deadline for the agency to develop rules under RCRA for solid waste generated by the oil and gas industry. The groups argue the EPA has missed nine successive statutory deadlines to assess whether to develop such regulations. Waste generated from the exploration and production of oil and gas (E&P waste) is currently regulated as nonhazardous under Subtitle D of RCRA,[18] but this suit seeks to require the EPA to regulate E&P waste as hazardous waste under Subtitle C.

Typical E&P wastes include drill cuttings, residual waste, drilling muds, hydraulic fracturing sand, and wastewater. The existing hazardous waste exemption allows the E&P waste to be held in impoundments, reinjected into wells, spread on roads, and disposed at municipal waste landfills (subject to state regulation). Subtitle C, in contrast, would impose

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[15]Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Extension of Compliance Deadlines for Certain Inactive Surface Impoundments; Response to Partial Vacatur, 81 Fed. Reg. 51,802 (Aug. 5, 2016) (to be codified at 40 C.F.R. pt. 257).

[16]S. 612, 114th Cong. (2016).

[17]Envtl. Integrity Project v. McCarthy, No. 1:16-cv-00842 (D.D.C. May 4, 2016).

[18]Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, §§ 4001-09, 90 Stat 2795 (1976).

"cradle to grave" federal requirements, including disposal in permitted hazardous waste landfills.

The Plaintiffs' Complaint mirrors the complaint in Appalachian Voices v. McCarthy,[19] which resulted in a court-ordered deadline for the EPA to review its regulations relating to coal ash disposal. If this lawsuit yields the same result, more stringent federal regulation of E&P waste could impose significant costs on producers and ultimately lead to increased energy and fuel costs. Given the immense volume of waste produced by oil and gas exploration and production operations, requiring disposal in hazardous waste landfills would not only be burdensome but also potentially infeasible given the lack of capacity for such volumes in existing hazardous waste landfills.

III. DEVELOPMENTS IN ELECTRONIC WASTE

A. Enforcement and Litigation

1. Connecticut's E-Waste Law Upheld

In a March 31, 2016 decision, the United States District Court in Connecticut dismissed a complaint filed by Vizio, a television manufacturer, against Connecticut's Department of Energy and Environmental Protection, which challenged the constitutionality of Connecticut's electronic waste (e-waste) law.[20] Vizio sought declaratory and injunctive relief and claimed the state's e-waste law was unconstitutional under the United States Constitution because it violates the dormant Commerce Clause, the Takings Clause of the Fifth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and Vizio's due process under the Fourteenth Amendment, in addition to similar claims pursuant to the Connecticut Constitution. The court found Vizio's complaint failed to state a plausible Commerce Clause claim that the e-waste law is "clearly discriminatory, imposes burdens on interstate commerce that outweigh the benefits secured, regulates commerce extraterritorially, or imposes user fees."[21] The court also found Vizio failed to demonstrate that the e-waste law effects a taking under the Constitution and failed to state plausible claims of both equal protection and due process.

2. Washington E-Waste Recycler Fined for Improper Disposal

On September 1, 2016, the Washington Department of Ecology (WDE) issued a fine of $444,000 to electronics recycler Total Reclaim Inc. for illegal disposal of flat-screen televisions and monitors containing toxic mercury.[22] According to the WDE complaint, Total Reclaim sent shipments of monitors to Hong Kong where they were dismantled by workers without appropriate personal protective equipment. Total Reclaim admitted to WDE that it sent the televisions to undocumented recycling facilities overseas for seven years.

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[19] 989 F. Supp. 2d 30 (D.D.C. 2013).

[20] Vizio Inc. v. Robert Klee, No. 3:15-cv-00929, 2016 WL 1305116 (D. Conn. Mar. 31, 2016).

[21] *Id.* at *5.

[22] *Electronics recycler fined $444,000 for illegally disposing of dangerous waste overseas*, WASH. DEP'T OF ECOLOGY (Sept. 1, 2016).

3. City Settles Suit by Landlord of Defunct E-Waste Recycling Center

In November 2016, the North Augusta City Council authorized the City to pay $17,000 to settle a lawsuit filed against it by Carolina Pines I, LLC.[23] Carolina Pines sued the City and other solid waste providers in February 2016 seeking removal of more than six million pounds of e-waste from a defunct recycling center for which Carolina Pines was the landlord. Carolina Pines also sought damages, interest, and attorneys' fees and costs. The settlement will provide a full release to the City.

4. California Auto Parts Retail Chain Settled Allegations of Mishandling E-Waste and Other Hazardous Waste

On November 30, 2016, O'Reilly Auto Enterprises, LLC (O'Reilly) entered into an agreement with the state of California whereby O'Reilly agreed to pay $9.86 million to settle allegations that the company sent hazardous waste to landfills not permitted to accept it.[24] Among the allegedly mishandled hazardous waste was e-waste. The enforcement action against O'Reilly involved fifty counties in California and alleged that more than 525 O'Reilly stores in California improperly disposed of hazardous waste. Pursuant to the settlement agreement, O'Reilly will pay $6 million as a civil penalty, $1.85 million to fund compliance projects, $1.51 million to fund supplemental environmental projects, and $500,000 to reimburse the cost of the investigation.

5. Apple Settles Allegations of Unreported Silicon Valley E-Waste Facilities

In December 2016, Apple Inc. agreed to pay $450,000 to the California Department of Toxic Substances Control (DTSC) to settle allegations that it violated California's Hazardous Waste Control Law at unreported e-waste facilities located in Silicon Valley.[25] DTSC filed its lawsuit against Apple after a June 2013 inspection found hazardous waste violations at Apple's e-waste shredding facility in Sunnyvale, California. According to the complaint filed by DTSC, Apple allegedly failed to manage fine dust which accumulated in its facility where e-waste was shredded prior to shipping the shavings in bags to be recycled or sold as scrap metal. DTSC tested samples of the dust and found they contained hazardous levels of copper, zinc, and other hazardous materials.

In addition–according to the complaint–Apple had processed more than 800,000 pounds of waste at this facility before notifying DTSC the facility was processing e-waste. DTSC also alleged Apple opened an e-waste shredding facility in Cupertino, California, which operated from 2011 to January 2013 without informing DTSC or complying with the state's hazardous waste regulations. At the Cupertino facility, DTSC alleged that Apple processed approximately 1.1 million pounds of e-waste and mismanaged metal dust from its shredder operations by sending it to a recycling facility which was not authorized to handle Apple's hazardous waste. In addition to paying the civil penalty, Apple agreed to improve its record-keeping practices and to conduct regular inspections at its Sunnyvale facility to ensure proper waste management.

B. Federal Legislative Developments

On June 24, 2016, Representative Paul Cook introduced H.R. 5579, the Secure E-Waste Export and Recycling Act. The bill seeks to prevent e-waste from becoming a

[23]James Folker, *North Augusta votes to settle waste lawsuit*, THE AUGUSTA CHRON. (Nov. 7, 2016).
[24]People v. O'Reilly Auto Enters., No. RG13838247 (Alameda Cty. Super. Ct. 2016).
[25]State v. Apple Inc., No. 16CV303579 (Santa Clara Cty. Super. Ct. 2016).

"source of counterfeit goods that may reenter military and civilian electronics supply chains in the United States."[26] The proposed bill prohibits a person or entity from exporting or re-exporting e-waste unless that person or entity is registered, files the appropriate 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 11, 2016, the governor of New Jersey signed into law Senate Bill S-2978/A-4194, authorizing the use of mobile e-waste destruction units to operate without receiving a permit from the New Jersey Department of Environmental Protection. The material generated from the destruction of the electronic storage devices must then be sent to an authorized recycling center.[27]

2. West Virginia

West Virginia passed House Bill 4540 in March 2016 which allows e-waste to once again be disposed in landfills, repealing a mandate that previously made such disposal illegal. The law does allow local authorities to ban landfill disposal upon determination that there is a cost effective recycling alternative for the e-waste. The law became effective on July 1, 2016.[28]

3. California

On June 30, 2016, California's Office of Administrative Law (OAL) approved an emergency rulemaking filed by the California Department of Resources Recycling and Recovery (CalRecycle) applicable to the state's Electronic Waste Recovery and Recycling law and payment rates, increasing the Standard Statewide Recovery Payment Rate from eighteen cents per pound to nineteen cents per pound.[29]

On September 22, 2016, OAL approved CalRecycle's emergency rulemaking that will increase the current e-waste recycling and recovery fees paid by consumers on purchases of electronic devices containing video screens, effective January 1, 2017.

4. Minnesota

On July 1, 2016, extensive modifications to the Minnesota Electronics Recycling Act became effective.[30] Covered electronic devices will now include tablet computers and laptops, which are no longer defined as video display devices. Manufacturers will need to register with the Minnesota Pollution Control Agency (MPCA) by August 15 each year, and all registered manufacturers that sell 100 or more video display devices must pay a registration fee, due August 15 each year. There will not be a registration fee for manufacturers with sales of ninety-nine or fewer devices. Collectors and recyclers are to

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[26]H.R. 5579, 114th Cong. (2016)
[27]S. 2978, 216th Leg. (N.J. 2015).
[28]H. 4540, 82nd Leg., 2nd Sess. (W.V. 2016).
[29]CALRECYCLE, *Covered Electronic Waste Recovery and Recycling Payment Rates* (last updated Sept. 26, 2016).
[30]*2016 Legislative Changes*, MINN. POLLUTION CONTROL AGENCY (last visited Jan. 6, 2017).

register with MPCA by July 15 each year. The amendments also include updates to manufacturers reporting requirements and responsibilities.

5. District of Columbia

A final rulemaking on the District of Columbia's Department of Energy and Environment Chapter 41, Electronics Stewardship, became effective November 18, 2016. The amendments implemented by this rulemaking establish requirements for manufacturers of electronic equipment by setting a de minimis limit which will exempt certain entities from e-waste statutory and regulatory requirements, include new requirements for annual registration applications, and revises registration and shortfall fees.[31]

D. International Developments

1. International E-Waste Management Network

On June 7, 2016, the International E-Waste Management Network (IEMN) collaborated with the Step Initiative and held a webinar entitled "Towards Solutions of the CRT Problem."[32]

In October 2016, the sixth annual meeting of IEMN was held in Kuala Lumpur, Malaysia. The meeting was co-hosted by the U.S. EPA, Taiwan EPA, and Malaysia's Ministry of Natural Resources and Environment, and had attendees from over forty countries. Private and public sector experts spoke with IEMN members about how to advance e-waste management in their countries.[33]

2. North American Commission for Environmental Cooperation

In October 2016, the North American Commission for Environmental Cooperation, with financial support from Canada, Mexico, and the United States, published a report, "Quantitative Characterization of Domestic and Transboundary Flows of Used Electronics Products," which details a case study of the transboundary flows of e-waste between and from North American countries.[34]

3. India

In March 2016, India's Ministry of Environment, Forest and Climate Change passed new e-waste management legislation that includes extended producer responsibility provisions.[35] The new rules, which will supersede the e-waste laws passed in 2011, will hold producers and manufacturers of electrical and electronic equipment responsible for collecting e-waste and ensuring that it is properly recycled or disposed. The rules, effective October 1, 2016,[36] also allow financial penalties to be assessed for violations of the law.

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[31]63 D.C. Reg. 4100 (Nov. 18, 2016).
[32]*Step Webinar with IEMN "Towards Solutions of the CRT Problem,"* INT'L ENVTL. PARTNERSHIP (last visited Jan. 7, 2017).
[33]*Cleaning Up Electronic Waste (E-Waste)*, ENVTL. PROTECTION AGENCY (last visited Jan. 7, 2017).
[34]COMM'N FOR ENVTL. COOPERATION, QUANTITATIVE CHARACTERIZATION OF DOMESTIC AND TRANSBOUNDARY FLOWS OF USED ELECTRONIC PRODUCTS (Sept. 2016).
[35]Ministry of Environment, Forest, and Climate Change (E-waste Management Rules), 2016, Gazette of India, pt. II sec. 3(i) (G.S.R. 338(E)) (Mar. 23, 2016).
[36]Sandeep Mishra, *Plans for e-waste-free future*, THE TELEGRAPH (July 22, 2016).

4. Hong Kong

The Legislative Council of Hong Kong's Environmental Protection Department (EPD) passed the Promotion of Recycling and Proper Disposal (Electrical Equipment and Electronic Equipment) (Amendment) Ordinance 2016 in March 2016. This amendment allows for the expansion of import and export permit control to cover more categories of e-waste and proper disposal of same.[37]

5. Ghana

In July 2016, the Parliament of Ghana passed an act that will provide for the control and management of hazardous waste, including e-waste.[38] The act prohibits the disposition of hazardous waste and e-waste in the country or its waters. Manufacturers of electronic equipment will be required to register with Ghana's Environmental Protection Agency and pay an e-waste levy, which will be used for the costs of collection, treatment, recovery, and disposal of e-waste. Pursuant to the act, an e-waste recycling plant will also be established.

[37]Promotion of Recycling and Proper Disposal (Electrical Equipment and Electronic Equipment) (Amendment) Ordinance, No. 3 (2016).
[38]Press Release, Gov't of Ghana, Parliament Passes Law to Control Hazardous & E-Waste (July 2016).

Chapter 11 • WATER QUALITY AND WETLANDS
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I. JUDICIAL DEVELOPMENTS

A. Clean Water Act (CWA) Section 303—Water Quality Standards

On August 3, the United States District Court for the Western District of Washington granted in part the summary judgment motions of United States Environmental Protection Agency (EPA) and of environmental groups seeking to require the EPA to promulgate water quality standards for Washington using a revised fish consumption rate.[2] In September 2015, the EPA issued proposed revisions to the human health criteria applicable to Washington waters after concluding that Washington's water quality standards were based on an unreasonably low fish consumption rate. The EPA recommended that Washington develop new standards based on a rate of 175 grams/day. A lawsuit sought to compel the EPA to promulgate standards for Washington based on the higher fish consumption rate. The court held that the EPA's determination triggered a non-discretionary due to promulgate revised standards for Washington within ninety days.[3] The court accepted the EPA's proposed timeline and ordered the agency to promulgate standards by September 15 if Washington failed to submit its own or by November 15 if Washington submitted standards for EPA's approval. On August 1, Washington submitted revised water quality standards for EPA's approval. The EPA issued a partial disapproval and promulgated certain water quality standards for Washington on November 15.[4]

The EPA settled a suit alleging the agency failed to issue revised water quality standards to address certain metals on Oregon.[5] Oregon submitted aquatic life criteria for aluminum, cadmium, and copper for EPA's approval in 2004. The EPA disapproved Oregon's criteria for those metals in 2013, but did not promulgate revised water quality standards at that time. In a consent decree filed with the United States District Court for the District of Oregon, the EPA agreed to 2017 and 2018 deadlines to either approve submissions by Oregon to address the 2013 disapproval or start rulemaking to promulgate standards for the state.

In an ongoing dispute over Maine's water quality standards for waters on Indian lands, the EPA moved to dismiss a claim brought by the State of Maine pursuant to the CWA citizen suit provision.[6] Maine first sued the EPA in 2014 to force the EPA to act on

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[1]This report was compiled and edited by Susan Kirsch of Bergeson & Campbell, PC, Washington, D.C., and Gene Wasson of Brunini, Grantham, Grower & Hewes, PLLC, Jackson, Miss. Contributing authors include Lynn A. Long, Office of the Solicitor, U.S. Department of the Interior; Albert P. Barker of Barker Rosholt & Simpson LLP, Boise, Idaho; Meredith Weinberg, Laura Kerr & Margaret C. Hupp of Perkins Coie LLP, Seattle, Wash.; John B. King of Breazeale, Sachse & Wilson, LLP; Nate Hunt of Kaplan, Kirsch & Rockwell LLP, Denver, Colo.; Scott McAninch of Kirk & Simas, PLC, Santa Maria, Cal.; Carol Lynn Green of the Law Office of Carol Lynn Green, Bethesda, Md.; Larry Liebesman & Zachary Howerton of Smouse & Mason, LLC, Towson, Md.; and LaJuana Wilcher & Sarah Payne-Jarboe of English, Lucas, Priest & Owsley, LLP, Bowling Green, Ky.

[2]Puget Soundkeeper All. v. EPA, 2016 WL 4127315 (W.D. Wash. Aug. 3, 2016).

[3]*See* 33 U.S.C. § 1313(c)(4) (2016).

[4]*See* Section II.A, *infra*.

[5]Consent Decree, Nw. Envtl. Advocates v. EPA, No. 3:15-cv-00663-BR (D. Or. June 9, 2016).

[6]Motion to Dismiss Count III, Maine v. EPA, No. 1:14-cv-264-JDL (D. Me. June 30, 2016). *See also* Section II.A, *infra*.

its submission of water quality standards. After the EPA disapproved Maine's standards for waters in Indian lands in 2015, Maine amended its complaint to add a claim seeking a declaration that the state's environmental jurisdiction and approved water quality standards apply throughout the state, including in Indian territories. The EPA moved to dismiss the new claim, arguing that Maine sought review of the substance of the EPA's decision to approve or disapprove water quality standards and that the citizen suit provision only grants a court jurisdiction to order the EPA to perform a non-discretionary duty.

On September 8, the EPA's failure to respond to a 2013 petition to address ocean acidification led to a complaint filed in the United States District Court for the District of Columbia.[7] The complaint cites surveys of waters along the California, Oregon, and Washington coasts and claims the EPA failed to promulgate water quality standards to reduce the threat of ocean acidification to marine life. The complaint claims the EPA failed to grant or deny a 2013 petition for rulemaking and seeks to compel the agency to update its water quality criteria.

A magistrate judge recommended the United States District Court for the District of Oregon hold the EPA violated the CWA by approving total maximum daily loads (TMDLs) for temperature in certain Oregon waters.[8] The magistrate found the EPA did not have a rational basis for approving the use of natural conditions criteria in the TMDLs, or the potential natural temperatures historically present without human interference. Prior case law invalidated the use of natural conditions criteria for thermal limits, and a lawsuit claimed the TMDLs should be based on safe temperatures for aquatic life. The magistrate found claims were untimely for four similar TMDLs.

B. CWA Section 303(d)—TMDLs

In *American Farm Bureau Federation v. EPA*,[9] the Third Circuit upheld an EPA TMDL plan for discharges of nitrogen, phosphorous, and sediment from Virginia, West Virginia, Maryland, Delaware, Pennsylvania, New York, and the District of Columbia into the Chesapeake Bay. Farm Bureau argued the EPA's authority was limited to setting numeric limits necessary to achieve the water quality standards applicable to the Bay and that EPA exceeded its authority by allocating pollutant loads among different types of sources, promulgating target dates for meeting the TMDLs, and obtaining assurances from the affected states that they would fulfill the TMDL's objectives.[10] Applying *Chevron* deference, the court found that the phrase "total maximum daily load" was ambiguous and the EPA's interpretation was reasonable, so the court affirmed the grant of summary judgment in favor of EPA.

In *Ohio Valley Environmental Coalition, Inc. v. McCarthy*,[11] the court held environmental groups have standing to sue the EPA under the Administrative Procedures Act and CWA for its failure to disapprove West Virginia's Section 303(d) list. The environmental groups argued their use and enjoyment of forty-one waterbodies located throughout West Virginia had been diminished due to biological impairment in those waterbodies. The EPA argued that to demonstrate standing, the members must have used every impaired waterbody in the state. The court found the putative harm is inflicted absent TMDLs, without which pollution damages waters, thereby injuring the groups.[12] So the

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[7]Complaint for Declaratory and Other Relief, Ctr. for Biological Diversity v. EPA, No. 1:16-cv-01791-CRC (D.D.C. Sept. 8, 2016).
[8]Nw. Envtl. Advocates v. EPA, No. 3:12-cv-01751-AC (D. Or. Oct. 12, 2016).
[9]792 F.3d 281 (3d Cir. 2015), *cert. denied*, No. 15-599 (U.S. Feb. 29, 2016).
[10]*Id.* at 294.
[11]Memorandum Opinion and Order, No. 3:15-0271, 2016 U.S. Dist. LEXIS 122019, at *20 (S.D.W. Va. Dec. 14, 2015).
[12]*Id.* at *28.

groups made a sufficient showing of standing to compel the EPA to develop TMDLs for biologically impaired waterbodies statewide.[13]

In *Las Virgenes Municipal Water District-Triunfo Sanitation District v. McCarthy*,[14] the court denied the plaintiff sanitation district's motion for summary judgment against the EPA's promulgation of a 2013 TMDL. The plaintiff's Wastewater Reclamation Facility discharged treated effluent into Malibu Creek under a permit issued by a Regional Water Quality Control Board, which planned to incorporate the strictures of a revised 2013 TMDL list into the facility's next permit. In 2003, pursuant to a 1999 Consent Decree (Consent Decree) the EPA promulgated a TMDL for Malibu Creek. In 2008, California updated its 303(d) listing for Malibu Creek and the EPA notified interested parties of its intent to modify the Consent Decree. Following notice and comment, the EPA promulgated the 2013 TMDL. In September 2013, the plaintiff filed suit against the EPA for numerous claims and subsequently filed a motion for summary judgment claiming, inter alia, the EPA lacked authority to promulgate the 2013 TMDL, the 2013 TMDL was an improper revision to the 2003 TMDL, and the 2013 TMDL was arbitrary and capricious.[15] As to its first claim, the plaintiffs argued the EPA lacked authority to promulgate the 2013 TMDL because, under the constructive submission doctrine, the state had neither submitted nor had the EPA disapproved any TMDL and therefore the EPA had no authority to promulgate TMDLs. The court disagreed because approving the 2013 TMDLs was within the EPA's authority as it was pursuant to the court-approved Consent Decree. Regarding its second argument, the plaintiff claimed the EPA could issue revised TMDLs only if the revising agency could show that the revision "'will assure the *attainment* of [the applicable] water quality standard.'"[16] The court held that section 303(d)(4)(A) does not impose such a heightened standard for promulgation of a new TMDL.[17] Regarding the arbitrary and capricious claims, the court held the EPA reasonably concluded that natural geology is not the primary cause of nutrient loading or BMI impairment and the EPA had adequately considered the impact of invasive species.

C. CWA Sections 304 and 306–Criteria and Guidelines, and Performance Standards

In *Environmental Integrity Project v. EPA*,[18] the United States District Court for the District of Columbia ruled that Section 1318(b) of the CWA, which requires the EPA to make available to the public records, reports and information obtained during the development of effluent limitations guidelines (ELG), does not preempt the Freedom of Information Act's (FOIA) protection of confidential business information (CBI). The plaintiffs filed FOIA requests seeking CBI obtained by the EPA from the industry when the EPA developed ELGs for steam-electric power plants; the Court ruled that Section 1318(b) of the CWA does not displace or supersede Exemption 4 of FOIA, which protects CBI from disclosure.

In *Southern California Alliance of Publicly Owned Treatment Works & Central Valley Clean Water Ass'n v. EPA*,[19] the United States District Court for the Eastern District of California denied the plaintiffs' motion for reconsideration of an order dismissing the case as moot. The plaintiffs challenged the EPA's approval of the California State Water Board's request to use an Alternate Test Procedure (ATP) (the two-concentration Test of

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[13] *Id.* at *30.
[14] Order on Cross-Motion for Summary Judgment, No. C 14-01392, 2016 U.S. Dist. Lexis 12406 (N.D. Cal. Feb. 1, 2016).
[15] *Id.* at *6.
[16] *Id.* at *14.
[17] *Id.* at *15.
[18] 177 F. Supp. 3d 36 (D.D.C. 2016).
[19] No. 2:14-cv-01513-MCE-DB, 2016 U.S. Dist. LEXIS 146388 (E.D. Cal. Aug. 23, 2016).

Significant Toxicity (TST)) for NPDES permits. The court dismissed the case as moot after the EPA withdrew its ATP approval, and would not let the plaintiffs switch tactics to allege the EPA is impermissibly using the 2010 TST guidance document as a regulation. In the same case,[20] the court subsequently denied the plaintiffs' motion to re-open the case and allow amendment of the complaint to make that argument.

D. CWA Section 309—Enforcement

In *United States v. The New York Racing Ass'n, Inc.*,[21] the New York Racing Association (NYRA) settled a case involving a municipal discharge of wastewater containing animal wash water, detergent and feed waste into storm sewer systems. The NYRA paid a penalty of $150,000 and agreed to correct the violations and implement a supplemental environmental project. Aqueduct Racetrack is a concentrated animal feeding operation (CAFO) and the case is part of the EPA's National Enforcement Initiative that identifies areas impacted by CAFOs and promotes technologies to address excess nutrients and reduce animal waste pollution.

In *United States v. D.G. Yuengling and Son Inc.*,[22] a brewing company agreed to spend approximately $7 million to improve environmental measures at its brewery after allegedly discharging pollutants into a municipal wastewater treatment plant. The company agreed to implement an environmental management system (EMS) to achieve CWA compliance and to pay a $2.8 million penalty.

In *United States v. Commonwealth of Puerto Rico*,[23] three Puerto Rican government agencies agreed to upgrade portions of the stormwater systems within the municipality of San Juan aimed at eliminating or minimizing future discharges of sewage and other pollutants into water bodies in and around San Juan. The EPA estimates that over six million gallons of untreated sewage is being discharged into waterways in and around San Juan every day with more than 2.2 billion gallons discharged annually. Puerto Rico will invest an estimated $77 million in infrastructure upgrades over the life of the agreements.

In *United States v. Southern Coal Corp.*,[24] Southern Coal and twenty-six affiliated mining companies, located in five Appalachian states settled claims of NPDES violations, discharge without a permit, failure to respond to information requests, and failure to report violations involving operations. The companies agreed to pay a civil penalty of $900,000, establish a $4.5 million letter of credit and standby trust to fund consent decree obligations, implement a company-wide EPA-approved environmental management system, maintain a centralized data management system, and establish a public website for posting compliance information, estimated to cost about $5 million.

In *United States v. CONSOL Energy Inc.*,[25] Consol agreed to pay a $3 million penalty and to implement water management and monitoring activities to prevent contaminated discharges of mining wastewater to the Ohio River. Consent decree requirements included implementation of an environmental management system and payment of a $3 million penalty.

In *United States v. Enbridge Energy*,[26] Enbridge agreed to spend at least $110 million to improve its 2,000 mile pipeline system located in the Great Lakes, address 2010

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[20] *Id.*

[21] Consent Judgement and Decree, No. 1:16-cv-05442-LDH-CLP (E.D.N.Y. Sept. 30, 2016).

[22] Consent Decree, No. 3:16-cv-01252 (M.D. Pa. June 23, 2016).

[23] Consent Decree, No. 3:14-cv-1476-CCC (D.P.R. Dec. 23, 2015).

[24] Consent Decree, No. 7:16-cv-00462-GEC (W.D. Va. Sept. 30, 2016).

[25] Consent Decree, No. 2:16-cv-1178-NBF (W.D. Pa. Aug. 4, 2016).

[26] Consent Decree, No. 1:16-cv-00914 (W.D. Mich. July 20, 2016).

oil spills from pipelines located in Michigan and Illinois, and pay a penalty of $61 million under CWA section 311.

In *United States v. Freedom Industries, Inc.*,[27] Freedom Industries and a former plant manager were prosecuted for federal crimes associated with the 2014 Elk River chemical spill. The company, which declared bankruptcy shortly after the spill, was sentenced to a fine of $900,000, to be paid after all other claims were satisfied, Freedom and its plant manager pleaded guilty in March 2015 to negligently discharging a pollutant, unlawfully discharging refuse matter, and knowingly violating an environmental permit.[28]

E. CWA Section 401—State Certification

In *Ohio Valley Environmental Coalition v. United States Army Corps of Engineers*,[29] an environmental group challenged the section 404 permit on numerous grounds, including compliance with section 401. The group contended the Corps was required to consider human health impacts of coal mining. The court held that the "activity authorized" by the 404 permit is only the fill activities associated with the coal mining and not the coal mining itself. Also, the court also concluded that section 401 does consider human health issues because state water quality standards are developed with human health effects in mind, so human health effects of the fill were not ignored.

In *Delaware River Keeper Network v. Secretary of the Pennsylvania Department of Environmental Protection*,[30] the court entertained a petition for review of an order from the Federal Energy Regulatory Commission concerning a contest over state water quality certifications issued for 404 permits and state gas pipeline permits. The Third Circuit held that it had jurisdiction as a matter of federal law to review the certifications issued by the states of New Jersey and Pennsylvania. The court held that a water quality certification under section 401 is issued pursuant to federal law and is not merely a matter of state law. The court held that it had jurisdiction to review the state permits and the states were not protected by Eleventh Amendment immunity because the states' participation under the regulatory schemes of both the Clean Water Act and the Natural Gas Act constitutes a "gratuity waiver" of its Eleventh Amendment defense to jurisdiction. In reviewing the permits and certifications, the court upheld both New Jersey and Pennsylvania's actions because they were not arbitrary or capricious.

In *Center for Environmental Law and Policy v. Department of Ecology*,[31] the court addressed an appeal of a state water right permit which incorporated a provision of section 401 certification for minimum flows in the bypass reach of a dam project. The previously issued 401 certification required studies of the flows over the dam in order to meet Washington water quality standards regarding aesthetic flows. The certification required those flows to be finally established after the project was complete and in operation. The Washington water permit contained the same conditions regarding aesthetic flows as the 401 certification. The court held that it was not error for the water right permit to defer studies of the precise amount of flows necessary for the aesthetic flow requirement under state water quality standards.

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[27]Indictment, No. 2:14-cr-00275 (S.D.W. Va. Feb. 4, 2016).
[28]Document 31, United States v. Freedom Indus., Inc., No. 2:14-cr-00275 (S.D.W. Va. Feb. 4, 2016).
[29]828 F.3d 316 (4th Cir. 2016).
[30]833 F.3d 360 (3d Cir. 2016).
[31]383 P.3d 608 (Wash. Ct. App. 2016).

F. CWA Section 402—National Pollutant Discharge Elimination System (NPDES) Permitting

1. Permit Violations

In *Harpeth River Watershed Ass'n v. City of Franklin*,[32] plaintiff filed a citizen suit alleging that defendant municipality discharged pollutants, including untreated sewage, ammonia, and toxic wastewater, into the Harpeth River and its tributaries in violation of its NPDES permit.[33] On a motion to dismiss, the court found that the alleged overflows were not discharges under the 2004 permit,[34] and that the allegations underlying the ammonia violations were unfounded since there was a three year gap between the alleged violations.[35] Thus, the court granted in part the motion to dismiss.[36]

The plaintiffs in *NRDC v. Metropolitan Water Reclamation District of Greater Chicago*[37] claim that defendant water reclamation district violated the terms of its NPDES permits for excessive discharge of phosphorus, which violate state water quality standards with respect to levels of algal and plant growth and dissolved oxygen.[38] Defendant argued that the CWA's permit shield defense insulates it from claims that phosphorous discharge violates its NPDES permit.[39] The court stated that the permit shield defense cannot be used to evade the express terms of the permit.[40] Because the NPDES permit incorporated the state water quality standards, the court found that permit holder must demonstrate that it has not violated those standards in order for the permit shield to apply.[41]

In *Ohio Valley Environmental Coalition v. Fola Coal Co.*,[42] plaintiffs alleged that defendant violated its NPDES permit by discharging water polluted with ionic toxicity into several streams.[43] In Phase I, the court found defendant violated its NPDES permit.[44] Now in Phase II, the court found that injunctive relief was appropriate and necessary to remedy the violations, but stayed its decision on a specific remedy until defendant submitted a proposed plan for collecting water flow and quality data from the affected streams.[45]

The defendants in *Puget Soundkeeper Alliance v. Louis Dreyfus Commodities LLC*[46] were alleged to have discharged grain materials directly into Elliott Bay or violated various conditions in the various industrial stormwater general permits.[47] The court found that summary judgment was appropriate for some of the incident dates when grain materials were discharged[48] and for violating some of the conditions of the general permits.[49]

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[32]No. 3:14-1743, 2016 U.S. Dist. LEXIS 27208 (M.D. Tenn. Mar. 3, 2016).
[33]*Id.* at *2.
[34]*Id.* at *18.
[35]*Id.* at *29.
[36]*Id.* at *38-39.
[37]175 F. Supp. 3d 1041 (N.D. Ill. 2016).
[38]*Id.* at 1044.
[39]*Id.* at 1049.
[40]*Id.* at 1051.
[41]*Id.* at 1053.
[42]No. 2:13-21588, 2016 U.S. Dist. LEXIS 73904 (S.D.W. Va. June 7, 2016).
[43]*Id.* at *5-6.
[44]*Id.* at *7 (referring to Ohio Valley Envtl. Coalition v. Fola Coal Co., 120 F. Supp. 3d 509 (S.D.W. Va. 2015)).
[45]*Id.* at *53.
[46]No. C14-803RAJ, 2016 U.S. Dist. LEXIS 82643 (W.D. Wash. June 24, 2016).
[47]*Id.* at *1.
[48]*Id.* at *18.
[49]*Id.* at *39.

In *Friends of Mariposa Creek v. Mariposa Public Utilities District*,[50] defendant requested the court vacate or amend the previous order, which found that defendant violated its two NPDES permits by discharging effluent emissions in excess of the limitations set in the permits.[51] The court denied the request because, among other reasons, the court determined that the terms of permits were clear and unambiguous.[52]

On a motion for summary judgment, plaintiffs in *California Sport Fishing Protection Alliance v. River City Waste Recyclers, LLC*,[53] alleged that defendant failed to comply with the 1997 General Permit and continues to be in non-compliance with the 2-15 General Permit.[54] To determine noncompliance, the court considered effluent limitations, receiving water limitations, Storm Water Pollution Prevention Plans, and monitoring and reporting.[55] While the court did find that defendant did not comply with the 1997 General Permit, it could not reach the same conclusions as to the 2015 General Permit based on the record,[56] and thus, the remaining allegations are to be determined at trial.[57]

In *Tennessee Clean Water Network v. TVA*,[58] the district court considered a citizens suit concerning coal ash contamination stemming from a coal-fired power plant.[59] Although the state filed an enforcement action against TVA, the plaintiffs argued that their complaint alleged violations based on a number of provisions of the NPDES Permit that the state did not cite.[60] The court determined that the allegations which do not overlap—unlawful use of a particular creek as a wastewater treatment facility; unauthorized discharge to the Cumberland River from a non-registered site; and discharge to the Cumberland River from the ash pond complex through hydrologic connections—are conceptually distinct and, contrary to TVA's argument, not the "same issues" being pursued by the state, and therefore, plaintiffs may go forward with some of their CWA claims against TVA.[61]

Plaintiffs in *NRDC v. County of Los Angeles*[62] alleged that defendant county discharged polluted stormwater in violation of the terms of the NPDES permit.[63] The case began in 2008.[64] In 2012, defendant received a new NPDES permit that, while it had substantially the same baseline receiving water limitations as the previous permit, it made significant changes as how the receiving water limitations requirement could be met.[65] Thus, the defendant argued that the 2012 permit supplanted the pervious permit, and therefore injunctive relief was not available.[66] The Ninth Circuit, however, reversed the district court's finding that injunctive relief was moot[67] because the defendant county is

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[50]No. 1:15-cv-00583-EPG, 2016 U.S. Dist. LEXIS 87606 (E.D. Cal. July 5, 2016).
[51]*Id.* at *2.
[52]*Id.* at *17.
[53]No. 2:14-cv-01452-KJM-CKD, 2016 U.S. Dist. LEXIS 120186 (E.D. Cal. Sept. 2, 2016).
[54]*Id.* at *44.
[55]*Id.* at *46.
[56]*Id.* at *46-63.
[57]*Id.* at *64.
[58]No. 3:15-cv-00424, 2016 U.S. Dist. LEXIS 122233 (M.D. Tenn. Sept. 9, 2016).
[59]*Id.* at *2-3.
[60]*Id.* at *24-25.
[61]*Id.* at *65-66.
[62]840 F.3d 1098 (9th Cir. 2016).
[63]*Id.* at 1099.
[64]*Id.*
[65]*Id.*
[66]*Id.* at 1101.
[67]*County of Los Angeles*, 840 F.3d at 1105.

still subject to receiving water limitations and "it is not 'absolutely clear' that [defendant's] violation will not recur."[68]

2. No Permit

In *Pacific Coast Federation of Fishermen's Ass'ns v. Murillo*,[69] the court held that plaintiffs could go forward with their CWA citizen suit against the Bureau of Reclamation and a California water authority.[70] The plaintiffs argued that the jointly administered irrigation project discharges a substantial quantity of contaminated groundwater from fallow, retired agricultural-use parcels without a NPDES permit.[71] Defendant agencies claimed that the irrigation project is exempt from the NPDES permit requirement because it is covered by the "return flow from irrigated agriculture" exemption.[72] The court held that the exemption does not cover the resulting commingled discharges because it is plausible that discharges from retired land, which no longer supports irrigated agriculture, are not related to crop production.[73]

The plaintiffs in *Sierra Club v. BNSF Railroad Co.*[74] sought declaratory and injunctive relief against the defendant for alleged discharges of coal and related pollutants into protected waterways within Washington state without a NPDES permit.[75] The plaintiffs argued that the defendant had over twelve million CWA violations because "'[e]ach and every train and each and every rail car discharges coal pollutants to waters of the United States when traveling adjacent to, over, and in proximity to the waters of the United States.'"[76] The court determined that while emissions to land and from land to water were not point source discharges,[77] aerial and windblown emissions of coal particles are point source discharges.[78] However, the court declined to find liability because there remained disputes of material fact.[79]

G. CWA Section 404—Wetlands

1. Jurisdictional Determinations

On May 31, in *Hawkes Co. v. United States Army Corps of Engineers*, the United States Supreme Court ruled that an approved jurisdictional determination (JD) issued by the United States Army Corps of Engineers (Corps) under the CWA is a final agency action subject to judicial review under the federal Administrative Procedure Act (APA).[80] The Court found that the approved JD passed the two-part legal test for finality under the APA, as outlined in *Bennett v. Spear*[81] because it "'mark[s] the consummation of the agency's

[68] *Id.* at 1102.
[69] No. 2:11-cv-02980-KJM-CKD, 2016 U.S. Dist. LEXIS 119325 (E.D. Cal. Sept. 2, 2016).
[70] *Id.* at *34.
[71] *Id.* at *20.
[72] *Id.* at *26.
[73] *Id.* at *28-34.
[74] No. C13-967-JCC 2016, U.S. Dist. LEXIS 147786 (W.D. Wash. Oct. 25, 2016).
[75] *Id.* at *3.
[76] *Id.* at *32.
[77] *Id.* at *29.
[78] *Id.* at *32.
[79] *BSNF R.R. Co.*, U.S. Dist. LEXIS 147786, at *36.
[80] 136 S. Ct. 1807, 1816 (2016).
[81] *Id.* at 1810 (quoting Bennett v. Spear, 520 U.S. 154 (1997)).

decisionmaking process'" and is the type of action from which "'rights or obligations have been determined, or from which legal consequences will flow.'"[82]

2. Challenges to Permitting Decisions

In *Black Warrior Riverkeeper, Inc. v. United States Army Corps of Engineers*, the court affirmed that Corps' decision to re-issue 2012 Nationwide Permit 21 for coal mining operations was not arbitrary and capricious, even though it grandfathered in activities approved under 2007 version of NWP 21 (which had more permissive discharge limits), because those grandfathered activities would have minimal adverse effects).[83]

In *Mingo Logan Coal Co. v. Environmental Protection Agency*, the United States Court of Appeals for the D.C. Circuit affirmed the district court's post-remand decision that EPA's Section 404(c) veto of a discharge permit for mountain-top mining was not arbitrary and capricious, because the EPA adequately explained the project's environmental effects, the EPA permissibly considered effects of the project on downstream water quality, and the mining operator could not raise an argument for the first time on appeal the EPA failed to consider its costs of reliance on a permit or its history of compliance.[84]

In *Ohio Valley Environmental Coal., Inc. v. United States Army Corps of Engineers*, the court upheld the lower court's decision that Corps did not violate Section 404 in granting permit for surface coal mining, where Corps did not consider public health effects beyond proposed discharge itself.[85]

In *Marquette County Rd. Commission v. United States Environmental Protection Agency,* the court dismissed a complaint filed against the EPA, finding that agency's objection to issuance of 404 permit by Michigan DEQ (which has delegated permitting authority) did not consummate the agency's decisionmaking process, and therefore was not final agency action.[86]

In *Citizens of Karst, Inc. v. United States Army Corps of Engineers*, the court upheld the Corps' decision not to issue a supplemental notice when the applicant's mitigation plan changed from 7.5 acres to 9.31 acres.[87] The court reasoned that an increase in mitigation decreased the scope of the adverse impact of the project, and therefore it would not affect the public's review of the proposal.[88]

In *Sisseton-Wahpeton Oyate of the Lake Traverse Reservation v. United States Army Corps of Engineers*, the court denied the Tribe's request for an injunction, finding the Corps' determination that a landowner's road projects were for the purpose of the building of an exempt farm road was not arbitrary and capricious.[89] The court upheld the Corps' determination that the landowner's bridge project qualified for the farm road exemption and his culverts were properly permitted under NWP 14.[90]

In *Duarte Nursery, Inc. v. United States Army Corps of Engineers*, the court granted summary judgement in favor of the Corps on its claim that the plaintiff violated the CWA by discharging into Waters of the United States without a permit.[91] The court rejected the

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[82] *Id.* at 1810.
[83] 833 F.3d 1274 (11th Cir. 2016).
[84] 829 F.3d 710 (D.C. Cir. 2016).
[85] 828 F.3d 316 (4th Cir. 2016).
[86] 188 F. Supp. 3d 641 (W.D. Mich. 2016).
[87] 160 F. Supp. 3d 451, 460 (D.P.R. 2016).
[88] *Id.* at 460.
[89] 124 F. Supp. 3d 958 (D.S.D. 2015).
[90] *Id.* at 973.
[91] 2016 WL 4717986 (E.D. Cal. June 10, 2016).

plaintiff's claim that where the land was used for grazing it qualified the farming exemption under the CWA.[92]

3. Permitting Exemptions

In *Quad Cities Waterkeeper, Inc. v. Ballegeer*, the court held that where defendants never received Corps authorization to build a levee, the maintenance of said levee cannot be exempted from the prohibitions of the CWA under the CWA section 1344(f)(1)(B) maintenance exception.[93]

4. Challenges to Corps' Authorization of its Own Activities

After holding the plaintiffs' claims were moot in *Idaho Rivers United v. United States Army Corps of Engineers*,[94] the court found that the Corps did not violate the CWA when it adopted the Programmatic Sediment Management Plan but did not conduct a public interest review, thereby authorizing its own dredging on the Lower Snake River.[95]

5. Challenges to the Clean Water Rule

In the consolidated challenge to the Clean Water Rule,[96] the Sixth Circuit found that it had jurisdiction to consider the validity of the Rule under the jurisdictional provisions of the CWA in this consolidated proceeding.[97] The nationwide preliminary injunction against implementation of the rule remains in place while the Sixth Circuit considers the merits of the case.

H. CWA Section 505—Citizen Suits

In *Askins v. Ohio Department of Agriculture*,[98] citizens alleged that the Ohio EPA failed to notify the EPA that it had transferred its authority over NPDES permits for animal feeding operations to the Ohio Department of Agriculture, and that the EPA wrongly permitted this transfer without prior approval. The Sixth Circuit affirmed the dismissal of the action for lack of subject matter jurisdiction. The court held that any violation by the State of the notification requirement is not actionable in a citizen suit because it is not a "condition" of any CWA permit and there is no private cause of action against regulators for violating procedural regulations under the CWA. As to the claims against the EPA, the court stated that the CWA allows suits against the EPA as a regulator only where the EPA fails to perform a non-discretionary duty.

In *Tennessee Clean Water Network v. Tennessee Valley Authority*,[99] conservation organizations sued the Tennessee Valley Authority (TVA) alleging CWA violations for unauthorized discharges from a coal-fired power plant. The plaintiffs alleged that TVA's NPDES permit authorized the discharge of wastewater from only one point source and that seepages from ash ponds at the plant were contaminating surrounding waters as

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[92] *Id.* at *19.
[93] 84 F. Supp. 3d 848 (C.D. Ill. 2015).
[94] No. C14-1800JLR, 2016 WL 498911 (W.D. Wash. Feb. 9, 2016).
[95] *Id.* at *20.
[96] Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328).
[97] *In re* U.S. Dep't of Def., U.S. E.P.A. Final Rule: Clean Water Rule: Definition of Waters of U.S., 817 F.3d 261, 274 (6th Cir. 2016).
[98] 809 F.3d 868 (6th Cir. 2016).
[99] 2016 U.S. Dist. LEXIS 122233 (M.D. Tenn. Sept. 9, 2016).

unauthorized discharges.[100] TVA argued that the plaintiffs prohibited from bringing the action by the CWA's diligent prosecution bar, which prohibits citizens from filing suit if the state has already commenced and is diligently prosecuting an action in court. Tennessee filed an enforcement action against TVA in state court alleging violations of state environmental laws prior to the plaintiffs' initiating their federal lawsuit. Through an extensive comparison of the allegations at issue in the citizen suit and the parallel state action, the court determined that some of the plaintiffs' allegations overlapped those in the state action, and therefore, were barred.[101] However, the court held that it had jurisdiction over the plaintiffs' claims regarding unauthorized discharges that were distinct from those that the state action covered. TVA also moved for judgment on the pleadings by arguing that the plant's NPDES permit shielded TVA from liability regarding all seeps from the ash ponds.[102] However, the district court found that TVA's permit did not extend its permit shield protection categorically to all seeps from the ponds. Rather, determining whether specific seeps were of a type reasonably contemplated by the permit was a factual issue on which a conclusion could not be reached on the pleadings.[103]

In *Friends of Mariposa Creek v. Mariposa Public Utilities District,*[104] the plaintiffs alleged discharges of certain pollutants in excess of the relevant limits in the District's permit. On a motion for summary judgment as to liability, the court found that the District had violated its permit a total of 2,218 times and assessed a violation for every day in any month in which a violation of the monthly average occurred.[105] In so ruling, the court rejected the District's two main defenses. First, the District argued that two Time Scheduling Orders (TSOs), which relaxed the permit limits for the pollutants at issue and imposed a compliance schedule on the District, superseded the final effluent limits in the permits. The court found that nothing in the TSOs indicated that they were actual permits or were intended to supplant or replace the permits.[106] Second, the District argued that a settlement with the Regional Water Board covered many of the violations at issue. The court found that the settlement agreement might impact the amount of penalties assessed against the District, but did not create a triable issue of fact with respect to liability.[107]

In *NRDC v. Metropolitan Water Reclamation District of Greater Chicago,*[108] the plaintiffs alleged that effluent from the District's water treatment plants caused conditions in the receiving waters that violated water quality standards (WQS) as to "algal and plant growth and dissolved oxygen."[109] The District argued that the CWA's permit shield insulated it from violations as to its phosphorous discharges. The District had fully disclosed in its permit application that its discharges contained phosphorus and that the phosphorus discharges were within the reasonable contemplation of the permit authority when it issued the permit without any phosphorous limitations. The permit did incorporate state WQS.[110] The court noted that more than disclosure to and reasonable contemplation by the permitting authority is required for the permit shield to apply. The permittee must also comply with its permit. The question became whether the WQS incorporated into the permit were a substantive term of the permit. The court found that the WQS were substantive terms, and as such, the District must ensure that its effluent does not cause

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[100] *Id.* at *4, *58.
[101] *Id.* at *11-12, *20.
[102] *Id.* at *19-20, *46-47.
[103] *Id.* at *46-51.
[104] 2016 WL 1587228 (E.D. Cal. Apr. 19, 2016).
[105] *Id.* at *1, *12-13.
[106] *Id.* at *9-11.
[107] *Id.* at *12.
[108] 175 F. Supp. 3d 1041 (N.D. Ill. 2016).
[109] *Id.* at 1044.
[110] *Id.* at 1045-47.

violation of the WQS. The court denied the District's motion for summary judgment as to the permit shield.[111]

In *Paolino v. JF Realty, LLC,*[112] the plaintiffs filed a citizen suit seeking injunctive relief and civil penalties, alleging that the defendant's property discharged contaminated stormwater runoff onto other properties without a permit. The state regulatory authority had extensive enforcement involvement with the site over the years, including orders to require the prior operator to install stormwater controls and obtain a permit, both of which were done.[113] However, the permit was issued to a related entity, which did not own the property. Recent inspections found compliance with the regulations. The court noted that the state regulatory authority's ongoing involvement with the property and the resolution of past enforcement issues precluded the need for a citizen suit.[114] As to the permit being held by an entity that neither owned nor operated the site, the court held the failure to notify the regulatory authority of a transfer of ownership was not a substantive violation that a single individual controlled all relevant entities, and the current owner was complying with relevant regulations.[115]

II. ADMINISTRATIVE DEVELOPMENTS

A. CWA Section 303—Water Quality Standards

On April 20, the EPA proposed federal CWA water quality standards for certain waters in Maine. Another action in a long-standing dispute regarding protections of waters on Indian lands and of waters subject to sustenance fishing rights under the Maine Implementing Act.[116] The EPA's proposed human health criteria for certain waters in Maine are based on a fish consumption rate the agency determined represents an unsuppressed level of tribal fish consumption and on local and regional information. The EPA's proposal is a follow up to disapprovals it issued in February, March, and June 2015 of various water quality standards submitted by Maine.[117]

On May 16, the EPA issued a revised interpretation of the CWA Tribal Provision.[118] CWA Section 518 authorizes the EPA to treat eligible tribes in a manner similar to states (Treatment as States or TAS) for many CWA purposes, and many tribes have used TAS status to develop water quality standards. Until issuing the revision, the EPA has followed a cautious interpretation of Section 518 and required tribes applying for TAS to demonstrate inherent authority to regulate waters and activities on their reservations under federal Indian common law.[119] The EPA's revised interpretation concludes that Congress expressly delegated authority to tribes to administer CWA regulatory programs over entire reservations, including regulation of nonmember activities on fee lands within a reservation. Although tribes will remain subject to eligibility requirements under Section 518, the EPA will no longer require tribes to demonstrate inherent authority when applying for TAS status.[120]

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[111] *Id.* at 1063-65.
[112] 830 F.3d 8 (1st Cir. 2016).
[113] *Id.* at 11.
[114] *Id.* at 14-15, 18.
[115] *Id.* at 16-17.
[116] Proposal of Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 23,239 (Apr. 20, 2016) (to be codified at 40 C.F.R. pt. 131).
[117] *Id.* at 23,241-42.
[118] Revised Interpretation of Clean Water Act Tribal Provision, 81 Fed. Reg. 30,183 (May 16, 2016) (to be codified at 40 C.F.R. pts. 123, 131, 233 and 501) (final interpretative rule).
[119] *Id.* at 30,183.
[120] *Id.* at 30,183-84.

On September 29, the EPA published advance notice of proposed rulemaking to announce its consideration of baseline water quality standards (BWQS) for Indian reservations.[121] Of the more than three hundred tribes with reservations, fewer than fifty have water quality standards under the CWA. The EPA invited comments on whether to establish BWQS for reservation waters not already covered by CWA-effective standards and, if so, what the standards should be and how they should be implemented. The comment period runs through December 28.[122]

The EPA approved forty-five human health criteria submitted by Washington as revised water quality standards, and disapproved 143 such criteria. The EPA promulgated standards for criteria it disapproved.[123]

B. CWA Section 303(d)—TMDLs

On September 26, 2016, the EPA issued its final rule to treat eligible recognized Indian tribes in a similar manner as a state for purposes of administering section 303(d) and certain other provisions of the CWA. The EPA has not yet promulgated regulations expressly establishing a process for tribes to obtain TAS authority to administer the water quality restoration provisions of CWA section 303(d).[124]

C. CWA Sections 304 and 306–Criteria and Guidelines, and Performance Standards

In February, the EPA published "A Practitioner's Guide to the Biological Condition Gradient: A Framework to Describe Incremental Change in Aquatic Ecosystems" to more precisely define and interpret baseline aquatic ecosystem quality and measure and document incremental changes in condition along a gradient of anthropogenic stress.[125]

On April 4, the EPA published Recommended Aquatic Life Ambient Water Quality Criteria for Cadmium to describe new data regarding the impacts of cadmium on aquatic life, including effects on seventy-five species and forty-nine genera not previously represented.[126] The freshwater and estuarine/marine acute values are lower (more stringent) than the 2001 criteria, while the freshwater chronic criterion is slightly higher than in previous years.[127]

On April 18, the EPA published a proposed rule entitled Aquatic Life Criteria for Copper and Cadmium in Oregon to establish federal freshwater acute criteria for cadmium and acute and chronic criteria for copper in Oregon.[128] Oregon had failed to address the EPA's 2013 disapproval of its freshwater criteria for cadmium, copper, and aluminum.

On June 28, the EPA promulgated the ELGs and Standards for the Oil and Gas Extraction Point Source Category, which prohibits the discharge of pollutants from

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[121]Federal Baseline Water Quality Standards for Indian Reservations, 81 Fed. Reg. 66,900 (Sept. 29, 2016) (to be codified at 40 C.F.R. pt. 131).
[122]*Id.*
[123]Revision of Certain Federal Water Quality Criteria Applicable to Washington, 81 Fed. Reg. 85,417 (Nov. 28, 2016) (to be codified at 40 C.F.R. pt. 131).
[124]Treatment of Indian Tribes in a Similar Manner as States for Purposes of Section 303(d) of the Clean Water Act, 40 C.F.R. § 130.16 (2016).
[125]OFFICE OF WATER, ENVTL. PROT. AGENCY, EPA 842-R-16-001, A PRACTITIONER'S GUIDE TO THE BIOLOGICAL CONDITION GRADIENT: A FRAMEWORK TO DESCRIBE INCREMENTAL CHANGE IN AQUATIC ECOSYSTEMS (2016).
[126]Recommended Aquatic Life Ambient Water Quality Criteria for Cadmium—2016, 81 Fed. Reg. 19,176 (Apr. 4, 2016).
[127]*Id.*
[128]Aquatic Life Criteria for Copper and Cadmium in Oregon, 81 Fed. Reg. 22,555 (Apr. 18, 2016) (to be codified at 40 C.F.R. pt. 131).

"unconventional oil and gas" facilities to publicly owned treatment works (POTWs).[129] This pretreatment standard (codified at 40 C.F.R. pt. 435) eliminates the option for discharging produced water from wells drilled into shale or other "tight" formations to a POTW, and applies directly to the method of oil or gas extraction using advanced hydraulic fracturing and horizontal drilling. The compliance date for the rule has been extended from August 29, 2016 to August 29, 2019.[130]

In June, the EPA published the Preliminary 2016 ELG Program Plan, identifying and providing a schedule for reviews, studies or ELGs for the following industry categories: Battery Manufacturing, Centralized Waste Treatment, Electrical and Electronic Components, Electroplating, Iron and Steel Manufacturing, Metal Finishing, Pesticide Chemicals, Petroleum Refining, and Pulp, Paper, and Paperboard.[131]

On July 13, the EPA published final Recommended Aquatic Life Ambient Water Quality Criterion for Selenium in Freshwater.[132] The criterion incorporates the EPA science and testing protocols for selenium bioaccumulation and toxicity, and is intends to protect animals higher in the food chain that feed on aquatic life, including species such as birds. This approach is a departure from traditional aquatic life water quality criteria.[133]

On July 15, the EPA relied on the new selenium criteria to propose Establishment of Revised Numeric Criteria for Selenium for the San Francisco Bay and Delta, California.[134] The EPA believes that the existing aquatic life criteria are not adequately protective of vulnerable species of clam eating fish and clam eating birds, among others.

On July 29, the EPA published a Request for Scientific Views: Draft Aquatic Life Ambient Estuarine/Marine Water Quality Criteria for Copper.[135] The recommended criteria use the recently developed saltwater biotic ligand model (BLM), which includes an assessment of the amount of copper binding to organic matter in estuarine/marine systems and to membranes of embryo-larval stages of several sensitive marine invertebrates.[136]

On November 15, the EPA published the Revision of Certain Federal Water Quality Criteria Applicable to Washington, revising the federal human health criteria in that state for toxic pollutants using new fish-consumption rates and toxicity and exposure parameters.[137] Concurrently, the EPA issued a Partial Approval/Partial Disapproval of Washington's Human Health Water Quality Criteria and Implementation Tools.

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[129]Effluent Limitations Guidelines and Standards for the Oil and Gas Extraction Point Source Category, 81 Fed. Reg. 41,845 (June 28, 2016) (to be codified at 40 C.F.R. pt. 435).

[130]Effluent Limitations Guidelines and Standards for the Oil and Gas Extraction Point Source Category—Implementation Date Extension, 81 Fed. Reg. 88,126 (Dec. 7, 2016) (to be codified at 40 C.F.R. pt. 435).

[131]OFFICE OF WATER, ENVTL. PROT. AGENCY, EPA-821-R-16-001, PRELIMINARY 2016 EFFLUENT GUIDELINES PROGRAM PLAN (2016).

[132]Recommended Aquatic Life Ambient Water Quality Criterion for Selenium in Freshwater, 81 Fed. Reg. 45,285 (July 13, 2016).

[133]*Id.*

[134]Water Quality Standards; Establishment of Revised Numeric Criteria for Selenium for the San Francisco Bay and Delta, State of California, 81 Fed. Reg. 46,030 (July 15, 2016) (to be codified at 40 C.F.R. pt. 131).

[135]Request for Scientific Views: Draft Aquatic Life Ambient Estuarine/Marine Water Quality Criteria for Copper—2016, 81 Fed. Reg. 49,982 (July 29, 2016).

[136]OFFICE OF WATER, ENVTL. PROT. AGENCY, EPA-822-P-16-001, DRAFT AQUATIC LIFE AMBIENT ESTUARINE/MARINE WATER QUALITY CRITERIA FOR COPPER – 2016 (2016).

[137]Revision of Certain Federal Water Quality Criteria Applicable to Washington, 81 Fed. Reg. 85,417 (Nov. 15, 2016) (to be codified at 40 C.F.R. pt. 131).

D. CWA Section 401—State Certification

There were three 2016 decisions from the Federal Energy Regulatory Commission regarding conditional approvals: *Constitution Pipeline Co.*,[138] *Northwest Pipeline, LLC*,[139] and *Transcontinental Gas Pipe Line Co.*[140] In each, the FERC concluded that it had the authority to authorize a pipeline project subject to the condition that the pipeline company obtain a 401 certification from the appropriate state. Opponents argued that FERC could not act until after the 401 certification was issued. The Commission concluded that it had the authority to conditionally approve the projects because no construction could take place until the 401 certification had been issued.

E. CWA Section 402—NPDES Permitting

On September 9, the EPA published a notice of guidance to provide an overview of the "initial recipient" term, the listing of the initial recipients, and the due date in accordance with the NPDES Electronic Reporting Rule.[141]

The EPA published its decision that "no additional regulations are needed to address stormwater discharges from forest roads under Section 402(p)(6)."[142]

On May 18, the EPA published a proposed rule to revise the NPDES regulations to eliminate regulatory and application form inconsistencies; improve permit documentation, transparency, and oversight; clarify existing regulations; and remove outdated provisions.[143]

All ten EPA Regions proposed for public comment the draft 2017 NPDES general permit for stormwater discharges from construction activities, which will replace the existing general permit that will expire on February 16, 2017.[144]

In response to the remand from the Ninth Circuit in *Environmental Defense Center v. EPA*,[145] the EPA issued a proposed rule to change the regulations governing small municipal separate storm sewer system (MS4) permits.[146]

F. CWA Section 404—Wetlands

On October 31, the Corps issued a Regulatory Guidance Letter (RGL) seeking to clarify the applicability and use of JDs.[147] The purpose of the RGL is to clarify the differences between approved and preliminary JDs, and provide guidance on which is appropriate under varying circumstances.

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[138]*Order Denying Rehearing and Approving Variance*, 154 FERC ¶ 61,046 (Jan. 26, 2016).
[139]*Order on Rehearing*, 157 FERC ¶ 61,093 (Nov. 8, 2016).
[140]*Order Denying Rehearing*, 157 FERC ¶ 61,095 (Nov. 9, 2016).
[141]NPDES Electronic Reporting Rule Implementation Guidance, 81 Fed. Reg. 62,395 (Sept. 9, 2016) (to be codified at 40 C.F.R. pt. 127).
[142]Decision Not To Regulate Forest Road Discharges Under the Clean Water Act; Notice of Decision, 81 Fed. Reg. 43,492 (July 5, 2016) (to be codified at 40 C.F.R. ch. I).
[143]National Pollutant Discharge Elimination System (NPDES): Applications and Program Updates, 81 Fed. Reg. 31,343 (May 9, 2016).
[144]Draft National Pollutant Discharge Elimination System (NPDES) General Permit for Stormwater Discharges From Construction Activities, 81 Fed. Reg. 21,328 (Apr. 11, 2016).
[145]344 F.3d 832 (9th Cir. 2003).
[146]National Pollutant Discharge Elimination System (NPDES) Municipal Separate Storm Sewer System General Permit Remand, 81 Fed. Reg. 415 (Jan. 6, 2016) (to be codified at 40 C.F.R. pt. 122).
[147]U.S. ARMY CORPS OF ENG'RS, REGULATORY GUIDANCE LETTER, NO. 16-01 (Oct. 2016).

On June 1, the Corps published a proposed rule to reissue and modify Nationwide Permits (NWPs).[148] This begins the process for renewing and revising the 2012 NWPs that are set to expire on March 18, 2017. The new NWP will go into effect on March 18, 2017, as the 2012 NWP expire.

III. LEGISLATIVE DEVELOPMENTS

A. CWA Section 303(d)—TMDLs

The Clean Water Affordability Act of 2016 was introduced to the Senate on April 7, 2016 and was referred to the Committee on Environment and Public Works. The bill would amend the CWA to update a program to provide assistance for the planning, design, and construction of treatment works to handle sewer overflows and require the Administrator of the EPA to provide guidance and determine the financial ability of communities to implement clean water infrastructure programs.[149]

B. CWA Section 402—NPDES

The House passed a bill to prohibit the EPA or a state from requiring a permit under the CWA for a discharge from a point source into navigable waters of a pesticide authorized for sale, distribution, or use under Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), or a residue resulting from the application of the pesticide.[150]

Rep. Bob Gibbs (R-OH) introduced a bill to amend the CWA Section 402 to provide for an integrated planning and permitting process.[151]

C. CWA Section 404— Wetlands

The Senate and House passed a joint resolution to nullify the rule submitted by the Corps and the EPA relating to the definition of "waters of the United States" under the Clean Water Act and published on June 29, 2015.[152]

On September 20, the United States Senate Environment & Public Works Committee published a report on the Clean Water Rule.[153] On October 27, the House Oversight and Government Reform Committee issued a report[154] on the findings of its investigation into the Clean Water rulemaking process.

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[148]Proposal To Reissue and Modify Nationwide Permits, 81 Fed. Reg. 35,186 (June 1, 2016) (to be codified at 33 C.F.R. ch. II).
[149]S. 2768, 114th Cong. (2016).
[150]Zika Vector Control Act, H.R. 897, 114th Cong. (2015-2016).
[151]Water Quality Improvement Act of 2016, H.R. 6182, 114th Cong. (2016).
[152]S.J. Res. 22, 114th Cong. (2016) (vetoed by the President Jan 20, 2016).
[153]STAFF OF S. COMM. ON ENV'T AND PUBLIC WORKS, 114TH CONG., FROM PREVENTING POLLUTION OF NAVIGABLE AND INTERSTATE WATERS TO REGULATING FARM FIELDS, PUDDLES AND DRY LAND: A SENATE REPORT ON THE EXPANSION OF JURISDICTION CLAIMED BY THE ARMY CORPS OF ENGINEERS AND THE U.S. ENVIRONMENTAL PROTECTION AGENCY UNDER THE CLEAN WATER ACT (Comm. Print Sept. 20, 2016).
[154]STAFF OF H. COMM. ON OVERSIGHT AND GOV'T REFORM, 114TH CONG., POLITICIZATION OF THE WATERS OF THE UNITED STATES RULEMAKING (Comm. Print Oct. 27, 2016).

Chapter 12 • ENERGY MARKETS AND FINANCE
2016 Annual Report[1]

I. SCOTUS UPHOLDS FEDERAL JURISDICTION OVER WHOLESALE CAPACITY AUCTIONS

A. *Hughes v. Talen Energy Marketing, LLC*

In April of this year, the United States Supreme Court issued a unanimous (8-0) decision upholding Federal Energy Regulatory Commission (FERC) authority over the wholesale power capacity auctions it regulates, affirming a United States Court of Appeals for the Fourth Circuit holding that a Maryland regulatory program enacted to encourage construction of new in-state electricity generation was preempted by the Federal Power Act (FPA), which grants the FERC exclusive jurisdiction over interstate wholesale electricity rates.[2] Despite the Court's rejection of the Maryland program, it signaled that states are not foreclosed from encouraging production of new generation through other means that do not disturb federal jurisdiction.[3]

1. The State Program at Issue

At issue in the case was Maryland's "contracts for differences," special power capacity contracts associated with a state-sponsored, competitive solicitation for new power generation[4] Maryland, a deregulated energy market, is located in the PJM Interconnection (PJM) footprint, a nonprofit Regional Transmission Organization (RTO) charged by the FERC with overseeing "the electricity grid in all or parts of [thirteen] mid-Atlantic and Midwestern States and the District of Columbia."[5] In addition to administering "same-day" and "next-day" competitive wholesale electricity auctions, PJM also runs a "capacity auction" that ensures the availability of an adequate future supply of power and serves to identify the need for new generation.[6] Because Maryland is located in a particularly congested portion of the PJM grid, where importing electricity cheaply into the state is difficult, Maryland developed a regulatory program to incentivize the construction of in-state generation.[7]

The program involved soliciting proposals for the new generation, proposals which included bidder-specified capacity prices that Maryland would guarantee to be paid to the

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[1]This chapter was created by the Energy Markets and Finance Committee. Editors include Katy Terrell, *Vice Chair of Year in Review*, and Miles Kiger, *Committee Co-Chair*. Authors by section include: I. Miles Kiger ("SCOTUS Upholds Federal Jurisdiction Over Wholesale Capacity Auctions") (*Any views expressed are those of the editor/author, and not necessarily that of FERC, the Commissioners, or the Federal Government); II. Katy Terrell ("FERC's Proposed Rule on Electric Grid Storage"); III. Lynn Wolf, Nadege Asale, and Anthony C. Marino Slattery (coauthoring "Additional Financial Security Measures at the Bureau of Ocean Energy Management"); IV. Tommy Ikard ("Decoupling CO2 Emissions from Economic Growth"); V. Keith Casto ("Triangulation of the Clean Power Plan, the California Cap and Trade Program, and the Paris Climate Change Agreement"); VI. Heather Rosmarin ("California Energy & Climate Legislation"); VII. Ken Gish ("Renewables in the Coal Fields – Solar Projects in Kentucky"); and VIII. Paul Elkins ("Debt Collection Issues During Stagnant Times for the Oil and Gas Industry").

[2]*See* Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1291-1292 (2016).

[3]*Id.* at 1299.

[4]*Id.* at 1294.

[5]*Id.* at 1293.

[6]*Id.*

[7]*Hughes*, 136 S. Ct. at 1294.

winning bidder, going forward.[8] CPV Maryland, LLC (CPV), the winning bidder (and Court petitioner), then would enter into twenty-year pricing contracts, the so-called contracts for differences, with capacity buyers (i.e., Load Serving Entities (LSEs)) at CPV's specified capacity prices.[9] The contracts for differences get their moniker from the fact that CPV must sell its new capacity in the PJM capacity auction and then, depending on whether the contract price is higher or lower than the capacity auction-clearing price, the difference is paid either to the LSEs from CPV (when the contract price is lower than the capacity auction-clearing price) or by the LSEs to CPV (when contract price is higher than the capacity auction-clearing price).[10]

2. Federal Preemption

The Court held because Maryland "requires CPV to participate in the PJM capacity auction, but guarantees CPV a rate distinct from the clearing price for its interstate sales of capacity to PJM," Maryland's regulatory program impermissibly "sets an interstate wholesale rate," and thus "invades FERC's regulatory turf."[11] Because such action "contraven[es] the FPA's division of authority between state and federal regulators",[12] according to the Court, it is preempted.

3. Arguments and Rationale

The Court pointed out the FPA allocates to the FERC exclusive jurisdiction over "'rates and charges . . . received . . . for or in connection with' interstate wholesale sales."[13] Accordingly, although states may regulate even when its laws incidentally affect areas within the FERC's domain, the Court held states "may not seek to achieve ends . . . through regulatory means that intrude on FERC's authority over interstate wholesale rates …."[14] The Court stated that it had encountered a similar preemption problem before in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*[15] and *Nantahala Power & Light Co. v. Thornburg*.[16] In those cases, states had established that a FERC-determined wholesale rate was unreasonable, and therefore, the states prevented local utilities from recovering the full cost of those wholesale purchases.[17] The Court reiterated that its holdings in those cases "invalidated the States' attempts to second-guess the reasonableness of interstate wholesale rates."[18] The Court further cautioned "*Mississippi Power & Light* and *Nantahala* make clear that States interfere with the FERC's authority by disregarding interstate wholesale rates the FERC has deemed just and reasonable, even when States exercise their traditional authority over retail rates or, as here, in-state generation."[19]

In responding to an additional argument set forth by petitioners that the contracts for differences are no different than traditional bilateral capacity contracts (which FERC

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[8] *Id.*
[9] *Id.* at 1294-95.
[10] *Id.* at 1295, n.5
[11] *Id.* at 1297 (citing FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 780 (2016)).
[12] *Hughes*, 136 S. Ct. at 1297.
[13] *Id.* (citing U.S.C. § 824d(a)).
[14] *Id.* at 1298.
[15] *Id.* (citing Miss. Power & Light Co. v. Miss. *ex. rel* Moore, 487 U.S. 354 (1988)).
[16] *Id.* at 1298 (citing Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986)).
[17] *Hughes*, 136 S. Ct. at 1298.
[18] *Id.*
[19] *Id.* at 1299.

has openly accommodated in PJM capacity auctions[20]), the Court pointed out the contracts for differences are distinguishable because they do "not transfer ownership of capacity from one party to another outside the auction," as do the bilateral capacity contracts.[21] Therefore, according to the Court, the contracts for differences do not operate outside of the PJM capacity auction; rather, they "mandate[] that LSEs and CPV exchange money based on the cost of CPV's capacity sales to PJM."[22]

4. Limitation to the Holding

The Court emphasized its holding was limited to a rejection of Maryland's program "only because it disregards an interstate wholesale rate required by FERC."[23] The Court noted it does "not address the permissibility of various other measures States might employ to encourage development of new or clean generation, including tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector."[24] The unanimous opinion of the Court concludes by cautioning that "[s]o long as a State does not condition payment of funds on capacity clearing the auction, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable."[25]

5. Sotomayor and Thomas's Concurring Opinions on Preemption

Finally, Justices Sotomayor and Thomas wrote separately to express their views on the pre-emption principles the Court relied on in reaching its conclusions. Justice Sotomayor's concurrence emphasized the "Federal Power Act, like all collaborative federalism statutes, envisions a federal-state relationship marked by interdependence", and, therefore, related pre-emption inquiries "are particularly delicate."[26] In such complementary federal-state contexts, Justice Sotomayor warns that "courts must be careful not to confuse the congressionally designed interplay between state and federal regulation [like the FPA] . . . for impermissible tension that requires preemption under the Supremacy Clause."[27] Justice Sotomayor further stresses that in this setting the Court's "general exhortation not to rely on a talismanic pre-emption vocabulary applies with special force."[28] From Justice Sotomayor's perspective, the Court's opinion reflects these principles when it concludes Maryland has impermissibly impeded the performance of one of the FERC's core regulatory duties because the Court focuses on the FPA as the "ultimate touchstone" of its pre-emption inquiry "rather than resting on generic pre-emption frameworks unrelated to the [FPA]."[29]

Justice Thomas wrote "I join the Court's opinion only to the extent that it rests on the text and structure of the Federal Power Act."[30] Justice Thomas asserts that "[t]o resolve these cases, it is enough to conclude that Maryland's program invades FERC's exclusive

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[20]*Id.* at 1295, n.3 (describing a hypothetical example of how bilateral capacity contracts are accommodated in the PJM capacity auction).
[21]*Id.* at 1299.
[22]*Hughes*, 136 S. Ct. at 1299.
[23]*Id.*
[24]*Id.*
[25]*Id.*
[26]*Id.* at 1300.
[27]*Hughes*, 136 S. Ct. at 1300. (quoting Nw. Cent. Pipeline Corp. v. State Corp., Comm'n of Kan., 489 U.S. 493, 518 (1989) (internal quotations omitted)).
[28]*Id.* (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
[29]*Id.* (quoting Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008)).
[30]*Id.* at 1301.

jurisdiction" and "[a]lthough the Court applies the FPA's framework in reaching [its preemption] conclusion . . . it also relies on principles of implied pre-emption."[31] Justice Thomas concludes that "[b]ecause we can resolve these cases based on the statute alone, I would affirm based solely on the FPA."[32]

Additional case coverage is available at SCOTUSblog.

II. FERC'S PROPOSED RULE ON ELECTRIC GRID STORAGE

A. Electric Storage in 2016

Historically storage has played a limited role in the electric grid, but advances in electric storage technology, such as grid-scale batteries, have made storage a commercially viable tool for a modern grid.[33] Not only can storage allow for easier implementation of distributed energy resources, but it has the potential to produce massive savings for ratepayers. In September of 2016, Massachusetts Energy Storage Initiative released a study, which concluded an installation of 600 MW of advance energy storage in Massachusetts by 2025 would capture $800 million in total system benefits.[34] Also in September 2016, Tesla announced a deal to provide 20 megawatts of battery storage to the Southern California Edison utility for use during peak demand.[35]

1. FERC's Proposed Rulemaking

Despite such promising activity in energy storage at the state level this year, the Federal Energy Regulatory Commission (FERC) determined further action is needed to remove market barriers that limit participation of electric storage in wholesale markets.[36] Following a panel discussion late last year, the FERC issued data requests in April of 2016 from the six Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs) to determine if such barriers exist which would lead to unjust and unreasonable wholesale rates.[37]

On November 17, 2016, the FERC issued a proposed rulemaking under the Federal Power Act (FPA) to address these limitations.[38] If finalized, the regulations will force the RTOs and ISOs to revise their tariffs in recognition of the physical and operational characteristics of these resources, and to include both "electric storage resources" and "distributed energy resources aggregations" in a nondiscriminatory manner with traditional generation resources.[39]

The proposed rulemaking has broadly defined "electric storage resources" to cover all types of storage technologies regardless of their size, storage, medium, or location on

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[31] *Id.*
[32] *Hughes*, 136 S. Ct. at 1301.
[33] *See generally* MASS. ENERGY STORAGE INITIATIVE, STATE OF CHARGE; Julian Spector, *Why the New Massachusetts Energy Storage Report is Such a Big Deal*, GREENTECH MEDIA (Sept. 19, 2016).
[34] MASS. ENERGY STORAGE INITIATIVE, *supra* note 33, at i; Spector, *supra* note 33.
[35] Katie Fehrenbacher, *California Utility Turns to Tesla for Huge Battery Project*, FORTUNE (Sept. 15, 2016, 2:25 PM).
[36] Notice of Proposed Rulemaking, *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 157 F.E.R.C. STATS. & REGS. ¶ 61,121, 81 Fed. Reg. 86,522 (2016) (to be codified at 18 C.F.R. pt. 35) [hereinafter Proposed Electric Storage Rule].
[37] *Id.* at 86,523-24.
[38] *Id.* at 86,522.
[39] *Id.* at 86,522-23.

the distribution system or interstate grid.[40] The term "distributed energy resource aggregations" includes "electric storage resources" as well as other distribution-side resources, such as distributed generation, thermal storage, and electric vehicles.[41]

For electric storage specifically, participation models would need to meet five requirements to comply with the proposed rulemaking.

a. Eligibility

First, the tariffs would need to make electric storage resources eligible to provide all the capacity, energy, and ancillary services which they are technically capable of providing.[42] According to the FERC, some markets have already taken steps to incorporate electric storage resources into their tariffs, but their models explicitly limit the services that electric storage resources may provide, such as regulation service only.[43]

b. Bidding Parameters

Second, the FERC proposes that bidding parameters must account for the physical and operational characteristics of electric storage resources.[44] While resource bidding parameters vary greatly between the RTOs/ISOs, the FERC has identified a lack of a state-of-charge bidding parameter and the lack of ability for electric storage resources to identify the maximum energy charge rate and maximum energy discharge rate.[45]

c. Buy and Sell

Third, the FERC proposes that tariffs must ensure electric storage resources can be dispatched as, and set the wholesale market clearing price as, both a wholesale seller and wholesale buyer.[46] Not all markets currently allow storage resources to submit bids to buy electricity, or electric storage resources may be limited to participating in negawatt markets through a price cap bid.[47] The FERC envisions electric storage resources used as dispatchable load to set the market price and better reflect the value of the marginal resource.[48]

d. Small Resources

Fourth, the FERC proposes the minimum size requirement for participation cannot exceed 100 kW.[49] The FERC found smaller electric storage resources face a number of limitations that, e.g., can prevent them from injecting power into the grid and preclude them from providing certain services.[50]

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[40] *Id.* at 86,522, n.1.
[41] Proposed Electric Storage Rule, *supra* note 36, at 86,522, n.2.
[42] *Id.* at 86,523.
[43] *Id.* at 86,525, 86,525, n.28, 86,529.
[44] *Id.* at 86,523.
[45] *Id.* at 86,532, 86,534.
[46] Proposed Electric Storage Rule, *supra* note 36, at 86,523.
[47] *Id.* at 86,535.
[48] *Id.*
[49] *Id.* at 86,523.
[50] *Id.* at 86,525.

e. Wholesale Price

Fifth, where a storage resource is acting as both buyer and seller, the sale of energy to that storage resource must be at the wholesale locational marginal price.[51] Under current market rules, most RTOs/ISOs already charge LMP to electric storage resources that are charging to later sell back their electricity when prices are higher.[52] There is some debate over whether behind-the-meter facilities could unfairly take advantage of the rule by discharging energy purchased at wholesale rates to retail customers who would avoid paying the retail rate.[53] However, other commenters suggested that metering and accounting practices can address these concerns.[54]

The comment period for the proposed rulemaking ends January 30, 2017.[55] A final rule in 2017 will likely bring many new developments in energy storage markets, which ultimately have the potential to transform the nation's electricity consumption.

III. Additional Financial Security Measures at the Bureau of Ocean Energy Management

A. BOEM Notice to Lessees No. 2016-N01 (Overview)

On July 14, 2016, the Bureau of Ocean Energy Management (BOEM) issued Notice to Lessees No. 2016-N01 made effective on September 12, 2016 (the New NTL) and, in so doing, rewrote the rule book for oil and gas exploration and development companies doing business in federal waters on the Outer Continental Shelf (OCS).[56] The New NTL replaces BOEM's then-existing 2008 Notice to Lessees (the 2008 NTL) which set forth the general criteria for determining a company's financial ability to fulfil the decommissioning obligations associated with its OCS leases, pipeline rights-of-way (ROWs), and rights-of-use and easements (RUEs). Such "decommissioning obligations" are based on estimates computed by the Bureau of Safety and Environmental Enforcement (BSEE) for plugging and abandonment (P&A) liability. In addition to the issuance of the New NTL by BOEM, BSEE has implemented new decommissioning assessment methodologies since August 2016 that have caused the P&A liability associated with a number of offshore oil and gas assets to increase significantly.

A key change under the New NTL is that companies will no longer be exempt from posting supplemental financial assurances.[57] The 2008 NTL allowed larger companies to rely on their size and net worth and essentially "self-insure" against future decommissioning liabilities by setting aside funds on the company's balance sheet as opposed to maintaining supplemental bonds/securities with the BOEM. Under the New NTL, however, such exemptions will no longer be granted and eligible companies will be limited in their ability to self-insure (i.e., limited to a maximum of 10% of their tangible net worth calculated as [total assets] less [total liabilities and intangible assets]).

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[51] Proposed Electric Storage Rule, *supra* note 36, at 86,523.
[52] *Id.* at 86,538.
[53] *Id.* at 86,538.
[54] *Id.* at 86,538-39.
[55] *Id.* at 86,548.
[56] *See* Bureau of Ocean Energy Mgmt., Notice to Lessees and Operators of Federal Oil and Gas and Sulfur Leases, and Holders of Pipeline Right-of-Way and Right-of-Use and Easement grants in the Outer Continental Shelf (Sept. 12, 2016).
[57] *Id.* at 2.

B. Key Changes

The New NTL provides significant detail concerning the changes affecting the following five (5) criteria that BOEM considers when evaluating the financial wherewithal of a company and its eligibility for self-insurance.[58]

1. Financial Capacity

BOEM now will look at, and use, financial ratios both in the short-term (liquidity and coverage ratios) and the long-term (leverage and performance ratios).[59] Companies should carefully review the Benchmark for each of the nine (9) ratios identified by BOEM in the New NTL [Current, Quick, EBIT/Interest Expense, Cash Flow/Debt, Total Debt/Capital, Total Debt/EBITDA, Return on Assets, Return on Assets, Return on Equity and Total Debt Equity ratios]. If a company meets at least five (5) out of the nine (9) ratios, self-insurance, expressed as a percentage of the company's tangible net worth, may be granted, up to a maximum of 5%.

2. Projected Strength

This criterion weighs the projected financial strength of a company in excess of its existing and future lease obligations, based on the estimated value of existing OCS lease production and proven reserves of future production.[60] When assessing the value of proven oil and gas reserves, BOEM will consider either (i) the Fair Market Value or (ii) SEC PV-10 when calculating the "lessee's" tangible net worth. When provided, BOEM may allow 25% of the proven reserves value to be used to augment a company's tangible net worth.

3. Business Stability

This criterion is based on "five (5) years of continuous operation and production on the OCS or onshore," although there may be exceptions based on the profile of the company.[61]

4. Reliability

The credit ratings from Moody's or Standard and Poor's or other trade references (for lessees that have no credit rating) will be used.[62]

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[58] *See generally* BUREAU OF OCEAN ENERGY MGMT., *supra* note 56. The five (5) criteria, namely (i) Financial Capacity; (ii) Projected Financial Strength; (iii) Business Stability; (iv) Reliability; and (v) Record of Compliance, will determine a company's eligibility for self-insurance. The determination of a company's eligibility for self-insurance for the maximum amount of 10% of its tangible net worth is a two-part approach. A company may be eligible for 5% self-insurance if it exceeds the threshold of a minimum of 5 of the 9 financial ratios. Thereafter, that 5%, if any, can be increased or decreased based on how the company satisfies the remaining 4 criteria (Projected Financial Strength [may add up to 25% of the PV10 value of proven reserves to calculate a company's tangible net worth]; Business Stability [may reduce the self-insurance amount by a maximum of 5%]; Reliability [may increase the self-insurance amount by a maximum of 5%]; and Record of Compliance [may reduce the self-insurance amount by -3%; -1% or 0%].

[59] *Id.* at 3.

[60] *Id.*

[61] *Id.*

[62] *Id.* at 4.

5. Record of Compliance

BOEM will review the operating history of companies to assess any operating violations BOEM or BSEE, or any other regulatory agency overseeing operations in the OCS, may have levied against them. BOEM's guidance seems to indicate that only "serious" infractions will be considered.[63]

C. Self-Insurance of P&A Liability

Based on these five (5) criteria, BOEM will determine whether a company is eligible for any self-insurance to cover any of its P&A liability. BOEM will provide companies with their total P&A liability based on BSEE-provided decommissioning assessment estimates for all of their OCS leases, ROWs and RUEs. BOEM will also provide companies with their uncovered liability that will need to be addressed either (i) through self-insurance, if available; (ii) by posting 100% of the required additional security; and/or (iii) through other types of supplemental financial security (e.g. Surety Bonds, United States Treasury Securities, Risk Pooling, Third-Party Guarantees, Abandonment Accounts, Insurance instruments, or a combination thereof in Tailored Plans). Additionally, under the New NTL, BOEM is now amenable to crediting companies with the third party escrow agreements, decommissioning trust agreements, sinking funds, surety bonds and other financial security existing amongst the companies in respect of P&A obligations even though BOEM is not named as a beneficiary of such third-party arrangements.[64]

D. Timeline

The New NTL also permits a phased-in approach to providing the supplemental financial security required by BOEM, as set out in the New NTL's Implementation Timeline. The phased-in timeline for posting financial assurance to satisfy decommissioning obligations dictated by the New NTL is a much shorter time period, however, and does not discuss the concept of an extended life expectancy of a lease, ROW and RUE. Nevertheless, the New NTL does allow a company to request that the BOEM Regional Director relax the phasing-in schedule. Proposed tailored plans, for instance, are to be submitted on or before November 25, 2016,[65] and approved or denied by BOEM within 180 days of their submission. However, if the company proposing the plan is working with BOEM, this 180-day timeline may be extended. As a result, the timeline for ultimate compliance with supplemental assurance obligations could be pushed out significantly. However, the BOEM Regional Director also reserves the right to require the full amount of the additional security to be posted within thirty days of the date the 180-day period ends.

[63]BUREAU OF OCEAN ENERGY MGMT., *supra* note 56, at 4.
[64]*Id.* at Attachment, at 1 (Those third-party arrangements are often parts of purchase and sale transactions, for instance).
[65]*See Id.* at 6-7. (This date is based on the original deadlines set forth under the BOEM NTL Implementation Timeline (the "Timeline") when the New NTL was issued. There has been some slippage of the scheduled dates in the Timeline due to certain internal agency delays. Under the New NTL, a company has ten days from receipt of an Order Letter to timely elect to submit a "tailored plan".

E. Take-Away

As noted above, BOEM's criteria for determining decommissioning liabilities will remain unchanged under the New NTL. The key change is the elimination of a company's ability to claim an exemption from its supplemental bonding requirements and a limitation on a company's reliance on self-insurance. Under the New NTL, we expect that to address the decommissioning obligations,[66] most, if not all companies, will elect to submit a "tailored" plan outlining the various forms of securities that they intend to post with respect to its supplemental bonding requirements.

IV. DECOUPLING CO_2 EMISSIONS FROM ECONOMIC GROWTH

A. Recent Commentary on CO_2 Trends Around the World

In April 2016, Fred Pearce from Yale Environment 360 reported on the results of an International Energy Agency (IEA) 2015 analysis, which seems to suggest a decoupling of economic growth and the production of CO_2 emissions.[67] He states "the IEA, a body linked with the Organization for Economic Co-operation and Development (OECD), reported that global CO_2 emissions from energy related activities have not risen since 2013 staying at 32.1 billion tons even as the global economy grew" (IEA Publication: CO_2 Emissions from Fuel Combustion (2015)).[68]

Pearce points out that

> [T]his surprising 'decoupling' of emissions from economic activity was led by the two largest emitters, China and the U.S., which both registered declines in emissions of about 1.5 percent. The IEA finding followed a similar conclusion about global emissions from an international team of climate scientists, headed by Corinne le Quere of the University of East Anglia in England, reported during the Paris climate conference last December.[69]

1. China

> A good part of the decoupling, both studies agree, is attributable to China. Its turnaround has been 'quite remarkable,' says Fergus Green, an analyst of China's energy policy at the London School of Economics. The country's coal use grew annually by more than 8 percent between 2000 and 2013, and that growth was the biggest single cause of rising global CO_2 emissions. As recently as 2011, China got 80 percent of its electricity from coal.[70]

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[66]BSEE's new estimate model no longer formulates liability estimates based on exploration or development plans, but rather determines its estimate based on the wells and facilities in place. Posting of additional financial security will be required within sixty days after the application to drill (APD) the well has been filed. *Financial Assurance NTL Questions & Responses*, BOEM (last updated Aug. 23, 2016).

[67]Fred Pearce, *Can We Reduce CO_2 Emissions and Grow the Global Economy?*, YALE ENV'T 360 (Apr. 14, 2016).

[68]*Id.*

[69]*Id.*; *see also* Robert B. Jackson et al., *Reaching Peak Emissions*, NATURE CLIMATE CHANGE (2016).

[70]Pearce, *supra* note 67.

But Pearce states a "growing concern about killer smog[] has triggered new controls that mean many coal-burning power plants in China have now been moth[-]balled. Coal burning fell by 3 percent in 2015, by which time the percentage of China's electricity produced by coal had fallen to 70 percent, according to the IEA."[71]

> Chinese emissions from oil and gas burning continue to grow, Green says. But that is more than counterbalanced by a combination of declining use of coal and reductions in energy demand from structural changes in the Chinese economy, with energy-guzzling heavy industries like cement and steel production both now declining. Per head of population, Chinese emissions exceed those of Europe, even though average income is less than a half that of citizens of the European Union.[72]

But, according to Pearce, "China seems set on the road to climate redemption. In Paris, Beijing pledged to peak emissions by 2030. In fact, it may already have done so, says Green; and even if not, he foresees only small increases from now on."[73]

2. The United States and Europe

Pearce believes "China is following a road already taken by more economically developed nations. The carbon intensity of high-income OECD countries has more than halved since 1970, meaning half as much CO_2 is now emitted for every dollar of GDP."[74] Pearce asserts that

> [l]ately, things have gone even further. United States emissions have been falling for more than half a decade now, as coal burning is replaced by fracked natural gas and wind power. The United States has become 28 percent richer, but 6 percent cleaner since 2000, says Nate Aden of the World Resources Institute (WRI), who reported that, since 2000, 21 countries — all in Europe, except the U.S. and Uzbekistan — have reduced their carbon emissions while growing GDP. Pearce points out that Britain, for instance, grew its economy by 27 percent while cutting emissions by 20 percent between 2000 and 2014.[75]

He explains "[p]art of this national decoupling is a result of advanced economies offshoring heavy industry to places like China with most of the 'decouplers' having reduced the industrial share of their economic activity."[76] But he cites comments from Nate Aden of WRI to show this is a minor element in the decoupling phenomena. "These 21 nations show an average emissions reduction of 15 percent, but cuts in the industrial share of GDP are just 3 percent."[77]

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[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] Pearce, *supra* note 67.
[76] *Id.*
[77] *Id.*

3. Asia and the Middle East

> [C]learly not all countries are decoupling. Emissions continue to rise in much of Asia and the Middle East. From Turkey to India, enthusiasm for coal remains strong. India has plans to double its already large coal production, which the Delhi government justifies by pointing out that its per capita emissions remain only one-tenth of those of the U.S. But [climate proponents] note that, despite the bluster, India also has big plans for expanding solar energy production. It is far from clear, says the University of East Anglia's le Quere, that the world has yet reached peak emissions of CO_2 from energy sources — still less that this translates into a peak in greenhouse gas emissions overall.[78]

4. The Decoupling Trajectory and Its Causes

But Pearce notes:

> that with the three largest emitters — China, the United States, and the European Union — all showing evidence of decoupling, the signs are suddenly rather encouraging. The first hint that decoupling was under way came four years ago, when a report from the Netherlands Environmental Assessment Agency and the European Commission's Joint Research Center (JRC) found that in 2012, CO_2 emissions rose just 1.1 percent globally, while GDP rose 3.5 percent. Greet Janssens-Maenhout of the JRC says now: 'There has been continuous and increasing decoupling over the past four years.'[79]

"There is no modern precedent. Global CO_2 emissions growth briefly faltered in the early 1980s, in 1992, and again in 2009; but in each case this was due to a decline in economic activity."[80] According to Pearce

> [t]he biggest cause of decoupling is the dramatic growth of renewable energy. Last year, more than twice as much money was put into new capacity for renewables such as solar and wind power than into new power stations burning fossil fuels, according to a new analysis by the Frankfurt School of Finance and Management. For the first time, the majority of this investment was in developing countries, with China responsible for 36 percent of the total.[81]
>
> The reason has as much to do with price as climate policies….The growth of renewables is being accompanied by a sharp decline in coal burning, not only in China, but in the U.S. and elsewhere. Canadian climate blogger Kyla Mandel recently noted that a quarter of European Union countries no longer burn any coal for power generation. This process is being amplified by a flight of capital, as investors fear that expensive coal mines and coal-burning power plants may become "stranded assets," with no markets, as renewables ramp up and limits on CO_2 emissions begin to bite. The coal

[78] *Id.*
[79] *Id.*
[80] Pearce, *supra* note 67.
[81] *Id.*

> industry has been hit hard, with the largest U.S. coal company, Peabody Energy, filing for Chapter 11 bankruptcy protection … [late April, 2016].[82]

5. The Future

Pearce believes "[t]hat this concern is likely to spread to other fossil fuels" and cites comments from British energy analyst and former Greenpeace science director Jeremy Leggett to support his belief:[83]

> Current low oil prices may encourage oil burning and could postpone the market penetration of, for instance, electric cars. But low prices also discourage investment in new oil fields. Pearce quotes Leggett's recent blog, 'Most fossil fuel companies face a future in which they might not have the capital to expand even if they still want to.'[84]

6. Countervailing Trends

Pearce acknowledges that

> there are countervailing trends. The IEA's emissions audit does not cover all CO_2 emissions. Deforestation for the past half century has been a major source of greenhouse gas emissions, although that too now appears to be declining. More worrying — because they are still increasing fast but were left out of the Paris agreement — are emissions from international aviation and shipping. Expansion plans for the aviation industry could lead to emissions from this source tripling by 2040, says Annie Petsonk of the Environmental Defense Fund. Once these are taken into account, 'the decoupling claimed for many nations disappears altogether,' says Kevin Anderson of the University of Manchester in England. The aviation industry may reach agreement later this year on plans to offset its emissions by investing in United Nations schemes for forest conservation. But some environmentalists are concerned that the industry will simply be funding projects already promised by governments as part of their plans to meet their Paris pledges. If so, there will be no additional benefit to the planet.[85]

7. Other Greenhouse Gases

> There are growing concerns too about trends for some other greenhouse gases — in particular, the second most important man-made planet warmer, methane, the main constituent of natural gas. When burned, natural gas produces energy with fewer CO_2 emissions than coal. But if distribution systems leak significant amounts of gas, the warming effect of that methane could negate the benefit of switching off coal. 'Methane numbers may undermine the basic thesis [of decoupling],' says climate activist Bill McKibben, who recently wrote in The Nation that U.S. emissions of methane — 'CO_2's nasty little brother' — have increased by more than 30

[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] Pearce, *supra* note 67.

> percent. In the article, McKibben emphasized leakage from fracking as the likely cause.[86]

According to Pearce, this is a damaging failure of regulation, but Pearce believes it is fixable and at relatively low cost. He cites studies by the United Nations Environment Programme to support his belief. Pearce also points out that "while methane is a potent greenhouse gas, its lifetime in the atmosphere is roughly a decade," and so the consequences are short lived.[87]

> Even if global emissions of CO_2 and other greenhouse gases can be curbed, however, this won't fix climate change, say critics of the decoupling narrative. The big problem is that warming is driven not by annual emissions but by the accumulation of greenhouse gases in the atmosphere. And while methane may disappear relatively quickly, CO_2 hangs around for centuries.[88]

8. The Big Picture of CO_2

According to some government reports,

> Last year CO_2 concentrations in the atmosphere exceeded 400 parts per million (ppm) for the first time. According to the U.N.'s Intergovernmental Panel on Climate Change, keeping global warming below two degrees probably requires keeping this figure below about 450 ppm. That means emitting in total no more than about 800 billion tons of CO_2 from all sources — or less than 20 years' worth at current rates.[89]

"'Set against the small and rapidly dwindling carbon [emissions] budgets associated with the Paris Agreement…the tentative signs of decoupling are of little relevance,' says Anderson, of Manchester University, an avowed pessimist. Andersen states that 'concept of green growth is very misleading.'"[90]

Others, according to Pearce, appear to be more optimistic. "Even if decoupling cannot limit warming to two degrees, it could deliver three or four degrees, after which the world might find ways to draw down CO_2 from the atmosphere."[91] But Pearce says "the bottom line is that, as le Quere puts it, 'we need to bring emissions down to zero. The faster we decrease the emissions, the less risk we take.'"[92]

V. TRIANGULATION OF THE CLEAN POWER PLAN, THE CALIFORNIA CAP AND TRADE PROGRAM AND THE PARIS CLIMATE CHANGE AGREEMENT

A. State Challenges to Clean Power Plan

On August 3, 2015, the United States Environmental Protection Agency (EPA) promulgated a set of performance standards and emission guidelines to reduce carbon pollution from existing fossil fuel-fired power plants under section 111(d) of the Clean Air

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[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] Pearce, *supra* note 67.
[91] *Id.*
[92] *Id.*

Act while encouraging the use of renewable energy and energy conservation.[93] This set of regulations taken together is called the Clean Power Plan (CPP) and requires implementation by the states of the best system of emission reduction (BSER), through three approaches (also known as "building blocks"): (1) heat rate improvements, (2) shifts to lower-emitting natural gas generation, and (3) substituting renewable resources for fossil fuel-fired generation). These building blocks are available to all affected electric generating units through direct investment, operational shifts, or emissions trading (if the state adopts such programs).

The EPA established two alternate approaches for state compliance: (1) source-level emission performance rates for the two source subcategories—fossil fuel-fired electric utility steam generating units (coal units) and stationary combustion turbines (gas units) and (2) state-specific CO_2 goals. If states elect the latter approach, they have discretion to achieve their goals through rate- or mass-based regimes. States which do not timely submit a plan by the regulatory deadline are potentially subject to a Federal Implementation Plan (FIP).

As expected, twenty-seven states and numerous private petitioners filed challenges to the CPP in the United States Court of Appeals for the District of Columbia and immediately sought to have the court stay the implementation of the CPP.[94] The EPA was supported by thirteen states (including California) and numerous environmental organizations.[95]

B. The Paris Agreement

In the meantime, the United States submitted its national climate change plan to the United Nations climate change conference in Paris. This climate change plan was largely based on the national benefits to be derived from the CPP. Based on leadership by the United States and active involvement by the State of California in the conference, the United Nations Climate Change Agreement was signed in Paris on December 12, 2015.[96] At the heart of the Paris Agreement is the contemplated linkage between emissions trading programs throughout the world, including the California cap and trade program.

C. SCOTUS Stays Enforcement of the Clean Power Plan

Shortly after the signing of the Paris Agreement, on January 21, 2016, a three-judge panel of the United States Court of Appeals for the District of Columbia denied the petitioners' application for stay.[97] However, on February 9, 2016, the United States Supreme Court ordered the EPA to halt enforcement of the CPP until the D.C. Court of Appeals ruled in the lawsuit against the plan.[98] The 5-4 vote, split along ideological lines, was the first time the Supreme Court had ever stayed a regulation before a judgment by the

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[93] *Clean Power Plan for Existing Power Plants*, ENVTL. PROT. AGENCY (last updated Jan. 12, 2017); 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, 80 Fed. Reg. 64,965 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) (final rule).

[94] *See* State Petitioners' Motion for Stay and for Expedited Consideration of Petition for Review, West Virginia v. EPA, Nos. 15-1363 et al. (D.C. Cir. Oct. 23, 2015).

[95] *See* Opposition to Petitioners' Motions for a Stay, West Virginia v. EPA, Nos. 15-1363 et al. (D.C. Cir. Dec. 8, 2015).

[96] Press Release, The White House Office of the Press Sec'y, U.S. Leadership and the Historic Paris Agreement to Combat Climate Change (Dec. 12, 2015).

[97] Order on Motions, West Virginia v. EPA, Nos. 15-1363 et al. (D.C. Cir. Jan. 21, 2016).

[98] Order in Pending Case, West Virginia v. EPA, 136 S. Ct. 1000 (2016).

lower Court of Appeals. Unexpectedly, on February 13, 2016, Justice Antonin Scalia, who voted for the stay, died leaving the stay in place but with a four-four split on the U. S. Supreme Court. On May 16, 2016, the D.C. Court of Appeals unexpectedly ordered that the case would be heard and decided en banc instead of by the original three-judge panel.[99] On September 27, 2016, the case against the CPP was heard en banc (except that the chief judge of the court, Merrick B. Garland, recused himself, because he was also President Obama's U.S. Supreme Court nominee). A decision is expected in the spring of 2017.

Notwithstanding the continuing stay of the EPA's implementation of the CPP, the California Air Resources Board (ARB) has continued preparation of its submittal under the CPP. This submittal has been based on the programs initiated under the California Global Warming Solutions Act of 2006 (otherwise known as AB 32), especially the cap and trade program. This program is currently linked with a similar program in the Canadian province of Quebec and another one in the province of Ontario. Similar programs in the states of Oregon and Washington are expected to link with California in 2018. The EPA has expressed a generally favourable view of the California AB 32 climate change program as a template for other state submittals, particularly the cap and trade emissions trading program, if it could be extended past its original expiration date of 2020.[100]

D. The Clean Power Plan in the New Administration

On November 8, 2016, the electorate determined Republican Donald J. Trump would be the next President of the United States. Immediately after assuming office, President-elect Trump vowed to rescind the CPP, to withdraw the United States for the Paris Agreement, and to appoint a United States Supreme Court Justice hostile to climate change regulation.[101] This now leaves three separate proceedings in limbo: (1) the administrative viability of the CPP; (2) the West Virginia v. EPA litigation, and (3) United States participation in the Paris Climate Change Agreement.

E. California's Cap & Trade Program

Apparently untouched by the election is the status of the California climate change initiatives, including the California cap and trade program, which was originally intended to expire in 2020. This program was extended to 2030 by executive order signed by Governor Jerry Brown in 2015 and by legislation (SB 32) signed into law on September 16, 2016. However, a cloud still hovers over the cap and trade program because of litigation in the two companion cases of *California Chamber of Commerce v. California Air Resources Board* and *Morning Star Packing v. Air Resources Board*.[102] Because the State of California auctions a portion of its cap and trade allowances at government-administered auctions, the cap and trade program has been challenged on the basis that it imposes an invalid "tax" on regulated entities under the California constitution because it lacks the requisite two-thirds vote of the legislature. In the case of *Morning Star Packing v. California Air Resources Board*, the trial court ruled that the ARB auctions of tradable allowances constituted a regulatory mitigation fee instead of a tax. The case remains on appeal in the California Court of Appeals under the name of the companion case, California

[99]*See* Order, West Virginia v. EPA, No. 16-1363 (D.C. Cir. May 16, 2016).
[100]STATE OF CAL. AIR RES. BD., CALIFORNIA'S PROPOSED COMPLIANCE PLAN FOR THE FEDERAL CLEAN POWER PLAN (Aug. 5, 2016).
[101]Press Release, Donald J. Trump For President, Inc., Trump Outlines Plan for American Energy Renaissance (Sept. 22, 2016).
[102]Cal. Chamber of Commerce v. Cal. Air Res. Bd., No. 34-34-2013-80001313 (Cal. Super. Ct. 2013); Morning Start Packing Co. v. Air Res. Bd., No. 34-80001464 (Cal. Super. Ct. 2013).

Chamber of Commerce. In the meantime, the Democrats have achieved a supermajority (i.e., two-thirds of both houses) in the state legislature which potentially provides a sufficient voting bloc to legislatively override the unconstitutional "tax" argument. In any event, if the cap and trade program survives by either legislative fix or litigation victory, it could continue to form the basis for a de facto American sub-national emissions trading program with linkage to Canada, Europe and throughout the world. These internationally linked programs could survive the administrative rescission of the CPP, an adverse decision in the D. C. Court of Appeals, and even the withdrawal of the United States from the Paris Climate Change Agreement.

VI. CALIFORNIA ENERGY & CLIMATE LEGISLATION

A. Senate Bill 350 Update

In 2016, California began implementing Senate Bill 350: The Clean Energy and Pollution Reduction Act of 2015[103] (SB 350), which established ambitious new renewable energy and energy efficiency targets and set the groundwork for a regional energy market.[104]

1. Key Components

Specifically, SB 350:

- Increases California's renewable electricity procurement goal to 50% by 2030, thereby increasing demand for eligible renewable energy resources, including solar, wind, biomass, and geothermal
- Requires the state to double statewide energy efficiency savings in electricity and natural gas end uses by 2030
- Provides for the evolution of the California Independent System Operator into a regional grid operator, contingent upon approval from the state legislature
- Requires large publicly owned utilities to adopt Integrated Resource Plans on or before January 1, 2019, which will detail how each entity will inter alia meet greenhouse gas emissions reduction targets, procure at least 50% eligible renewable energy resources by 2030, serve its customers at just and reasonable rates, and minimize localized air pollutants and other greenhouse gas emissions with early priority on disadvantaged communities
- Authorizes state agencies and utilities to take action to accelerate widespread transportation electrification
- Directs state agencies to undertake studies to identify and assess barriers to, and opportunities for, access to renewable energy, energy efficiency, and zero and near zero-emission transportation options by low-income customers

Entities charged with implementing various provisions of SB 350 include the California Energy Commission (CEC), the California Public Utilities Commission (CPUC), the California Air Resources Board (CARB), and the California Independent System Operator (CAISO).

In 2016, in compliance with SB 350, the CAISO released a study on the impacts of a regional ISO-operated power market on California,[105] and the CEC released a study on

[103] S.B. 350, 2015-2016 Reg. Sess. (Cal. 2015) (Adding CAL GOV'T CODE § 44258.5).
[104] *Regional energy market*, CAL. ISO (Feb. 11, 2017).
[105] THE BRATTLE GROUP ET AL., SENATE BILL 350 STUDY: THE IMPACTS OF A REGIONAL ISO-OPERATED POWER MARKET ON CALIFORNIA (July 8, 2016).

overcoming barriers to energy efficiency and renewables for low-income customers and small business contracting opportunities in disadvantaged communities.[106]

2. Upcoming Developments

Anticipated SB 350-related actions by the CEC in 2017 include the following:[107]

- Release draft guidelines for Integrated Resource Plans applicable to large publicly owned utilities
- Develop targets for statewide energy efficiency savings and demand reduction to achieve a cumulative doubling of statewide energy efficiency savings in electricity and natural gas final end uses of retail customers by 2030
- Adopt updated regulations and guidelines in connection with SB 350's 50% Renewables Portfolio Standard

In addition, the state legislature is expected to take up legislation for the transition of CAISO into a regional grid operator.[108]

B. Senate Bill 32 – California Global Warming Solutions Act of 2006: Emissions Limit

In 2016, California passed SB 32, which requires the California Air Resources Board to ensure statewide greenhouse gas (GHG) emissions are reduced to 40% below 1990 levels by 2030.[109] This bill expands on the GHG emissions targets set ten years ago in the landmark California Global Warming Solutions Act of 2006 (AB 32).

VII. RENEWABLES IN THE COALFIELDS – SOLAR PROJECTS IN KENTUCKY

A. Background

Like most states in coal producing areas, the Commonwealth of Kentucky has long obtained the overwhelming majority of its electricity from coal-fired generation. For example, in 2015, the most recent year for which data has been released, Kentucky obtained 92% of its electricity from coal.[110] In recent years, however, the percentage of electricity generated in Kentucky from coal has decreased. From 2015 to 2016, utilities in Kentucky retired coal-fired power plants totaling 3,233 MW. While some of retired coal-fired capacity has been replaced by natural gas generation, renewable generation is starting to slowly, and incrementally, gain a foothold in Kentucky. In 2016, three solar power developments in Kentucky highlighted this gradual transition.

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[106]CAL. ENERGY COMM'N, COMMISSION FINAL REPORT, LOW-INCOME BARRIERS STUDY, PART A: OVERCOMING BARRIERS TO ENERGY EFFICIENCY AND RENEWABLES FOR LOW-INCOME CUSTOMERS AND SMALL BUSINESS CONTRACTING OPPORTUNITIES IN DISADVANTAGED COMMUNITIES (2016).

[107]CAL. ENERGY COMM'N, SENATE BILL 350 & ASSEMBLY BILL 802 - IMPLEMENTATION TIMELINE & RELATED PROCEEDINGS (2016).

[108]CAL. INDEP. SYS. OPERATOR, ISO REGIONAL ENERGY MARKET FAQ (2016).

[109]S.B. 32, 2015-2016 Reg. Sess. (Cal. 2016) (Adding CAL GOV'T CODE § 38566).

[110]KY. ENERGY AND ENV'T CABINET, DEP'T FOR ENERGY DEV. AND INDEP., KENTUCKY ENERGY PROFILE 24 (5th ed. 2015).

B. E.W. Brown Solar Project

In the late spring of 2016, Louisville Gas & Electric Company (LG&E) and Kentucky Utilities (KU) began commercial operations at a jointly owned 10 MW solar generating facility in Mercer County, Kentucky on land located at its existing E.W. Brown Generating Station. The Brown Solar Facility is the first utility-scale solar generating facility in Kentucky. The Public Service Commission of Kentucky (Commission) granted LG&E and KU a certificate of public convenience and necessity (CPCN) despite the project being costlier than other alternatives available for the utilities to address capacity shortfalls. In its order approving the application, the Commission identified portfolio diversification and the potential impact of carbon regulation as reasons for approval:

> Joint Applicants state that '[m]oving forward with Brown Solar Facility now will afford the Companies an opportunity to gain operational experience with this type of resource should the economics continue to improve and future CO2 regulations enhance their value to the system.' The Commission agrees and believes it is appropriate for Joint Applicants to diversify their generation portfolio in light of a likely future carbon-constrained world.[111]

The start of commercial operations at the Brown Solar Facility represented a landmark moment in the development of renewable energy in the Commonwealth of Kentucky.

C. Subscriber Solar Projects

In addition to the commercial operation start date for LG&E and KU's Brown Solar Facility, 2016 saw Commission approval of two additional solar facilities in the Commonwealth. Both newly approved facilities will operate under a subscriber model, although the details are significantly different.

1. East Kentucky Power Cooperative Clark County Project

On November 22, 2016, the Commission issued an order approving East Kentucky Power Cooperative's (EKPC) application for a CPCN to install an 8.5 MW solar facility to be located at EKPC's headquarters in Clark County, Kentucky. The Clark County Project is driven by customer demand for renewable resources including the potential for attracting companies that require renewable energy prior to relocating.[112] EKPC is an electric generation and transmission cooperative providing wholesale electricity to sixteen member-owner distribution cooperatives (Members). The Clark County Project is described as a "Community Solar Facility," and Members who participate in the project will receive credits from EKPC for capacity and energy payments received from PJM.[113] Participating Members will be required to obtain signed 25-year licensing agreements from

[111]Order, In the Matter of Joint Application of Louisville Gas & Electric Company and Kentucky Utilities Company for Certificates of Public Convenience and Necessity for the Construction of a Combined Cycle Combustion Turbine at the Green River Generating Station and a Solar Photovoltaic Facility at the E.W. Brown Generating Station, No. 2014-00002, at 12 (Ky. P.S.C. Dec. 19, 2014).

[112]Order, In the Matter of Application of East Kentucky Power Cooperative, Inc. for Issuance of a Certificate of Public Convenience and Necessity, Approval of Certain Assumption of Evidences of Indebtedness and Establishment of a Community Solar Tariff, No. 2016-00269, at 3 (Ky. P.S.C. Nov. 22, 2016).

[113]*Id.* at 8.

retail customers and forwarding the licensing fee to EKPC.[114] The license fee for retail customers is set at $460.00 per panel, and, in exchange, participating retail customers would receive a monthly credit for power produced by the project in proportion to the customer's licensed interest.[115] Participating retail customers also receive renewable energy credits proportional to their share which can be sold or otherwise traded.[116] In the event EKPC and its Members are unable to fully license the Clark County Project, any unlicensed portion will be treated as a system resource and the costs associated with that portion will be shared among the Members in the same manner existing generating resources are shared.[117]

2. LG&E and KU Shelby County Project

In 2016, the Commission also approved another solar project for LG&E and KU. Unlike the utility-scale Brown Solar Facility, the new LG&E and KU project is described as a Solar Share Facility that will be constructed in Shelby County, Kentucky. The Shelby County Project is a subscriber project similar conceptually to EKPC's Clark County Project; however, the financial model is different. Unlike the Clark County Project, which will be constructed in total regardless of the level of licensing by retail customers, LG&E and KU will construct the Shelby County Project in 500 kW increments with a maximum of eight increments and a total capacity of 4 MW. The Companies will only construct the 500 kW increment when the increment is fully subscribed.[118] Customers "subscribe" to the Shelby County Project by agreeing to take service under an optional Solar Share Program Rider. Under the Solar Share Program Rider, customers elect the amount of capacity they wish to subscribe for, and pay (1) an upfront, non-refundable subscription fee of $40 per quarter-kW and (2) a monthly $6.29 Solar Capacity Charge per quarter-kW.[119] Subscribers will receive monthly bill credits for their pro rata share of energy produced by the facility.[120]

These three developments represent only a "drop in the bucket" compared to renewable energy development across the country. However, for a region where coal-fired generation has long dominated electric generation, these small projects are a first step towards a more diversified energy future.

VIII. DEBT COLLECTION ISSUES DURING STAGNANT TIMES IN THE OIL AND GAS INDUSTRY

A. Economic Downturn

The economic downturn in the oil and gas industry created an increase in payment disputes, among other things. Attorneys provide value to clients involved in such disputes by creatively analyzing non-litigation solutions and, when litigation become necessary, by diligently evaluating potential claims. Collection actions can become routine. However, all payment disputes benefit from the creativity and diligence attorneys provide. The value that attorneys add keeps money in clients' pockets. And money kept in clients' pockets keeps clients coming back.

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[114] *Id.*
[115] *Id.* at 9.
[116] *Id.* at 8.
[117] Order, *supra* note 112, at 5.
[118] Order, In the Matter of: Electric Joint Application of Kentucky Utilities Company and Louisville Gas and Electric Company for Approval of an Optional Solar Share Program Rider, No. 2016-00274, at 3 (Ky. P.S.C. Nov. 4, 2016).
[119] *Id.*
[120] *Id.*

B. Extended Payment Plans

When a debtor acknowledges an obligation, attorneys may view extended payment plans as the easiest solution. However, cash payments over an extended period unnecessarily bind clients' capital, so attorneys should think beyond monthly payments. An exchange of equipment, services, interests in future production, contracts, etc., or some combination of these, satisfies debts sooner than mere cash payments and saves liquid capital.

C. Accelerated Litigation

If litigation becomes necessary, many states have a cause of action or procedural mechanism to quickly resolve payment disputes.[121] In Texas, for instance, a suit on account requires that the creditor submit an affidavit verifying, among other things, the amount owed and the accuracy of the charges.[122] If the creditor provides the requisite information, the outstanding obligation and affidavit are prima facie evidence of the claim.[123] If the debtor does not file a specific, sworn denial, the debtor cannot deny receipt of the services or the accuracy of the charges, and the creditor has an easy path to judgment in its favor.[124] Of course, if the debtor disputes the amount of the obligation, the debtor can easily file a sworn denial to dispute the claim, leaving the creditor with a normal, but more costly and time consuming, breach of contract claim.

But note: many creditors and attorneys treat the evidentiary presumption provided by suits on account as a false sense of security. In Texas, Rule 185 governing suits on account is merely procedural: it does not prevent a debtor from raising substantive legal arguments to defeat a creditor's motion for summary judgment, even in the absence of a sworn denial.[125] The creditor must prove the other elements of its claim. For instance, if invoices or other documentation show the creditor has assigned or transferred the right to receive payment, the debtor can defeat summary judgment by raising lack of ownership. Thus, if the attorney carelessly documents the debt, the debtor may be able to defeat summary judgment even if it cannot deny an obligation exists. Thus, attorneys must exercise diligence to ensure clients receive the benefits provided by law.

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[121] *See, e.g.*, Tex. R. Civ. P. 185.
[122] *Id.*
[123] *Id.*
[124] *Id.*; *see also* Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P., 422 S.W.3d 821, 833 (Tex. App. 2014).
[125] *See* Rizk v. Fin. Guardian Ins. Agency, Inc., 584 S.W.2d 860, 862 (Tex. 1979).

Chapter 13 • ENERGY AND NATURAL RESOURCES LITIGATION
2016 Annual Report[1]

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 2016 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. LITIGATION OVER INTERNATIONAL ENERGY & RESOURCES OPERATIONS

A. United States District Court's judgment in the widely-publicized case of Chevron Corp. v. Donziger is affirmed on appeal.

On August 8, 2016, in one of the latest chapters in the long-pending litigation described by the Wall Street Journal as the "The Legal Fraud of the Century,"[2] the Second Circuit Court of Appeals issued its decision in the appeal of the judgment entered in favor of Chevron Corporation at the conclusion of the trial of Chevron's claims against attorney Steven Donziger and other defendants.[3] The court in a prior phase of the broader underlying litigation observed that the conflict which arose from oil and gas activities and legal proceedings in Ecuador "'must be among the most extensively [chronicled] in the history of the American federal judiciary.'"[4] Reference can be made to the opinion in this case (which is some sixty pages in length when reviewed on Westlaw) for a summary of the historical factual allegations and legal proceedings in Ecuador that resulted in an initial judgment against Chevron in the amount of $17.292 billion. The judgment was reduced on appeal to $8.646 billion (the Lago Agrio Judgment).[5] In the present appeal, seven amicus briefs were submitted in support of Chevron, five in support of the defendants, and the Republic of Ecuador submitted an amicus brief in support of neither party.

The present suit against Donziger and others was filed by Chevron in 2011, alleging that the plaintiffs in the Ecuadorian lawsuit (LAPs) procured the above judgment

> by a variety of unethical, corrupt, and illegal means, including: making secret payments to industry experts who would submit pro-LAPs opinions to the court while pretending to be neutral; announcing multi-billion-dollar remediation cost estimates while knowing them to be without scientific

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[1]This report was written by Mark D. Christiansen, an energy and natural resources litigation attorney with the Oklahoma City office of McAfee & Taft. The 2016-2017 Co-Chairs of the Energy and Natural Resources Litigation Committee are John J. McDermott of Archer & Greiner, P.C., Haddonfield, NJ and Sylvia N. Winston of the Pittsburgh, PA office of Jones Day.

[2]*Legal Fraud of the Century*, WALL ST. J. (Mar. 4, 2014) (subscription).

[3]Chevron Corp. v. Donziger, 833 F.3d 74 (2d Cir. 2016).

[4]*Id.* at 83 (quoting Chevron Corp. v. Naranjo, 667 F.3d 232, 234 (2d Cir. 2012)).

[5]*Id.* at 84.

> basis; persuading an expert to sign blank pages that were then submitted to the court with opinions he did not authorize; employing extortion to coerce an Ecuadorian judge to curtail inspections of alleged contamination sites after the experts began to find pro-Chevron conditions at other such sites; using the same extortionate means to coerce that judge to appoint, as a supposedly neutral expert court adviser, an expert who was bribed to submit—as his own opinion—a report written by the LAPs; and providing *ex parte* to another judge—or to whoever wrote the $17.292 billion Lago Agrio Judgment—material that is not part of the record for inclusion in that judgment.[6]

Chevron initially sought, and was granted, a global injunction forbidding enforcement of the Lago Agrio Judgment. However, that injunction was later reversed.[7] After the reversal of the injunction, Chevron waived its claims for damages and the case proceeded to a seven-week trial to the court without a jury. The trial involved "the conduct of—not the environmental issues in—the [Ecuadorian] Litigation."[8] Before making its findings as to the issues in the case, the district court stated in part:

> Justice is not served by inflicting injustice. The ends do not justify the means. There is no "Robin Hood" defense to illegal and wrongful conduct. And the defendants' "this-is-the-way-it-is-done-in-Ecuador" excuses—actually a remarkable insult to the people of Ecuador—do not help them. The wrongful actions of Donziger and his Ecuadorian legal team would be offensive to the laws of any nation that aspires to the rule of law, including Ecuador—and they knew it. Indeed, one Ecuadorian legal team member, in a moment of panicky candor, admitted that if documents exposing just part of what they had done were to come to light, 'apart from destroying the proceeding, all of us, your attorneys, might go to jail.'[9]

The district court then made extensive findings of fact as to the acts undertaken by Donziger to procure the judgment. None of those findings were disputed.[10] The district court concluded Donziger and the LAPs' team of attorneys, investors, experts and consultants constituted a RICO enterprise, and that Donziger had conducted the affairs of that enterprise in a pattern of racketeering activity. The court found Donziger and the lawyers he led corrupted the Ecuadorian case through a series of actions.[11]

In arriving at the permissible and appropriate relief to be granted in this case, the district court noted that Chevron no longer sought–and the court did not grant–a global injunction barring enforcement of the Lago Agrio Judgment anywhere in the world. "What this Court does do is to prevent Donziger and the two LAP Representatives, who are subject to this Court's personal jurisdiction, from profiting in any way from the egregious fraud that occurred here."[12] In order to ensure Donziger and the LAP Representatives never

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[6] *Id.*

[7] Chevron Corp. v. Naranjo, 667 F.3d 232, 234 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 423 (2012).

[8] *Chevron Corp.*, 833 F.3d at 85.

[9] Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 385–86 (S.D.N.Y. 2014) (quoting March 30, 2010 email from LAPs' attorney Julio Prieto to Donziger, Yanza, and LAPs' attorneys Pablo Fajardo Mendoza, and Juan Pablo Sáenz) (emphases added by the Second Circuit Court of Appeals).

[10] *Chevron Corp.*, 833 F.3d at 86-117.

[11] *Id.* at 117.

[12] *Id.* at 118.

benefit in any material way from the Lago Agrio Judgment, the district court awarded Chevron three types of relief: (a) a constructive trust, (b) disgorgement and (c) an injunction. The injunction

> enjoins Donziger and the LAP Representatives from, *inter alia*, '[f]iling or prosecuting any action for recognition or enforcement of the [Ecuadorian] Judgment' or 'seeking the seizure or attachment of assets based on the [Ecuadorian] Judgment . . in any court in the United States,' . . . and from 'monetiz[ing]' the Lago Agrio Judgment by, for example, 'selling, assigning, [or] pledging . . . any interest' in it.[13]

The Second Circuit affirmed the district court's judgment. In doing so, the court made the following findings and rulings with respect to certain of the contentions made by the Donziger defendants on appeal:

One of the arguments raised by Donziger was that Chevron was barred from seeking relief in this suit under the doctrine of judicial estoppel. Specifically, Donziger focused on an earlier lawsuit filed in 1999 by a group of Ecuadorian plaintiffs against Texaco (which, years later, was acquired by Chevron through a merger) in the United States District Court for the Southern District of New York. Texaco moved to dismiss the suit, urging the action belonged in Ecuador on the basis of forum non conveniens. "In so moving, Texaco offered 'to satisfy any judgments in plaintiffs' favor [by an Ecuadorian court], reserving its right to contest their validity only in the limited circumstances permitted by New York's Recognition of Foreign Country Money Judgments Act.'"[14] After reviewing the factual and procedural history underlying prior attempts by the Donziger defendants to make similar estoppel arguments, the court concluded there was no error in the district court's finding that Chevron was not barred from challenging "a judgment which 'the LAPs wrote,' *Donziger*, 974 F.Supp.2d at 502, and which the sitting Ecuadorian judge 'signed . . . as part of the *quid pro quo* for the promise of $500,000,' *id.* at 534-35."[15]

Chevron additionally sued Donziger and others (not including the LAPs),

> "alleging that, in orchestrating the frauds, extortions, and briberies leading to the entry of the $17.292 billion Lago Agrio Judgment, Donziger conducted the affairs of an enterprise through a pattern of racketeering activity in violation of 18 U.S.C. [section] 1962(c), and conspired to do so in violation of [section] 1962(d)."[16]

The Second Circuit affirmed the district court's ruling that the defendants to the RICO claim had engaged in acts that constituted a pattern of racketeering activity under the cited law.[17]

In rejecting the defendants' assertion on appeal that the judgment of the district court violated principles of international comity, the Second Circuit noted the new award of injunctive relief was unlike the injunction reversed in *Naranjo.* The present injunction

> is not global; and no part of it purports to limit in any way the conduct of any of the LAPs—the actual judgment creditors—other than the two LAP Representatives [over whom the district court had personal jurisdiction]. It

[13] *Id.* at 119.
[14] *Id.* at 127.
[15] *Chevron Corp.*, 833 F.3d at 129.
[16] *Id.* at 131-32.
[17] *Id.* at 134.

> does not invalidate the Lago Agrio Judgment; and it does not prohibit any of the judgment creditors—including the LAP Representatives—from taking action to enforce the Judgment outside of the United States.[18]

The circuit court noted at the conclusion of its opinion that what the judgment does do is "prohibit Donziger and the LAP Representatives from profiting from the corrupt conduct that led to the entry of the judgment against Chevron, by imposing on them a constructive trust for the benefit of Chevron."[19]

B. Effort of foreign plaintiff to sue U.S. affiliate of foreign party to contract, rather than suiting the party itself, for payment due for services performed in Venezuela is rejected by the courts.

The underlying dispute over international energy operations in *Energy Coal S.P.A. v. CITGO Petroleum Corp.*[20]—a dispute under certain contracts between two foreign entities—found its way into the Louisiana state courts. Energy Coal S.P.A., an Italian energy company based in Genoa, entered into contracts with Petróleos de Venezuela S.A. (a wholly-owned subsidiary of PDVSA) to provide various services in Venezuela relating to the construction and renovation of PDVSA facilities and the sale and transportation of petroleum coke. Petróleos was formed under Venezuelan law and is based in Caracas. The contracts provided that any disputes under the agreement would be resolved under Venezuelan law in a Venezuelan forum.[21]

Energy Coal filed this action in Louisiana state court alleging Petróleos failed to pay for the services provided by Energy Coal and seeking some $186 million in damages. In its attempt to have this dispute adjudicated in United States courts, Energy Coal sued CITGO Petroleum Corporation, which was not a party to the contracts. CITGO, like Petróleos, was a wholly-owned subsidiary of PDVSA. CITGO was formed under Delaware law with its headquarters being located in Houston, Texas, and it operated facilities located in the United States.

The lawsuit was removed to federal court. The district court granted CITGO's motion to dismiss and found CITGO could not be held liable for Petróleos' actions. Energy Coal appealed.

The basis upon which Energy Coal contended that it could recover from CITGO for alleged breaches of contract by Petróleos through legal proceedings in Louisiana was termed the "single business enterprise theory." Under that theory, "Louisiana courts have allowed companies in certain circumstances to be held liable for the acts of their affiliates."[22] It is a "theory for imposing liability where two or more business entities act as one."[23] As a result, Energy Coal's case hinged on success in its contention that Louisiana law was to be applied in this case.

The district court concluded that "Venezuelan law would govern the merits of the contract dispute in light of the choice-of-law clause in the contract."[24] However, since CITGO did not sign the contracts, the law that governs its liability for Petróleos' breach is determined by the choice-of-law analysis under the Louisiana Civil Code.

In affirming the decision of the district court, the Fifth Circuit Court of Appeals reviewed the foundation of the single business enterprise theory in Louisiana and noted

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[18] *Id.* at 144.
[19] *Id.* at 151.
[20] 836 F.3d 457 (5th Cir. 2016).
[21] *Id.* at 459.
[22] *Id.* at 458.
[23] *Id.* at 459.
[24] *Id.*

that the theory was first articulated in the early 1990s by the Louisiana First Circuit Court of Appeals.[25] However, "[t]he Supreme Court of Louisiana has never adopted the single business enterprise theory."[26] As a result, varying views were found to exist in the lower Louisiana courts with respect to this theory.[27] In contrast, Delaware was found to have "more steadfast policies on whether a corporation can be liable for its affiliate's conduct. It 'respects corporate formalities, absent a basis for veil-piercing, recognizing that the wealth-generating potential of corporate and other limited liability entities would be stymied if it did otherwise.'"[28]

Since the contract selected Venezuelan law to govern any disputes, the court noted that "Energy Coal had no reasonable expectation that it could seek recourse under the laws of Louisiana,"[29] and it further reasoned: "[a]pplying Louisiana law to hold a Delaware corporation responsible for its foreign affiliate's alleged breach of a contract in Venezuela would substantially undermine the high bar Delaware sets for disregarding corporate separateness. It would also be at odds with the expectations of the parties."[30]

Finally, in rejecting Energy Coal's assertion that CITGO's was on notice that its authority to transact business in Louisiana subjected CITGO to single business enterprise liability, the court observed that such a ruling "would mean any corporation conducting business in Louisiana could be liable in the state's courts for the conduct of an affiliate occurring anywhere in the world."[31] It found no case law to support such a broad principle.

C. Court finds that it lacked personal jurisdiction over the defendant limited liability company in a lawsuit over international energy operations.

The case of *RSM Production Corp. v. Global Petroleum Group, Ltd.*,[32] was a lawsuit brought by two plaintiffs, a Texas corporation with its principal place of business in Colorado and a Colorado resident (RSM). The defendant (Global) was a Grenadian limited liability company with its principal place of business in Grenada. RSM sued Global and others in state court in Houston, Texas, alleging that Global misappropriated RSM's seismic data that had been accumulated at great expense by the plaintiffs with regard to potential oil and gas reserves around the coast of Grenada. RSM further alleged that Global provided the proprietary information to certain third parties who were named as co-defendants. Global filed a special appearance and plea to the jurisdiction of the court. It "argued that it is not a Texas corporation and has no offices, employees, assets or registered agents [in Texas] … and did not advertise in Texas."[33] The trial court sustained Global's special appearance and dismissed RSM's lawsuit as to Global based on a lack of personal jurisdiction. RSM appealed.

In its appeal, RSM asserted Global's contacts with Texas provided the court with specific jurisdiction, which "is established when the claims in question arise from or relate to the defendant's purposeful contacts with Texas."[34] However, the court found RSM had failed to provide adequate evidence supporting its claim that Global's contacts with the

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[25]*CITGO Petroleum Corp.*, 836 F.3d at 460 (citing Green v. Champion Ins. Co., 577 So.2d 249, 251-53, 257-58 (La. App. 1st Cir. 1991)).
[26]*Id.* at 460 (citing Brown v. ANA Ins. Grp., 994 So.2d 1265, 1272 (La. 2008)).
[27]*Id.* at 461.
[28]*Id.* (citing Alliance Data Sys. Corp. v. Blackstone Capital Partners V L.P., 963 A.2d 746, 769 (Del. Ch. 2009)).
[29]*Id.* at 463.
[30]*CITGO Petroleum Corp.*, 836 F.3d at 463.
[31]*Id.*
[32]No. 01-15-00866, 2016 WL 6110913 (Tex. App. Aug. 18, 2016).
[33]*Id.* at *2.
[34]*Id.* at *6.

Texas-based companies that were involved in the activities that gave rise to RSM's alleged claim were substantially related to RSM's claim against Global for misappropriation of RSM's trade secrets.

> Global contacted Tricon in Venezuela, and through Tricon, was introduced to various Houston contractors who could carry out tasks in Grenada. Global sought contractors to provide services to enable it to exploit its Grenadian assets. The Tricon and INEXS employees could, quite literally, have been based anywhere in the world (and in fact were—Tricon had offices in Colorado and Venezuela along with Houston) and Global would presumably have interacted with the two in the same way. . . Global did not specifically seek a Texas contractor in connection with its use or misuse of RSM's allegedly proprietary data, and it did not initiate the interactions that it eventually had with INEXS.[35]

The court concluded Global's contacts with Texas, such as its meetings and contracts with Texas-based companies, had as their purpose the conduct of other business related to the development of Grenadian offshore oil and gas assets, and not the discussion of trade secrets. It affirmed the trial court's order sustaining Global's special appearance.

See also the decision in *Predator Downhole Inc. v. Flotek Industries, Inc.*[36] where Flotek sued Predator and an individual Wyoming defendant (Nancy) in Texas for the alleged misappropriation of trade secrets, breach of contract and related claims. The trial court denied the defendants' special appearances. The appellate court reversed, finding that Flotek failed to clearly state what any of its claims against Predator or Nancy had to do with Texas.[37] It described the efforts of Flotek to support specific jurisdiction as alleging "only that Predator and Nancy acted to further a conspiracy—conceived and consummated outside of Texas—by engaging in acts that eventually had effects in Texas."[38] The court construed Flotek's allegations against Predator and Nancy as "no more than 'bare assertions of . . . conspiracy,'"[39] while Predator and Nancy had not been shown to have any conduct and connection with the forum relevant to Flotek's claims. The court likewise lacked general jurisdiction because neither Predator's nor Nancy's contacts with Texas were "so 'continuous and systematic' as to give rise to general jurisdiction in Texas courts."[40]

II. Other Select Energy & Natural Resources Lawsuits

A. Court addresses forum selection and jurisdictional arguments in dispute over whether oil and gas company's insurance policy covered earthquake litigation.

The case of *Certain Underwriters at Lloyd's, London v. New Dominion, L.L.C.*,[41] involved a dispute over whether an insurance policy covering pollution liability extended to damages asserted in a series of lawsuits that alleged the existence of a connection between New Dominion's oil and gas-related activities and certain earthquakes. New Dominion, a company engaged in oil and gas exploration and development activities, obtained a pollution liability insurance policy from Lloyd's London covering, inter alia,

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[35] *Id.* at *12.
[36] No. 01-15-00846-CV, 2016 WL 4409073 (Tex. App. Aug. 18, 2016).
[37] *Id.* at *10.
[38] *Id.*
[39] *Id.*
[40] *Id.* at *9.
[41] No. 16cv5005 DLC, 2016 WL 4688866 (S.D.N.Y. Sept. 7, 2016).

"damages from claims for bodily injury or property damage that result from pollution conditions at, on, under or migrating from"[42] the sites on which New Dominion engaged in its oil and gas operations.

The insurance policy included the following forum selection clause:

> Choice of Law and Forum: In the event that [New Dominion] and [Lloyd's] dispute the validity of formation of this policy or the meaning, interpretation or operation of any term, condition, definition or provision of this policy resulting in litigation, arbitration or any other form of dispute resolution, [New Dominion] and [Lloyd's] agree that the laws of the State of New York shall apply and that all litigation, arbitration or other form of dispute resolution shall take place in the State of New York.[43]

In early 2016, five lawsuits[44] were commenced in the state and federal courts against New Dominion and other defendants alleging that "New Dominion's hydraulic fracturing—also known as fracking—and injection well operations caused or contributed to an increase in earthquakes in Oklahoma."[45] New Dominion advised Lloyd's that its insurance policy covered claims asserted in the five earthquake lawsuits. Lloyd's responded by disclaiming any responsibility to cover the earthquake lawsuits, alleging: "(1) the water injected into wells that allegedly caused the earthquakes is not a 'pollutant' as defined by the Policy and (2) the injuries alleged in the Earthquake Actions do not 'result from' any 'pollution condition.'"[46]

New Dominion brought an action against Lloyd's and an Oklahoma-based insurance agent and agency in the state District Court of Tulsa County for breach of contract and breach of the covenant of good faith and fair dealing for denying coverage under the insurance policy. Lloyd's responded by simultaneously filing both (a) a removal of the Tulsa County action to federal court in Tulsa (alleging that the joinder of the Oklahoma insurance agent and his agency was fraudulent), and (b) a motion to transfer the Oklahoma lawsuit to the United States District Court for the Southern District of New York because of the forum selection clause contained in the policy. New Dominion filed a motion to remand the case back to the state court. Lloyd's motion to transfer and New Dominion's motion to remand were both pending before the federal court in Tulsa at the time the present opinion was issued.

Some eleven days after New Dominion filed its lawsuit in Oklahoma, and before Lloyd's filed its removal notice and motion to transfer that case to New York, Lloyd's filed a new lawsuit in the United States District Court for the Southern District of New York seeking "a declaratory judgment that the Policy does not afford coverage for New Dominion for the claims asserted in the Earthquake Actions, and that Lloyd's has no obligation to defend or indemnify New Dominion with respect to the Earthquake Actions."[47] New Dominion moved the court to abstain from deciding the case, and to

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[42] *Id.* at *1.
[43] *Id.*
[44] *Id.* at n.3 (citing Felts v. Devon Energy Production Co., No. CJ-2016-I37 (Okla. Cty. Dist. Ct. Jan. 11, 2016); Griggs v. Chesapeake Operation, L.L.C., No. CJ 2016-6 (Okla. Dist. Ct. Logan Cty. Jan. 12, 2016); Lene v. Chesapeake Operating, LLC, No. CJ-2016-27 (Okla. Dist. Ct. Logan Cty. Feb. 12, 2016); Sierra Club v. Chesapeake Operating L.L.C., No. CIV-I6-134 (W.D. Okla. Feb. 16, 2016); and West v. ABC Oil Co., No. CJ-16-49 (Okla. Dist. Ct. Pottawatomie Cty. Feb, 18, 2016).
[45] *Id.*
[46] *New Dominion, L.L.C.*, 2016 WL 4688866, at *1.
[47] *Id.* at *2.

Lloyd's complaint on the grounds that the court lacked personal jurisdiction over New Dominion.

The court in the present lawsuit first found that "abstention is generally disfavored, and federal courts have a 'virtually unflagging obligation' to exercise their jurisdiction."[48] It further noted there are a few extraordinary and narrow exceptions to the abstention doctrine but concluded that none of them applied under the circumstances of this case. The court found abstention was particularly inappropriate here since "the Policy requires disputes to be litigated in New York and thus issues related to coverage under the Policy cannot be better settled in the Oklahoma Action."[49]

Regarding New Dominion's assertion that the New York court lacked personal jurisdiction, the court found that "[b]ecause New Dominion agreed that all litigation must be brought in New York, it has consented to personal jurisdiction in this Court."[50] The court denied New Dominion's motion to dismiss.

Also in 2016, a motion to transfer a proposed class action royalty lawsuit from the United States District Court for the Western District of Pennsylvania to the United States District Court for the Southern District of Texas was recommended by the United States Magistrate Judge.[51] The court observed that the level of deference normally given to the plaintiff's right to select the forum for its suit "is entitled to somewhat reduced deference because it was not their home forum and because this is a class action, and they have not provided any reason for selecting this forum."[52] After reviewing the facts in detail, the court concluded that "on the whole, the evidence points toward Texas as the locus of operative facts."[53] The magistrate judge recommended that the motion to transfer be granted pursuant to 28 U.S.C. section 1404.

B. Court finds that claims for alleged failure to register oil and gas interests as securities "arose under" the underlying agreements and were within the scope of the arbitration provision.

In *Eastland Energy, L.L.C. v. Sharpe Energy, L.L.C.,*[54] the plaintiff alleged that under the terms of the subject contracts and assignments (the Agreements),[55] plaintiff was entitled to receive various working interests in several oil wells. The plaintiff asks the court to rescind the Agreements and return to it the consideration paid for the interests because, as securities, the interests were not registered as required by law, and the broker or dealer was not properly registered under the Securities Exchange Act of 1934[56] and applicable state laws. Plaintiff further alleged that the defendants breached the Agreements.

The defendants moved the court "to compel arbitration of Plaintiff's claims based on the arbitration clause in the Agreements which require arbitration for 'any dispute

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[48]*Id.* (citing Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist., 673 F.3d 84, 100 (2d Cir. 2012)) (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)).
[49]*Id.* at *3.
[50]*Id.* at *4.
[51]*See* Regmund v. Talisman Energy USA, Inc., No. 16-711, 2016 WL 5794227 (W.D. Pa. Aug. 31, 2016).
[52]*Id.* at *13.
[53]*Id.*
[54]No. 15-CV-595-SMY-SCW, 2016 WL 3682620 (S.D. Ill. July 12, 2016).
[55]*Id.* at *1 (noting that this lawsuit involved Drilling Participation Agreements covering five wells, a collection of Assignments of Oil and Gas Leases and a Joint Operating Agreement that had been entered into between the plaintiff and defendants).
[56]*Id.* (citing 15 U.S.C. §§ 78a-78qq.).

arising under' the Agreements."[57] The plaintiff conceded the arbitration clause encompasses most of the claims in the controlling complaint,[58] but contends that the arbitration clause does not encompass the claims for lack of registration because those claims did not *arise under* the Agreements. The court rejected the plaintiff's assertion and found that it was clear that

> Plaintiff's lack of registration claims involve disputes, the resolution of which depends on the construction of the Agreements entered into by the parties. As Defendants correctly point out, the claims only exist because of the underlying Agreements and without the Agreements, there would be no relationship and no claims.[59]

As a result, the court found the registration claims were found to be within the scope of the arbitration clause.

The court next addressed the plaintiff's argument that the defendants waived any right to arbitration by their delay in asserting their claims and by actively participating in the litigation by answering the complaint and asserting counterclaims and affirmative defenses. The court found that the defendants had not conducted themselves inconsistently with their right to arbitrate and that no such waiver had occurred.[60] Defendants raised the arbitration clause as an affirmative defense in both their answer and counterclaim. The court granted the defendants' motion to compel arbitration and stayed the lawsuit pending the conclusion of the arbitration.

C. Debtor in bankruptcy is allowed to reject executory gas gathering contracts which were found to not be covenants running with the land.

On March 8, 2016, the United States Bankruptcy Court for the Southern District of New York issued its initial, and highly controversial, decision in *In re: Sabine Oil & Gas Corp.*,[61] which allowed a debtor in bankruptcy to reject certain gas gathering contracts covering Texas oil and gas properties. The court's further, formal binding ruling on May 3, 2016 followed this decision.[62]

The court found that the gas gathering agreements did not convey an interest in real property, did not touch and concern real property, and did not run with the land under Texas law. Consequently, the debtor could reject the contracts so that it could replace the gathering agreements with new contracts containing commercial terms more favorable to the debtor.

Since the time of these issued decisions were issued, there has been a proliferation of writings and presentations devoted to the analysis and future import of the *Sabine* rulings. Accordingly, given the wide range of written discussion the *Sabine* litigation has already received, the broader discussion and analysis of these highly-publicized rulings will be left to the many commentaries that are readily available online.[63]

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[57] *Id.*
[58] *Id.* at *2.
[59] *Id.*
[60] *Eastland Energy, L.L.C.*, 2016 WL 3682620, at *3.
[61] 547 B.R. 66 (Bankr. S.D.N.Y. Mar. 8, 2016).
[62] *In re* Sabine Oil & Gas Co. v. HPOP Gonzales Holdings, L.L.C., 550 B.R. 59 (Bankr. S.D.N.Y. May 3, 2016).
[63] *See, e.g.*, James Roberts, *Trouble Down the Pipeline? What Sabine Oil & Gas Corp. May Mean for the Midstream Service Sector*, LEXOLOGY (May 24, 2016).

D. Federal court lawsuit by operator of federally-regulated gas storage facility, alleging that a nearby gas well was improperly producing gas from its storage facility, is dismissed for lack of subject matter jurisdiction.

In *Enable Mississippi River Transmission, L.L.C. v. Nadel & Gussman, L.L.C.,*[64] Enable sued the Nadel defendants alleging that a gas well it operated was producing gas from Enable's West Unionville Gas Storage Facility in Lincoln Parish, Louisiana. The West Unionville gas storage facility was "owned and operated by Enable pursuant to a Certificate of Public Convenience and Necessity issued by the Federal Energy Regulatory Commission ('FERC') as authorized by the Natural Gas Act ('NGA')."[65] This facility is part of Enable's interstate natural gas pipeline system.

Nadel operates a well which produces gas near West Unionville. Enable filed a lawsuit when it discovered West Unionville had an unusually large amount of gas that was unrecoverable by Enable. Enable alleges its study of that situation and problem indicated that Nadel's nearby well was producing from West Unionville.

Enable filed suit against Nadel in the United States District Court for the Western District of Louisiana "seeking a declaratory judgment pursuant to 28 U.S.C. [section] 2201 to determine the ownership of the natural gas in West Unionville."[66] Enable also sued Nadel for an accounting of the gas that was produced from Nadel's well, disgorgement of profits made by Nadel from the gas production, an injunction mandating Nadel plug the well and any other wells producing Enable's stored gas, and attorney's fees.[67] The court noted that Enable, in a separate lawsuit, had "brought a condemnation action to take over the well as permitted by the NGA."[68] The court found that suit to be irrelevant to the present proceedings.

Nadel moved the court to dismiss Enable's lawsuit for lack of subject matter jurisdiction and failure to state a claim under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). The trial court concluded Enable was in essence asserting a state law conversion claim in federal court. It found that Nadel was not subject to regulation under the NGA and it granted Nadel's motion. Enable appealed.

On appeal, Enable agreed it did not allege any federal cause of action, but it contended there were still substantial questions of federal law implicated by Enable's state law claims. However, the Fifth Circuit noted the NGA excluded the production of natural gas from federal regulation and found that "[e]rroneously drawing gas from the ground is still a part of physical production, and we decline to reclassify it as the interstate sale or transportation of natural gas."[69] The Fifth Circuit went on to find:

> Regulation of the production and gathering of natural gas is left to the states. *Oneok*, 135 S.Ct. at 1596. The core subject of this suit is state-regulated production by Nadel, so 'there is no "serious federal interest in claiming the advantages thought to be inherent in a federal forum *Gunn*."', 133 S. Ct. at 1068 (quoting *Grable*, 545 U.S. at 313, 125 S. Ct. 2363).[70]

Finally, Enable argued this case presented issues that are within the exclusive jurisdiction of the federal courts because, "by withdrawing and possessing the storage gas,

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[64]844 F.3d 495 (5th Cir. 2016).
[65]*Id.* at 496.
[66]*Id.* at 497.
[67]*Id.*
[68]*Id.* at 501 n.4.
[69]*Enable Miss, River Transmission, L.L.C.*, 844 F.3d at 500.
[70]*Id.*

Nadel is interfering with Enable's own rights and obligations under the NGA."[71] The court rejected this argument "because Nadel's conduct is not a violation of the NGA even if it interferes with Enable's rights and obligations under the NGA."[72]

The Fifth Circuit affirmed the district court's order dismissing Enable's claims for lack of subject matter jurisdiction.

E. Bankruptcy Court in proceedings filed by debtor oil and gas exploration company determines the treatment of certain royalty owner claims for the alleged underpayment of oil and gas royalties.

The proceedings in *In re Samson Resources Corp., Debtor*[73] involved Samson's objection to proofs of claim alleging underpayment of royalties under oil and gas leases with certain mineral owners in some ten wells located in the Bakken Shale in North Dakota. At the time the wells were drilled, there was no pipeline to carry any oil or gas to the market.[74] Samson contracted with Oneok Rockies Midstream, LLC to construct a pipeline.

The parties entered into a Gas Purchase Agreement dated March 15, 2012, under which Oneok charged Samson for processing and bringing the oil and gas to market. The general manager of production and marketing for Samson testified at the hearing in this matter that neither the gas nor the oil are ready for sale on the market when produced at the wellhead from the Bakken Shale. Rather, he testified the gas must be put into the gas pipeline since the North Dakota Industrial Commission regulations require operators capture a minimum of 80% of the gas production rather than flaring the gas. The witness for Samson further testified the gas must be processed to reduce the natural gas liquids content of the gas stream, because the gas is "'too strong' to be marketable without processing."[75] In summarizing the evidence presented, the court observed that, "[d]ue to the low market price of gas in recent times, the post-production costs related to the gas extracted from the Ness Wells exceeds the market price of the gas."[76] When asked why Samson would keep producing the gas if it is unprofitable to do so, the witness explained it is necessary to produce the gas in order to produce the oil which is a profitable product at this time.

The evidence showed that from November 2012 to January 2016, Samson paid Lloyd Odell Ness royalties in the total amount of $48,123.49. During that same time period, Samson deducted post-production costs from his royalties in the amount of approximately $1,930.00. Mr. Ness filed a claim in the Samson bankruptcy proceedings asserting "'$75,000 - $1,000,000' for royalties allegedly owed by the Debtors to Mr. Ness, plus interest at an annual rate of 18 percent."[77] Mr. Ness asserted his claim was secured and entitled to priority as a mineral payee pursuant to section 507 of the Bankruptcy Code. Samson objected to the royalty underpayment claim on a variety of grounds.

In addressing the dispute over the royalty underpayment claims, some of the more notable rulings of the Bankruptcy Court were as follows:

With respect to Ness' claim of status as a secured creditor entitled to priority, the court found:

> The Ness Claimants have not identified any terms of the Ness Lease, specified any assets that constitute their collateral, or provided any legal

[71] *Id.*
[72] *Id.*
[73] 559 B.R. 360 (Bankr. D. Del. 2016).
[74] *Id.* at 364.
[75] *Id.*
[76] *Id.* at 365.
[77] *Id.*

> theory to establish their status as secured creditors. It appears that the basis for Mr. Ness's asserted secured status is that his royalty interests were 'bestowed upon severance' of the oil and gas from the land. However, the Court could find no case law or statute to support such an assertion. As such, Mr. Ness does not have a secured claim against the Debtors. The Ness Claimants also assert priority status for their claims. However, the Ness Claimants do not qualify for any category of priority claim under section 507 of the Bankruptcy Code.[78]

The court concluded that each of the Ness Claims–to the extent allowed–should be classified as general unsecured claims.

With respect to the royalty owners' general contention that post-production costs may not be deducted in the computation of their royalty payments, the court, citing two published decisions on that issue under North Dakota law,[79] found that post-production expenses were properly charged to the royalty owner claimants.[80]

The court rejected Ness' contention that Samson should not produce gas when natural gas production is unprofitable because Samson showed that it was unable to extract oil without extracting gas from the same wells.[81]

A final ruling of particular note is the court's holding that "[p]ost-[p]roduction costs related to gas that exceed the value of the gas can be netted against the oil royalties."[82]

The court disallowed and expunged the Ness claims.

F. Plaintiff seeks to remand case removed to federal court based upon a recent transition of employees and facilities of the defendant to another state.

The case of *Bison Resources Corp. v. Antero Resources Corp*.[83] involved a lawsuit by Bison filed in West Virginia state court, alleging "breach of rights-of-first-refusal to drill certain oil and gas leases."[84] The Antero Resources removed the case to federal court based on diversity of citizenship. Bison filed a motion to remand. Bison did not deny diversity of citizenship existed between the parties. Instead, Bison asserted Antero Resources was a citizen of West Virginia, so its removal of the case violated the forum defendant rule in 28 U.S.C. section 1441(b)(2).[85]

In its notice of removal, Antero Resources alleged that (a) Bison was a California corporation with its principal place of business in either California or Oklahoma, and (b) Antero Resources Corporation was a Delaware corporation with its principal place of business in Colorado. Antero Resources did not make any allegations regarding the citizenship of Antero Resources Appalachian Corporation. However, "the complaint alleges that Antero Appalachian was a West Virginia corporation until it merged into Antero Resources in 2013,"[86] and that the amount in controversy exceeded $75,000.00. In

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[78]*In re Samson Resources Corp., Debtor*, 559 B.R. at 367.

[79]Hurinenko v. Chevron U.S.A. Inc., 69 F.3d 283 (8th Cir. 1995); Bice v. Petro-Hunt, L.L.C., 768 N.W.2d 496 (N.D. 2009).

[80]*In re Samson Resources Corp., Debtor*, 559 B.R. at 367.

[81]*Id.*at 369.

[82]*Id.* at 373.

[83]No. 1:16CV107, 2016 WL 4538608 (N.D.W. Va. Aug. 30, 2016).

[84]*Id.* at *1.

[85]28 U.S.C. § 1441(b)(2) (2016) ("[a] civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.").

[86]*Bison Res. Corp.*, 2016 WL 4538608, at *1.

moving to remand the case to state court, Bison asserted that Antero Resources was a citizen of West Virginia.

After reviewing the evidence and arguments presented in connection with the motion to remand, the court found that Antero Resources' principal place of business was in Denver, Colorado. The evidence showed that "Antero Resources maintains its corporate office in Denver and its 'senior management team' makes significant corporate decisions and sets corporate policy from the Denver office."[87] The office of Antero Resources that was located in West Virginia was found to be a district office.

The court was not persuaded by the evidence presented by Bison, suggesting that among other considerations, the majority of Antero Resources' operations and employees were in West Virginia, that West Virginia was going to be the long-term headquarters for the company, that the company's development plans spanned the next thirty-plus years in West Virginia, and that the company directed all management to relocate there. "[T]he nerve center is 'where the corporation's high level officers direct, control, and coordinate the corporation's activities' … [and] 'where corporate officers make significant corporate decisions and set corporate policy.'"[88]

The court concluded that Antero Resources' Denver office was the nerve center, with the result that the above-referenced forum defendant rule did not apply. The court denied the motion to remand.

For another 2016 action addressing the requirements for removal, see *Markwest Liberty Midstream & Resources, L.L.C. v. Bilfinger Westcon, Inc.*,[89] where Markwest originally filed its action in state court in West Virginia. Bilfinger removed the case to federal court asserting diversity of citizenship under 28 U.S.C. section 1332. Markwest moved to remand the case, alleging it is a citizen of North Dakota because Markwest had limited partners residing in North Dakota.[90] Since Bilfinger is also a citizen of North Dakota, complete diversity of citizenship between the parties was not present. Bilfinger argued the individuals relied upon by Markwest to defeat diversity are excluded from limited partner status by the existing partnership agreement. However, after reviewing the governing documents, the court concluded that "the citizenship of the unitholders of publicly-traded partnership interests in a master limited partnership is relevant to a diversity analysis."[91] Citing the decision in *Carden v. Arkoma Associates*,[92] the court agreed with Markwest that complete diversity of citizenship did not exist, and the court remanded the case to state court.[93] It denied Markwest's request for an award of attorney's fees and costs.

G. Litigants who sought judicial relief in another venue in violation of the existing court's rulings were found to be in contempt of court.

The underlying facts in *GE Oil & Gas, Inc. v. Turbine Generation Services, L.L.C.*,[94] involved TGS's default on a $25 million loan memorialized by a Note personally guaranteed by the co-defendant Moreno. The Note and Guarantee provided the company would be governed by New York law, and further provided a venue for any disputes arising under this Note and Guarantee would be in New York.

On April 7, 2014, GE sued the TGS parties in the United States District Court for

[87] *Id.* at *2.
[88] *Id.*
[89] No. 5:16–CV–118, 2016 WL 6553591 (N.D.W. Va. Nov. 4, 2016).
[90] *Id.* at *1.
[91] *Id.* at *5.
[92] 494 U.S. 185 (1990).
[93] *Markwest Liberty Midstream & Res., L.L.C.*, 2016 WL 6553591, at *5.
[94] 41 N.Y.S.3d 449 (N.Y. Sup. Ct. 2016).

the Western District of Louisiana. However, the court dismissed the lawsuit due to a lack of diversity jurisdiction on August 18, 2015. Prior to the dismissal of that Louisiana federal court action, the TGS parties commenced a lawsuit in Louisiana state court, and GE commenced the present action in New York state court.

On July 30, 2015, the TGS parties moved to either dismiss or stay the present proceedings so that they could proceed forward in Louisiana state court without any interference from this action. On August 13, 2015, GE moved this court to grant partial summary judgment on the Note and Guarantee. The present court denied the TGS parties' motion to dismiss or stay on December 8, 2015, and thereafter granted summary judgment to GE on the note and guarantee. The court initially stayed entry of judgment on the Note and Guaranty in order to provide the TGS parties with an opportunity to assert counterclaims and third party claims that could possibly lead to set-offs against the judgment. The court commented that, in hindsight, its discretionary stay "was misguided."[95]

While GE's motion for summary judgment was under consideration, GE moved the court to enjoin the TGS parties' Louisiana state court action. The court observed their filing of suit in Louisiana willfully breached the forum selection clause contained in the parties' agreements.[96] However, "the court initially declined to enjoin the entirety of the Louisiana State Court Action based on the assumption that the TGS Parties would not seek to collaterally attack the [New York] court's rulings."[97] By order dated March 30, 2016, the court

> (1) only enjoined the TGS Parties from 'applying for an injunction in Louisiana enjoining [GEOG] from prosecuting this action before this court'; (2) amended the SJ Decision to direct the entry of judgment on the Note and Guaranty, but stayed enforcement pending the remainder of this action; and (3) struck the TGS Parties' amended third-party complaint . . . which ignored ordering language in the court's summary judgment decision granting them leave 'to amend their answer, counterclaims, and third-party claims to conform to the instant decision finding that the Term Sheet is an agreement to agree.'[98]

On April 26, 2016, GE filed its second motion to enter an order to show cause to enjoin the TGS parties from proceeding in the Louisiana State Court Action, asserting that "despite the issuance of the March 30 Order, the TGS Parties continued to assert"[99] in other actions the arguments that had already been rejected in the summary judgment ruling of the New York court. The week after GE filed the renewed motion, the TGS parties asked the Louisiana State Court to enjoin the present New York lawsuit and the oral arguments scheduled to occur on GE's injunction request.

On May 9, 2016, GE moved the court to enter an order to show cause and to hold the TGS parties in contempt and to sanction them for violating the New York court's March 30 order, "which expressly prohibited the TGS Parties from seeking the injunctive relief sought in their May 5" filing. [100] The court held extensive oral arguments on May 18, 2016. It granted GE's requested anti-suit injunction and reserved ruling on the contempt

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[95]*Id.* at *2.
[96]*Id.* (finding that the clause "permits GEOG to file suit against the TGS Parties outside of New York, but requires any suit brought by the TGS Parties arising out of or relating to the Note, the Guaranty, or the Term Sheet to be filed in New York." *Id.* at *2-3.).
[97]*Id.* at *3.
[98]*Id.*
[99]*GE Oil & Gas, Inc.*, 41 N.Y.S.3d 449, at *3.
[100]*Id.*

motion.

In its May 27, 2016 Opinion that is the primary subject of this summary, the New York court observed that, while it had issued a judgment on key substantive issues in the case, the TGS parties sought to collaterally challenge the court's judgment through proceedings in the Louisiana state courts where they asked that court not to give res judicata or collateral estoppel effect to this court's judgment. The court found "[d]oing so not only violates the parties' forum selection clause, it evinces an utter disregard for this court's authority."[101] It went on to state that "[t]his court cannot allow the integrity of its judgment to be challenged."[102]

The court found that "[w]hile the question of the damages available for breach of a forum selection clause is somewhat of an uncertain issue under New York law, the court's ability to sanction a party for intentionally violating a court order is not."[103] The court found the TGS parties in contempt and ordered that, unless their contempt was purged by e-filing proof of their discontinuance of the Louisiana state court action within fourteen days, "an inquest to determine an appropriate sanction will be referred to a Special Referee to hear and report."[104]

H. Court reviews and applies the standards for appropriate and admissible expert witness testimony in a complex breach of contract lawsuit.

In *Musket Corp. v. Suncor Energy (U.S.A.) Marketing, Inc.*,[105] Musket and Suncor entered into a Master Agreement for United States Crude Oil Purchase, Sale or Exchange Transactions and a Physical Confirmation Transaction. Musket was a commodity supply, trading and logistics company, and Suncor was a crude oil supply, marketing and trading company. Musket brought the present lawsuit asserting that "Suncor did not deliver the crude oil as required under the Agreement, and Suncor claims Musket's claims are barred due to the occurrence of an 'Interruption' as defined by the Agreement."[106] In connection with the filing of competing motions for summary judgment, the parties filed motions to exclude expert testimony that were the subject of the present opinion.

The court began by recognizing the proper standard for determining the admissibility of expert testimony is found in the Supreme Court's decision in *Daubert v. Merrell Dow Pharms,*[107] and Federal Rule of Evidence 702. In sum, the party offering the expert testimony "does not have to demonstrate that the testimony is correct, only that the expert is qualified and that the testimony is relevant and reliable."[108] Certain of the more notable findings, among the many rulings and observations made by the court in the course of addressing the three challenged expert witnesses, were as follows.

Musket presented Smith "to provide a report and testimony on the value chain and logistics of the north American crude oil market from wellhead to refinery, the actions and capabilities of the parties during the term of the Agreement,"[109] and the alleged damages of the parties. Suncor asserted that Smith had no specialized knowledge in the interpretation of the Agreement and that his testimony about the agreement would not help the trier of fact. Musket responded that Smith's education, training and long-term experience qualified him to testify about the crude-by-rail industry, the Agreement and

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[101] *Id.* at *5.
[102] *Id.*
[103] *Id.*
[104] *GE Oil & Gas, Inc.*, 41 N.Y.S.3d 449, at *6.
[105] No. H-15-100, 2016 WL 7374225 (S.D. Tex. Dec. 20, 2016).
[106] *Id.* at *1.
[107] 509 U.S. 579 (1993).
[108] *Musket Corp.*, 2016 WL 7374225, at *2.
[109] *Id.*

related issues.

With regard to the testimony of Smith that amounted to that Suncor categorized as legal conclusions, the court found as follows:

> [W]hile it is the court's province to determine the legal meaning of a contract, the court may rely on an expert experienced in a specific field to obtain explanations of 'the technical meaning of terms used in the industry.' *Kona Technology Corp. v. Southern Pacific Transportation Co.*, 225 F.3d 595, 611 (5th Cir. 2000). The court has reviewed the contested testimony and finds that Smith draws many legal conclusions.[110]

The court ruled it would not consider any of Smith's testimony to the extent he drew legal conclusions about the meaning of the Agreement. However, the court found it would rely on Smith's testimony to the extent he provided insight into the technical meaning of terms as used in the industry.

Suncor also complained Musket's expert Smith had referred in his deposition testimony to an individual he termed as a "rogue trader" because the individual did not follow all of Suncor's risk policies.[111] The court found this testimony was outside of Smith's expert report, the testimony about a Suncor employee being a rogue trader would not be permitted at trial, and would not be considered in ruling on the pending motions for summary judgment.

Suncor presented Hackett to opine that Musket's Windsor Terminal "did not have enough tankage or infrastructure to reliably receive 20,000 barrels per day of crude oil …"[112] and was therefore insufficient, that the subject "Agreement was a sales agreement and not the type of agreement that could have included a take-or-pay provision …"[113], and that alternatives were available to Musket which would have allowed Musket to mitigate its damages, but it failed to do so. Musket contends, in part, that Hacket is not qualified to render opinions regarding the obligations under the Agreement and related transactions, and that Hackett's opinions were unreliable and not helpful to the trier of fact.

The court concluded Musket's concerns about Hackett's qualifications went to the weight of his testimony and not its admissibility. The fact that "his experience is not directed at crude oil specifically may be considered by the trier of fact when deciding how much weight to give Hackett's testimony."[114] With regard to Musket's objection to Hackett testifying as to legal conclusions, the court concluded that to the extent Hackett's opinions did not relate to specialized trade usage, and instead focused on the legal significance of the terms in the Agreement, the opinions would be inadmissible. The court further found Hackett's opinion regarding the inadequacy of the crude oil receipt capacity of Musket's terminal was based on unreliable methodology. Hackett admitted he did not visit the terminal and that he used incorrect information for his for his analysis. Hackett's testimony for Suncor with regard to this opinion was found to be unhelpful and unnecessary.

With regard to Hackett's opinion that, as part of the duty to mitigate damages, Musket should have gone into the market to purchase alternative supplies when Suncor could not deliver the agreed amount of crude oil, the court rejected the contention that Hackett's testimony was unreliable because he based his conclusions on his own experience in administering similar contracts and relied on a colleague. However, "the court here reiterates that Hackett may not offer . . . testimony that relates to the actual

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[110] *Id.* at *3.
[111] *Id.* at *4.
[112] *Id.* at *7.
[113] *Musket Corp.*, 2016 WL 7374225, at *4.
[114] *Id.* at *6.

interpretation of the contract; this is the court's province."[115]

A final finding of note occurred in the court's discussion of the non-reliability of certain of Hackett's opinions which were said to be based upon his review of certain unspecified internet sites. The court commented as follow:

> While it is possible to reliably investigate on the Internet, as is evidenced by the use of Westlaw Next or LexisNexis to investigate the law, the court cannot determine that Hackett based his opinion on reliable information when the only information it has is that he reviewed some articles he found online.[116]

The motions of Musket and Suncor to strike and exclude certain expert witnesses and testimony were granted in part, as detailed in the opinion.

I. In a suit for disgorgement of profits, court grants motion in limine excluding from the trial evidence of environmental damage.

The plaintiffs in *Mary v. QEP Energy Co*.[117] alleged QEP breached certain oil and gas leases and several additional agreements. Specifically, the plaintiffs asserted various property damage claims related to oil and gas activities of QEP on the subject lands. It was alleged

> that QEP is a bad faith trespasser because it constructed a 16' pipeline, instead of a 12' pipeline authorized in the servitude agreement. . . Plaintiffs further allege that QEP failed to fence the surface location around the [well pad]; failed to institute and provide adequate erosion control measures; and exceeded the permissible width of the lease roads and pipeline servitude granted by plaintiffs.[118]

The plaintiffs admitted they did not previously allege a specific claim for recovery of environmental damages. They only sought disgorgement of profits.

QEP filed a Motion in Limine to Exclude Evidence of Environmental Damage at trial on the grounds that such evidence would not be relevant to the case. The plaintiffs opposed the motion and argued evidence of environmental damage would be relevant to show bad faith on the part of QEP, without regard to any issue of damages. QEP responded that "the only issue in this lawsuit [the disgorgement of profits claim] which requires a determination regarding QEP's good faith or bad faith arises from QEP's alleged bad faith possession, not its operations …"[119] on the property.

The court found that, under Louisiana law, "the question of whether a possessor be in good faith or in bad faith (legal or actual) is the sole factor in determining whether such possessor should or should not account for the fruits of his possession."[120] The court further found "the sole basis for Plaintiffs' disgorgement claim is their allegation that QEP wrongfully possessed portions of the Subject Property . . ."[121] Assuming for the sake of discussion that QEP might be found to be a bad faith possessor because it located a portion

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[115]*Id.* at *8.
[116]*Id.* at *7, n.4.
[117]No. 13-2195, 2016 WL 4487804 (W.D. La. 2016).
[118]*Id.* at *1.
[119]*Id.* (emphasis added by the court).
[120]*Id.* at *2 (quoting SGC Land, L.L.C. v. La. Midstream Gas Serv., 939 F. Supp. 2d 612, 619 (W.D. La. 2013)).
[121]*Id.*

of its pipeline outside the servitudes, the court concluded the presence or absence of environmental damage around QEP's well site or production facilities would have no bearing on the determination of good faith or bad faith. As a result, the court granted QEP's Motion in Limine to Exclude Evidence of Environmental Damage.

Chapter 14 • FOREST RESOURCES
2016 Annual Report[1]

I. DEVELOPMENTS IN FEDERAL LITIGATION

A. National Forest Roadless Area Management

Fifteen years after promulgation, litigation over the Roadless Area Conservation Rule (Clinton Rule)[2] may be moving closer to an end, at least regarding its general validity. In 2016, the United States Supreme Court denied the State of Alaska's petition for writ of certiorari review of the Ninth Circuit en banc decision that vacated a Tongass National Forest exemption from the Clinton Rule and reinstated application of the rule on the Tongass.[3] However, the State of Alaska claims challenging the Clinton Rule remain pending on remand from the D.C. Circuit Court of Appeals.[4] Idaho and Colorado are not subject to the Clinton Rule because they have both promulgated state-specific roadless rules.[5] In Colorado, the Department of Agriculture has now issued a final rule to reinstate the North Fork Coal Mining Area exception to the Colorado Roadless Rule.[6] It remains to be seen whether the incoming Trump Administration will review or consider revocation, further exceptions, or other modifications of the Clinton Rule.

B. Federal Court Cases

In *Sierra Club v. U.S. Forest Service*,[7] the Sixth Circuit affirmed a lower court's decision upholding the United States Forest Service's (Forest Service) decision to re-issue a special use permit for the operation and maintenance of an oil pipeline in Wisconsin under a categorical exclusion to the National Environmental Policy Act (NEPA).[8] The court agreed that the re-issuance of the permit was categorically excluded because Enbridge Energy, L.P., (Enbridge) the owner and operator of the pipeline, was not seeking to increase the intensity or scope of its activities, nor was Enbridge late in seeking a renewal under NEPA or the Administrative Procedure Act.[9] The court further rejected the Sierra Club's arguments that the presence of an endangered bird would preclude the Forest Service from using a categorical exclusion where a biologist's report unambiguously concluded the authorization would have no effect on the bird, and that the agency was

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[2]Clinton Rule, 36 C.F.R. §§ 294.10-294.14 (2001).

[3]Alaska v. Organized Vill. of Kake, Alaska, 136 S. Ct. 1509 (2016).

[4]Alaska v. U.S. Dep't. of Agric., 772 F.3d 899, 900 (D.C. Cir. 2014).

[5]Idaho Roadless Area Management, 36 C.F.R. §§ 294.20-294.29; Colorado Roadless Area Management, 36 C.F.R. §§ 294.40-294.49.

[6]Roadless Area Conservation; National Forest System Lands in Colorado, 81 Fed. Reg. 91,811 (Dec. 19, 2016) (to be codified at 36 C.F.R. pt. 294) (final rule).

[7]828 F.3d 402 (6th Cir. 2016).

[8]*Id.* at 404-05, 409, 412 (referring to categorical exemption at 36 C.F.R. § 220.6(e)(15)).

[9]*Id.* at 409-10.

required to independently evaluate the cumulative impacts or whether an environmental impact statement (EIS) was required prior to applying the categorical exclusion.[10] Consequently, the court held that the Forest Service did not act arbitrarily in determining that the renewal fell within the Forest Service's categorical exclusion for replacement of an existing or expired special use authorization where the changes were only administrative.[11]

In *Helping Hand Tools v. U.S. Environmental Protection Agency*,[12] environmental interest groups challenged the U.S. Environmental Protection Agency's (EPA) decision to issue a prevention of significant deterioration permit for Sierra Pacific Industries to construct a biomass-burning power plant at its lumber mill in California.[13] The interest groups claimed that the EPA was required to consider solar power and a greater natural gas mix as clean fuel control technologies in its best available control technology (BACT) analysis and challenged the EPA's BACT guidance for facilities burning biomass fuel and emitting greenhouse gases.[14] The Ninth Circuit held that the EPA committed no error on both claims.[15] Although the court recognized that the failure to consider all available control alternatives in a BACT analysis would constitute clear error, the EPA did not have to consider solar, natural gas, or other clean technology alternatives that would "redefine the source," i.e. require a complete redesign of the proposed facility.[16] Instead, the court held that there was a sufficient basis for the EPA to find the purpose of the proposed facility was to burn wood waste from Sierra Pacific's lumber operations, and requiring the facility to consider burning other fuel sources would redefine the source.[17] As a result, in deferring to the EPA's scientific expertise, the Ninth Circuit found that the EPA did not act arbitrarily by not considering alternative fuel sources, and that the EPA's BACT guidance for biomass-burning power plants was not arbitrary and capricious under the *Chevron* standard.[18]

In *Alliance for the Wild Rockies v. Christensen*,[19] the Ninth Circuit upheld the lower court's grant of summary judgment to environmental plaintiffs enjoining two projects in the Gallatin National Forest in Montana for failing to adequately protect lynx habitat under the Endangered Species Act (ESA) and the NEPA, and the lower court's decision in favor of the Forest Service concerning project impacts to grizzly bears. Because the United States Fish and Wildlife Service (FWS) designated additional critical lynx habitat that was not in the area considered at the time of the original consultation, the Ninth Circuit affirmed the decision that the Forest Service and FWS must reinstate ESA section 7(a)(2) consultation.[20] However, the Ninth Circuit found that the Forest Service and FWS did not act arbitrarily when reviewing the forest projects impacts to grizzly bears because the agencies identified and applied the "secure habitat standard" as the best available science, considered road density to measure impacts on grizzly bear populations, and adequately

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[10] *Id.* at 410-11.
[11] *Id.*
[12] 836 F.3d 999 (9th Cir. 2016).
[13] *Id.* at 1001.
[14] *Id.* at 1005, 1010.
[15] *Id.* at 1012.
[16] *Id.* at 1001, 1006-10 (adopting two-step analysis previously promulgated by the Environmental Appeals Board and approved by the Seventh Circuit to draw distinction between consideration of appropriate control technologies and redefining a facility).
[17] *Helping Hand Tools*, 836 F.3d at 1010.
[18] *Id.* at 1010-12 (citing Chevron U.S.A. Inc. v. Nat. Res. Def. Counsel, Inc., 467 U.S. 837 (1984)).
[19] Nos. 14-35069, 14-35123, 2016 WL 6465748 (9th Cir. Nov. 1, 2016).
[20] *Id.* at *1 (citing Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv., 789 F.3d 1075 (9th Cir. 2015).

explained the basis for a surrogate measure of grizzly bear takes based on duration for helicopter logging.[21]

In *Beard v. United States*,[22] the United States Court of Federal Claims granted summary judgment to the Forest Service in a suit brought by permittees alleging that the Forest Service violated the terms of a long-term special use permit issued in 1981 by allowing a logging contractor to harvest timber on the permitted lands in the Sierra Nevada Forest in California. The plaintiffs were initially granted a special use permit for the purposes of constructing, maintaining and operating a seasonal resort on approximately 3.5 acres of land, but as a result of reduced demand, contemplated construction under a site development plan was abandoned or delayed.[23] In 2011, the Forest Service entered into a contract for a forest fire reduction project that resulted in clear cutting on a little over half an acre of the permitted land for a log landing area.[24] Plaintiffs sued the Forest Service for breach of contract, inter alia, claiming the clear cutting impeded their ability to further develop the rented land.[25] The court, however, rejected the plaintiffs' claims that the contract imposed an implied reciprocal duty on the Forest Service to protect the scenic esthetic values of the area and found that any damages were not reasonably foreseeable and speculative, even if the contract provisions required the Forest Service to exercise its rights without "undue interference" to the plaintiffs.[26]

II. Developments in State Courts

In *Oliver v. Ball*,[27] the Pennsylvania Superior Court held that a purchaser of land with harvestable timber did not need to demonstrate that "'the quality, quantity, or type of timber'" or other attribute of the property was unique to be entitled to specific performance in a land sale dispute.[28] This case arose from a buyer's suit for breach of contract when a seller failed to convey certain property. At the trial court level, the buyer asserted he was entitled to specific performance because the property was unique. However, the trial court disagreed stating the buyer failed to offer evidence regarding the quality, quantity, or type of timber, inter alia, on the property that is unique or unavailable elsewhere.[29] On appeal, the Superior Court expressly rejected the trial court's view that a buyer must show that land has "'unique characteristics, of import to him, that cannot be found or purchased elsewhere,'" or that the value of the property was not quantifiable to obtain specific performance.[30] Instead, the Superior Court restated the longstanding proposition that because all land is unique and cannot be duplicated with any amount of money, it generally may be assumed that a buyer of real property has no adequate remedy at law, and the appropriate remedy is specific performance.[31]

In *Georgia Pacific Corp. v. Cook Timber Co.*,[32] the Supreme Court of Mississippi found that a directed verdict was improper because a reasonable juror could have concluded that a wood-processing company had improperly culled wood that was not substandard in

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[21] *Id.* at *1-2.
[22] 125 Fed. Cl. 148 (2016).
[23] *Id.* at 151-153.
[24] *Id.* at 154.
[25] *Id.* at 157.
[26] *Id.* at 158-164.
[27] 136 A.3d 162 (Pa. Super. Ct. 2016).
[28] *Id.* at 165, 168.
[29] *Id.* at 165.
[30] *Id.* at 165, 168.
[31] *Id.* at 167 (acknowledging that as an equitable remedy, specific performance may be denied where injustice or hardship could result to either of the parties).
[32] 194 So. 3d 118 (Miss. 2016).

violation of its contract with a logging company based on: (1) evidence that the company failed to maintain scale tickets with the statutorily required information, and (2) an email from a company executive suggesting a plan to lower prices. This case arose from breach-of-contract, antitrust, and conspiracy claims brought by Cook Timber Company, a Mississippi logging company, against Georgia Pacific Corporation (Georgia Pacific), a wood processor.[33] On the breach of contract claim, the Mississippi Supreme Court held that reasonable jurors could interpret the email to mean that Georgia Pacific culled wood to avoid payment, and along with the adverse presumption raised by the incomplete scale tickets, there was sufficient evidence for a reasonable juror to conclude that Georgia Pacific had breached its contract. [34] As a result, the Mississippi Supreme Court reversed and remanded the case for a new trial on that claim.[35] However, on the other claims, the Mississippi Supreme Court found that a directed verdict was proper because: (1) Georgia Pacific's strategy and conduct to purchase timber at the lowest possible price with the intent to stockpile timber in anticipation of higher future timber prices, and other alleged activities, did not violate the state antitrust statute, and (2) the plaintiff had failed to establish an agreement between market participants to establish a conspiracy claim under the state statute.[36]

In *Kirk v. Wescott*,[37] the Supreme Court of Idaho determined that a deed may create a future easement and held that based on the plain language of the deed, the easement terminated one-year from delivery of the deed regardless of whether the easement went into effect.[38] The case arose when the servient estate owners sought to quiet title and terminate a temporary easement of access over their property that had been conveyed to the dominant estate owner of an adjacent lot (Lot 8).[39] The temporary easement was unique because it was a contingent future interest that became effective only if the owner of Lot 8 received a written denial from the Forest Service for an easement across Forest Service lands.[40] The easement also contained three circumstances upon which the easement would terminate: (1) when/if Blaine County and the Forest Service provided a permanent access across Forest Service lands; (2) when Blaine County agreed to allow access to Lot 8 from a strip of undeveloped land known as Jones Lane; and (3) within one-years' time or upon completion of a driveway across Jones Lane or Forest Service property.[41] In interpreting these provisions, the district court held that the deed was ambiguous and concluded that the parties must have intended that the easement terminate only after the dominant estate owner had obtained an alternative, permanent access to Lot 8. Although the dominant estate owner had obtained an easement from the Forest Service, the district court concluded that the Forest Service easement was not permanent because it had an expiration date and was revocable.[42] The Supreme Court of Idaho, however, disagreed and reversed the lower court, finding that the deed was not ambiguous and instead that the plain language of the deed created an express future easement with conditions and a limited one-year duration.[43] Consequently, because the provision contained no beginning date regarding the one-year timeframe when the easement would become effective, the Idaho Supreme Court determined the only reasonable interpretation was that this timeframe began to run from

[33] *Id.* at 119-20.
[34] *Id.* at 124-26.
[35] *Id.* at 125-26.
[36] *Id.* at 122-124.
[37] 382 P.3d 342 (Idaho 2016).
[38] *Id.* at 350-51.
[39] *Id.* at 343.
[40] *Id.* at 350.
[41] *Id.* at 350-51.
[42] *Kirk*, 382 P.3d at 348.
[43] *Id.* at 350-51.

the time the deed was delivered.[44] Because the deed was delivered in 2000, the Idaho Supreme Court held the easement had terminated and did not address whether the Forest Service easement provided permanent access, or the other points raised on appeal.[45]

III. Developments in Federal Legislation, Directives, and Policy

In last year's edition, we reported that the EPA had agreed to consider rulemaking under the Clean Water Act (CWA) section 402(p)(6) concerning stormwater discharges from forest roads as a result of litigation.[46] On July 5, 2016, the EPA issued a decision that declined to regulate discharges from forest roads under section 402(p)(6) of the CWA.[47] As a result, National Pollutant Discharge Elimination System permits and other section 402 regulations do not apply to stormwater runoff from logging roads and other certain forestry activities.[48] The EPA's decision was in response to a remand in *Environmental Defense Center, Inc. v. U.S. EPA*[49] that required the EPA to consider whether to regulate stormwater discharges from forest roads under the CWA.[50] The EPA declined to regulate stormwater discharges from forest roads for the following reasons: (1) state, federal, regional, tribal, and private sector programs already address such discharges, and efforts to help strengthen these existing programs would be more effective than imposing additional regulations; (2) "[w]ide variations in topography, climate, ownership, management, and use" across the United States' forest roads makes development of a universal regulation complex and difficult; and (3) federal implementation and enforcement mechanisms are limited, and existing best management practices programs are effective in addressing water quality near forest roads.[51]

A. New BLM Planning Regulations

On February 25, 2016, the Bureau of Land Management (BLM) proposed amended regulations to 43 C.F.R. Part 1600.[52] The proposed regulations are part of BLM's "Planning 2.0" initiative, which seeks to rethink the framework for the management of public lands.[53] Planning 2.0 has three main objectives: (1) improve BLM's ability to timely respond to social and environmental change; (2) provide meaningful opportunities for other federal agencies, state and local governments, tribes, and the public to be involved in BLM resource management plans; and (3) improve BLM's ability to address landscape-scale resource issues and develop and apply landscape-scale management approaches.[54] In addition to the proposed rule, the Planning 2.0 initiative includes a revision of the BLM Land Use Planning Handbook (H-1601-1).[55] The proposed rule would revise 40 C.F.R.

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[44] *Id.* at 351.
[45] *Id.*
[46] Joint Motion For Entry of Order, *In re* Envtl. Def. Ctr., No. 14-80184 (9th Cir. Aug. 26, 2015).
[47] Decision Not to Regulate Forest Road Discharges Under the Clean Water Act, 81 Fed. Reg. 43,492 (July 5, 2016) (to be codified at 40 C.F.R. ch. 1) (notice of decision).
[48] *Id.* at 43,492.
[49] 344 F.3d 832 (9th Cir. 2003).
[50] 81 Fed. Reg. at 43,494.
[51] *Id.* at 43,493.
[52] Resource Management Planning, 81 Fed. Reg. 9674 (Feb. 25, 2016).
[53] *Planning 2.0: Improving the Way We Plan Together*, Bureau of Land Mgmt. (last updated June 9, 2016) (the BLM manages more than 245 million acres of public land, which is more than any other federal agency).
[54] 81 Fed. Reg. at 9674.
[55] *Id.*

subparts 1601 (Planning) and 1610 (Resource Management Planning).[56] Proposed changes to subpart 1601 address purpose, objective, responsibilities, definitions, and principles. Proposed changes to subpart 1610 focus on the framework for resource management planning.[57] The changes also update public notification and public comment requirements and create new opportunities for public involvement, develop a baseline condition assessment process, clarify plan procedures, update monitoring and evaluation requirements, modify amendment and maintenance provisions, and update rules for designating areas of critical environmental concern.[58]

B. Forest Service Planning Rule

The Forest Service continues to implement its 2012 Planning Rule[59] that sets forth detailed process and content requirements for the development, amendment, and revision of land resource management plans for national forests (also known as forest plans).[60] During 2016, the agency continued with revising several forest plans for various national forests, some of which are scheduled to be completed in 2017.

In December 2016, the Forest Service issued its final Record of Decision (ROD) for the first major amendment of a forest plan under the 2012 Planning Rule and for the Tongass National Forest in Alaska, the nation's largest national forest.[61] The amendment, which focuses upon transitioning from harvest of old growth timber to second growth timber from previously harvested areas on the forest for commercial timber sales, has engendered much political and legal controversy. The draft ROD and final EIS were the subject of numerous and voluminous complaints from both pro-development and preservationist sides of the debate under the Forest Service "objection" process that applies to amendments under the 2012 Planning Rule.[62] Review and potential further action by the incoming Trump Administration and the Congress may be expected, as well as likely litigation over the amendment.

In December 2016, the Forest Service also issued a final regulation modifying the 2012 Planning Rule focused on clarifying requirements with respect to amendments of forest plans such as the Tongass plan that were developed and revised under the forest planning regulations in effect prior to the 2012 Planning Rule.[63] Notably, this final modified regulation provides that forest plan amendments that are limited to a specific project or activity are not significant changes to the plan that would require the Forest Service to complete the arduous process applicable to plan revisions under the 2012 Planning Rule and that other amendments for which an EIS is prepared do not necessarily require completion of all requirements applicable to a plan revision.[64]

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[56] *Id.* at 9675.
[57] *Id.*
[58] *Id.*
[59] National Forest System Land Management Planning Directives, 78 Fed. Reg. 13,316 (Feb. 27, 2013).
[60] *Id.* at 13,316-17; 36 C.F.R. § 219 (2016).
[61] Tongass National Forest Land and Resource Management Plan Amendment, 81 Fed. Reg. 88,657 (Dec. 8, 2016).
[62] *Id.*; Letter from M. Earl Stewart, Forest Supervisor, Tongass NF, to Reader (Dec. 9, 2016).
[63] National Forest System Land Management Planning, 81 Fed. Reg. 90,723 (Dec. 15, 2016) (to be codified at 36 C.F.R. pt. 219).
[64] *Id.* at 90,738; 36 C.F.R. § 219.13(b)(3).

C. Renewed United States-Canada Softwood Lumber Trade Dispute

Disputes regarding alleged Canadian subsidies of softwood lumber exported to the United States have spanned decades and spawned numerous trade cases and associated settlements. The most recent settlement agreement reached in 2006 expired in October 2015 but included a "cooling off" period during which no softwood lumber trade disputes could be filed, extending to October 2016.[65] After negotiations to reach a new agreement failed, a group of United States companies calling itself COALITION (Committee Overseeing Action for Lumber International Trade or Negotiations) filed antidumping and countervailing duty petitions with the United States Department of Commerce and the International Trade Commission.[66] The petitions, filed on November 25, 2016, assert that the United States lumber industry has been injured by unfairly traded imports of softwood lumber from Canada.[67]

Key allegations in the petitions include claims that Canadian provincial governments, which own most of Canadian commercial timberlands, provide standing trees to Canadian producers for a fee that is far below the market value of the timber, as well as a number of other subsidies, which result in Canadian lumber being sold at low "dumped" prices in the United States.[68] The petitions seek imposition of substantial dumping duties on Canadian imported lumber within the scope of the petitions and could result in interim import duties being imposed on Canadian lumber during the pendency of the cases.[69] The petitions may engender further settlement negotiations, but a renewed settlement appears doubtful prior to the incoming Trump Administration taking office and addressing the dispute. If not resolved by settlement, the pending petitions are likely to take many years to resolve and may have a substantial effect on United States lumber and housing prices, as well as related markets.

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[65] *Softwood lumber exports to the United States: Possible company exclusions process regarding a potential United States investigation into imports of certain Canadian softwood lumber products into the United States*, GLOBAL AFFS. CAN. (Oct. 19, 2016).
[66] Certain Softwood Lumber Products From Canada: Initiation of Countervailing Duty Investigation, 81 Fed. Reg. 93,897 (Dec. 22, 2016).
[67] *Id.*
[68] *Id.*
[69] *Id.*

Chapter 15 • HYDRO POWER
2016 Annual Report[1]

I. JUDICIAL DEVELOPMENTS

A. Ninth Circuit Affirms District Court Mandate that State Fix Culverts Blocking Fish Passage

On June 27, 2016, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) affirmed a permanent injunction issued by the United States District Court for the Western District of Washington against the State of Washington (State), requiring the State to replace or repair culverts impeding fish passage in waterways throughout the State.[2] The district court imposed the injunction to remedy claims by Tribes that state-owned and operated culverts underneath state roads impeded fish passage through streams.[3] The Tribes argued that the blockage created by the culverts diminished the number of fish traveling through the Tribes' "usual and accustomed" fishing grounds and stations and restricted the ability of anadromous species' ability to return to their spawning grounds, violating the Tribes' Treaty-reserved fishing right and depriving them of their ability to earn a moderate living from fishing.[4]

The case first arose in the 1970s, brought by the Tribes and the United States against the State, seeking determinations on the scope of the Tribes' right to off-reservation fishing, reserved in exchange for relinquishing their land under the so-called Stevens Treaties.[5] In Phase I of the litigation, the Tribes established their right to take up to 50% of the harvestable fish in the State,[6] or a sufficient quantity to provide them a "moderate standard of living."[7] In 2001, in Phase II of the litigation, known as the Culvert Case sub-proceeding, the Tribes sought declaratory judgment establishing that the Stevens Treaties impose a duty on the State to refrain from diminishing the number of fish passing through, to, or from the Tribes' usual and accustomed fishing grounds by construction and/or maintenance of culverts, and that the State violated, and continued to violate, that duty.

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[1]This report, which covers significant decisions in the area of hydropower during 2016, was authored by Michael R. Pincus, Sharon L. White, Carly Summers, and Keturah Brown, attorneys at Van Ness Feldman, LLP and Robert Conrad, law clerk at Van Ness Feldman, LLP.

[2]United States v. Washington, 827 F.3d 836 (9th Cir. 2016).

[3]"The Tribes include the Suquamish Indian Tribe, Jamestown S'Klallam Tribe, Lower Elwha Band of Klallams, Port Gamble Band Clallam, Nisqually Indian Tribe, Nooksack Indian Tribe, Sauk–Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island Tribe, Stillaguamish Tribe, Upper Skagit Indian Tribe, Tulalip Tribes, Lummi Indian Nation, Quinault Indian Nation, Puyallup Tribe, Hoh Tribe, Confederated Tribes and Bands of the Yakama Indian Nation, Quileute Indian Tribe, Makah Indian Tribe, Swinomish Indian Tribal Community, and the Muckleshoot Indian Tribe." *Id.* at 841.

[4]*Id.* at 842.

[5]The relevant Treaties, the Treaties of Medicine Creek, Quinault River, Neah Bay, Point Elliott, and Point-No-Point, entered by the Tribes and the United States in the 1860s and commonly referred to as the "Stevens Treaties," all contain language reserving to the Tribes the right to continue hunting, gathering, fishing, and engaging in other activities in the traditional places, even on lands beyond reservations. United States v. Washington, 384 F. Supp. 312, 406 (W.D. Wash. 1974).

[6]*Id.* at 343.

[7]United States v. Washington, 506 F. Supp. 187, 191 (W.D. Wash. 1980).

The Tribes sought an injunction requiring the State to identify and repair or replace all culverts impeding fish passage within a specific time period.[8]

In 2007, the district court ruled that the Stevens Treaties do impose a duty on the State to refrain from degrading fish habitat with barrier culverts and reducing the fish available to Tribes,[9] and in 2013, the court granted the permanent injunction.[10] On appeal, the Ninth Circuit affirmed the district court order, concluding that the culverts degrade fish habitat in violation of the tribal fishing rights and mandating the State to correct high-priority barrier culverts within seventeen years, and the remainder at the end of their natural life or in the course of independent road construction projects. The court acknowledged that the Stevens Treaties do not expressly guarantee that the government will not significantly degrade the resource, but inferred that promise to support the intent of the Stevens Treaties. The court noted that the number of fish suitable for harvest is currently insufficient to provide the moderate living promised to the Tribes. The court rejected the State's arguments that the district court improperly failed to consider the substantial cost of implementing the injunction or the State's expertise in concluding that correction of state-owned barrier culverts was unlikely to meaningfully improve fish runs.[11]

II. ADMINISTRATIVE DEVELOPMENTS

A. FERC Issues First License under Pilot Two-year Process

On May 5, 2016, the Federal Energy Regulatory Commission (FERC) issued its first license under its two-year licensing process.[12] The FERC issued an original license to FFP Project 92, LLC (FFP) for the Kentucky River Lock & Dam No. 11 Hydroelectric Project No. 14276 (FFP Project).[13] The 5-megawatt (MW) FFP Project will be located on the Kentucky River at Kentucky River Lock and Dam No. 11, which is owned by the Commonwealth of Kentucky and operated by the Kentucky River Authority.[14]

The two-year licensing process was established in 2014 upon issuance of a Final Rule revising the FERC's regulations in response to the Hydropower Regulatory Efficiency Act of 2013 (HREA) and its directives.[15] The HREA,[16] among other things, directed the

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[8]United States v. Washington, No. CV-9213RSM, 2007 WL 2437166, at *1 (W.D. Wash. Aug. 22, 2007).
[9]*Id.* at *10.
[10]United States v. Washington, No. CV70-9213, 2013 WL 1334391, at *25 (W.D. Wash. Mar. 29, 2013). *See also* United States v. Washington, 20 F. Supp. 3d 986, 1022-23 (W.D. Wash. 2013).
[11]*Washington*, 827 F.3d 836.
[12]*FFP Project 92, LLC*, 155 FERC ¶ 62,089 (2016).
[13]*Id.* at 64,245.
[14]*Id.*
[15]*Revisions and Technical Corrections to Conform the Commission's Regulations to the Hydropower Regulatory Efficiency Act of 2013*, F.E.R.C. STATS. & REGS. ¶ 31,358 (2014), 79 Fed. Reg. 59,105 (Oct. 1, 2014).
[16]Hydropower Regulatory Efficiency Act of 2013, Pub. L. No. 113-23, 127 Stat. 493 (2013). The HREA also: (1) amended Section 30 of the Federal Power Act (FPA) to establish a new category of qualifying conduit hydropower facilities; (2) increased the capacity of conduit projects qualifying for FERC's conduit exemption program from 15 MW to 40 MW, and expanded the exemption to cover conduit projects on federal lands; (3) amended the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2705, to double the capacity of hydropower projects qualifying for FERC's small hydropower exemption under the FPA from 5 MW to 10 MW; and (4) amended the FPA to permit

FERC to explore a two-year licensing process for hydropower development at closed-looped pumped storage and non-powered dams and establish criteria for selecting such projects.[17]

In compliance with the HREA, the FERC issued a notice to solicit pilot projects to test the two-year licensing process.[18] In order for a project to be considered, a project was required to meet various criteria, including: (1) not being continuously connected to a naturally-flowing water feature if the project is closed loop pumped storage, (2) creating little to no change to existing ground and surface water uses and flows, (3) being unlikely to adversely affect threatened or endangered species, (4) obtaining a letter from a dam owner that the project is feasible if the project is located at or uses a federal dam, and (5) obtaining an approval letter from the managing entity of a public park, recreation area, or wildlife development if the project would use any of those sites.[19] FFP was the only entity to apply for the two-year licensing project. The license was issued approximately two years after the FERC approved FFP to test the two-year licensing process.[20] Currently, the 5-MW FFP Project is the only project that the FERC has granted a license under the two-year licensing process. The FERC is required to hold a follow-up workshop to solicit public comment on the effectiveness of the pilot project testing the two-year process within three years of the date of implementation of the two-year process and submit a report to Congress.[21]

B. FERC and the Corps Sign Updated MOU to Streamline Hydro Project Permitting

The FERC and the United States Army Corps of Engineers (Corps) executed an updated Memorandum of Understanding (MOU) to address development of FERC-licensed non-federal hydroelectric projects at Corps facilities, on July 20, 2016.[22] The previous MOU, signed in 2011, contained a general commitment to better coordination of the FERC licensing process, and the Corps' separate processes for dredge and fill permits under Clean Water Act section 404 (Section 404) and permits to occupy Corps facilities under section 14 of the Rivers and Harbors Act, also known as Section 408 (Section 408) permits.[23] Section 404 requires authorization from the Corps for the discharge of dredged or fill material into all waters of the United States, including wetlands.[24] Section 408 authorizes the Secretary of the Army to grant approval for the temporary occupation or use of any public works when the Secretary determines that such occupation or use will not be injurious to the public interest.[25]

FERC, at its discretion, to extend preliminary permit terms a maximum of two years beyond the current three-year maximum term. *Id.* §§ 3-5.

[17] *Id.* § 6.

[18] Hydropower Regulatory Efficiency Act of 2013; Notice Soliciting Pilot Projects to Test a Two-year Licensing Process, 79 Fed. Reg. 2164 (Jan. 13, 2014).

[19] *Id.* at 2164-65.

[20] Letter from Jeff C. Wright, FERC Office of Energy Projects, to Dan Lissner, Free Flow Power Corp. (Aug. 4, 2014).

[21] Hydropower Regulatory Efficiency Act of 2013, § 6(b)(4), 127 Stat. at 495.

[22] Memorandum of Understanding Between United States Army Corps of Engineers and the Federal Energy Regulation Commission on Non-Federal Hydropower Projects (July 20, 2016) [hereinafter MOU].

[23] Memorandum of Understanding Between United States Army Corps of Engineers and the Federal Energy Regulation Commission on Non-Federal Hydropower Projects (Mar. 30, 2011).

[24] 33 U.S.C. § 1344.

[25] *Id.* § 408.

The updated MOU establishes a two-phase process for acquiring both agencies' authorizations.[26] In Phase 1, environmental issues associated with all three authorizations are addressed in a single environmental review document for which the FERC is the lead agency.[27] It is contemplated that the FERC license and Section 404 applications would be filed contemporaneously. Following issuance of the FERC's license order, the Corps informs the applicant of any additional environmental information needed for the Corps' authorizations. When the Corps deems that it has all the environmental information it needs, Phase 2 will begin. In Phase 2, the applicant prepares detailed plans and specifications for the project for submission to the Corps and files its Section 408 application. When the Corps' environmental and engineering reviews are complete, it issues the Section 408 and Section 404 permits. The MOU notes that a standard article in a FERC license for a project at a Corps' dam requires the developer to enter into an agreement with the Corps to coordinate its plans for site access and activities on Corps' lands.[28]

The key feature of the process is the Corps' commitment to proactive early participation in the environmental review, which increases the likelihood that the Corps' environmental review will be complete or nearly complete when the FERC issues its license. The two-phase process is not mandatory; license applicants may instead elect to pursue their FERC and Corps authorizations sequentially.

C. EPA Expands Clean Energy Incentive Program of Clean Power Plan to Include Hydro Generation

On June 16, 2016, the Environmental Protection Agency (EPA) issued a proposed rule introducing certain design details and expanding the scope of its Clean Energy Incentive Program (CEIP).[29] The CEIP is a component of the EPA's "Clean Power Plan" (CPP),[30] a rule promulgated under section 111(d) of the Clean Air Act[31] that requires states to submit plans that will set carbon dioxide emission reduction limits on existing fossil fuel-fired electric generating units in the U.S. power sector. The CEIP is an optional program that states may adopt to incentivize early emission reduction projects under the CPP. A state that opts-in to the CEIP may allocate allowances or issue emission rate credits to eligible projects for energy generation or energy savings that occurs during 2020 and 2021. The EPA will provide matching allowances or emission rate credits for such projects.

As part of its proposed CEIP rule, the EPA expanded the types of projects eligible for the CEIP. In its original proposal, only generation from wind and solar projects qualified for credits under the CEIP. In its 2016 proposed rule, the EPA proposed to expand the eligible renewable energy resources that qualify for the CEIP program to include hydropower and geothermal. To qualify, the hydropower project must commence commercial operations on or after January 1, 2020. A CEIP-eligible project that secures an allowance or emission rate credit may sell or otherwise transfer the allowance or credit to an affected power plant, which may use them for compliance with an emission standard under the CPP.[32]

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[26]MOU, *supra* note 22, at Att. A.
[27]*Id.* at 5.
[28]*Id.* at Att. A.
[29]Clean Energy Incentive Program Design Details, 81 Fed. Reg. 42,940 (June 30, 2016) (to be codified at 40 C.F.R. pts. 60 and 62).
[30]Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).
[31]42 U.S.C. § 7411(d) (2012).
[32]Clean Energy Incentive Program Design Details, 81 Fed. Reg. 42,940.

In the EPA's CPP rule, states adopting the CEIP were required to notify the EPA of their intention to participate by September 6, 2016. On February 9, 2016, however, the United States Supreme Court stayed the effectiveness of the CPP for the pendency of the litigation challenging the rule.[33] As a result, states were not required to notify the EPA by September 2016 of their intention to participate in the program. Despite the judicial stay, the EPA moved forward with a proposed rule introducing design details and expanding the scope of the CEIP to assist states in the development of their state plans to comply with the CPP. The EPA accepted comments on the proposed rule through November 1, 2016. At this time, the CEIP program and the fate of the overall CPP is uncertain.

D. Department of Energy Issues Hydropower Vision Report

On July 26, 2016, the Department of Energy Office of Energy Efficiency and Renewable Energy issued a comprehensive report entitled "Hydropower Vision: A New Chapter for America's 1st Renewable Electricity Source."[34] The report is the product of a collaborative study conducted by 300 experts from over 150 organizations and agencies and provides a comprehensive analysis for evaluating future pathways for low-carbon, renewable hydropower in the United States.[35] Within the study, more than fifty hydropower deployment scenarios were modeled, allowing the researchers to assess the relative influence of specific variables on hydropower growth in the competitive energy marketplace.[36] Three key factors emerged, which were deemed to be the most influential during the modeling process: (1) technology innovation to reduce cost, (2) improvement of market lending conditions by valuing the long asset life of hydropower facilities, and (3) the concurrent influences of several environmental considerations.[37] These factors, along with others, were combined in a final set of four scenarios which were used to quantify potential benefits from specific metrics when compared to a baseline scenario representing no new unannounced hydropower development.[38]

The analysis revealed several key insights regarding the role of existing and future hydropower in the United States power sector, including (1) that "existing hydropower facilities have high value … [and] provid[e] low-cost, low-carbon, renewable energy as well as flexible grid support", (2) that "significant potential exists for new pumped storage hydropower to meet grid flexibility needs and support increased integration of variable generation resources", and (3) that the "economic and societal benefits of both existing and potential new hydropower … are substantial and include job creation, cost savings in avoid[ing] mortality and economic damages from air pollutants, and avoided [greenhouse gas] emissions."[39]

The analysis also revealed that U.S. hydropower has the potential to grow from 101 gigawatts (GW) of capacity in 2015 to 150 GW by 2050, with more than 50% achieved by 2030.[40] This level of hydropower deployment could power more than thirty-five million United States homes, save $209 billion from avoided greenhouse gas emissions, and create over 195,000 hydropower-related jobs.[41]

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[33]West Virginia v. EPA, 136 S. Ct. 1000 (2016) (mem).
[34]U.S. DEP'T. OF ENERGY, Hydropower Vision: A New Chapter for America's 1st Renewable Electricity Source (July 2016).
[35]*Id.* at xvii.
[36]*Id.* at 3.
[37]*Id.*
[38]*Id.*
[39]U.S. DEP'T. OF ENERGY, *supra* note 34, at 2.
[40]*Id.* at 7.
[41]*Id.*

Chapter 16 • MARINE RESOURCES
2016 Annual Report[1]

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 2016 review is meant to discuss the more significant events during 2016 across the full spectrum of the Committee's responsibilities, but it is not meant to be all-inclusive.

I. FISHERIES

A. Judicial Developments

Anglers Conservation Network v. Pritzker[2] confirmed that fishery management Councils[3] cannot be sued for their actions or inactions. In 2012, the Mid-Atlantic Fishery Management Council (Council) began formulating an amendment to the Fisheries Management Plans (FMPs) that would add several species which were important to birds of prey and recreational fishermen so that quotas could be set for them. Then in 2013, by a ten-to-nine vote, the Council decided to send the proposed amendment to a working group and revisit the issue three years later.[4]

Councils make only "recommendations" on management to the Secretary of Commerce.[5] Then the Secretary makes final decisions which can be judicially challenged. Plaintiffs sued even though the Secretary had made no decision, arguing that since the National Marine Fisheries Service (NMFS) representative had voted in favor of and argued for delaying the action for at least three years, this action by the NMFS representative could be construed as a decision by the Secretary.

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[1]This report was prepared by the Marine Resources Committee and edited where necessary by Peter H. Flournoy, International Law Offices of San Diego, and Ashley Nicole Stilson, Pace University School of Law. In addition to the Editors, Contributors to the report include: Joan Bondareff and Patricia O'Neill of Blank Rome LLP; Lynn Long, Department of Interior; and John G. Cossa, Beveridge & Diamond, PC. Nothing in this review represents the views of the employers of the contributors or their clients.

[2]809 F.3d 664 (D.C. Cir. 2016).

[3]The Magnuson Stevens Act (MSA), 16 U.S.C. §1801, first passed by Congress in 1976 to manage United States federal 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 regional geographic jurisdiction. The FMPs are developed by the Councils through a series of meetings of federal, state, Native American, and territorial fishery management officials, scientists and 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), the regulations are enforced by NMFS. Regulations to manage fisheries never get to the Secretary of Commerce without first being proposed through the Council system (except through legislation).

[4]*Anglers Conservation Network*, 809 F.3d at 668.

[5]*Id.* at 668-69.

The court determined the only "action" that had been taken was by the Council, and it could not be attributed to the Secretary. The Council is not a federal agency within the meaning of the Administrative Procedure Act (APA),[6] and therefore, a Council's "action" or "inaction" cannot be a "final agency action" which is reviewable under the Section 706(2) of the APA.[7] The frustration of Council members and constituents being forced to wait months, or sometime years, until NMFS has acted on a Council recommendation, before they can seek judicial review of that action, will remain.

In *Pacific Choice Seafood Co. v. Pritzker,*[8] the court decided another "procedural" question. Challenges to NMFS' regulations must be made within thirty days of the publication of a Final Rule in the Federal Register. NMFS instituted an individual transferable quota program (ITQ) in 2010, including a provision that quota shares held by one ownership entity which exceeded 2.7% had to be divested by November 30, 2015 or they would be automatically revoked. NMFS modified this part of the rule, which become final in November 2015, and plaintiffs filed their complaint within thirty days of the November rule, inter alia, challenging the substantive provisions of the 2010 ITQ program.[9] Defendants argued the complaint was time barred, but the court, relying on *Oregon Trollers Ass'n v. Gutierrez*[10] and *Gulf Fishermen's Ass'n v. Gutierrez,*[11] determined that the November 2015 regulation was "an indispensable part" of the 2010 ITQ program regulations, and therefore, the plaintiffs' challenges to the 2010 ITQ program were timely.[12]

In *Alaska Oil and Gas Ass'n v. Pritzker,*[13] the court upheld a NMFS determination under the Endangered Species Act that its climate projections used to determine the loss of sea ice over shallow waters in the Artic which would leave the Pacific bearded seal subspecies endangered by the year 2095. The district court believed that NMFS' "attempt to predict the bearded seals' viability beyond [fifty] years was 'too speculative and remote to support a determination that the bearded seal was in danger of becoming extinct.'"[14] Plaintiffs argued bearded seals were spread over a wide range, their populations had naturally low densities, and the seals spent a considerable amount of time underwater, all of which made it very difficult to obtain any reliable estimate of their population, and in addition, there was considerable disagreement among reviewing scientists over the future availability of sea ice in the Bering Sea.[15] Access to sea ice over shallow water was important to seal mating; the birthing process, so seal mothers would have easy access to food sources while nursing; and decreased exposure to their primary predators – polar bears and walruses.[16]

The issue was: When NMFS determines that a species that is not presently endangered will lose its habitat due to climate change by the end of the century, may it list that species as threatened under the Endangered Species Act? The Court of Appeals found that all of the independent scientific peer reviewers had agreed that the bearded seal's continued viability depended on the availability of sea ice over shallow waters during

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[6] 5 U.S.C. § 706.

[7] *Anglers Conservation Network*, 809 F.3d at 669-70.

[8] Order Denying Defendants' Motion to Dismiss, Pac. Choice Seafood Co. v. Pritzker, No. 15-cv-05572-HSG, 2016 WL 3916322 (N.D. Cal. July 20, 2016).

[9] *Id.* at *4.

[10] 452 F.3d 1104, 1113 (9th Cir. 2006).

[11] 529 F.3d 1321 (11th Cir. 2008).

[12] Order Denying Defendants' Motion to Dismiss, *supra* note 8.

[13] 840 F.3d 671 (9th Cir. 2016).

[14] *Id.* at 675 (quoting Alaska Oil & Gas Ass'n v. Pritzker, Nos. 4:13–cv–00018–RRB et al., 2014 WL 3726121, at *15 (D. Alaska July 25, 2014)).

[15] *Id.* at 676-77.

[16] *Id.* at 677.

critical life stages and that NMFS' projections indicated by sea ice would have almost disappeared entirely during the mating, nursing, and birthing season.[17] Additionally, the review of the petition to list the bearded seal as threatened or endangered had lasted four years involving biological review teams, public hearings, and thousands of responded to comments.[18] The court found NMFS' climate predictions beyond 2050 to be reliable, referring to its ruling in *Alaska Oil and Gas Ass'n v. Jewell*[19] where it found that those very same climate models represented the "'best available science' and reasonably supported the determination that a species reliant on sea ice likely would become endangered in the foreseeable future."[20] Thus, the court upheld the listing.

In *Marilley v. Bonham*, nonresident commercial harvesters challenged California's fee differential for nonresident fishing licenses, vessel registration, and permits.[21] The *en banc* court determined that the fee differentials charged by California were less than the amount that California subsidized the management of the nonresident harvesters' portion of its commercial fisheries, thus surviving the challenge under the Privileges and Immunities Clause.[22] The court also found that due to California's state interest in receiving compensation for its management, there was a "rational basis" for its fee differentials, thus surviving the Equal Protection Clause challenge.[23] The dissent argued that nonresident harvesters paid other multiple California taxes beginning the fishing season thousands of dollars in the hole because of the discriminatory fees, and this should have been given more consideration.[24] The majority reviewed the only two prior Supreme Court decisions, *Toomer v. Witsell*,[25] (the Court struck down a license fee for nonresidents which was 100 times greater than that for residents finding it exclusionary) and *Mullaney v. Anderson*,[26] (Alaska charged a ten-fold differential for nonresident fees trying to justify it on enforcement costs, but presented insufficient evidence). The *Marilley* court noted that in both *Toomer* and *Mullaney* the Supreme Court had found that nonresident fee differentials charged in order to recover the state's expenses in enforcement, conservation, and management measures attributable to the nonresidents could justify such discrimination that would otherwise be impermissible under the Privileges and Immunities Clause, thus upholding the California fees.[27]

B. Legislative Developments

Congress passed, and the President signed on December 16th, a law implementing two treaties governing fishing for species on the high seas (other than highly migratory species such as tunas and billfish).[28] The bill, H.R. 6452,[29] was entitled "Assuring Access

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[17] *Id.* at 679-80.
[18] 840 F.3d at 677.
[19] 815 F.3d 544 (9th Cir. 2016), *appeal docketed*, No. 16-610 (U.S. Nov. 7, 2016).
[20] *Alaska Oil and Gas Ass'n*, 840 F. 3d at 679 (citing *Alaska Oil & Gas Ass'n*, 815 F.3d at 558-559).
[21] Marilley v. Bonham, 844 F.3d 841 (9th Cir. 2016).
[22] *Id.* at 852.
[23] *Id.* at 854-855.
[24] *Id.* at 855-56 (Smith, J., dissenting).
[25] 334 U.S. 385 (1948).
[26] 342 U.S. 415 (1952).
[27] *Marilley*, 844 F.3d at 849.
[28] Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean, May 2, 2012, S. TREATY DOC. NO. 113-2; Convention on the Conservation and Management of High Seas Fisheries Resources in the South Pacific, Nov. 14, 2009, S. TREATY DOC. NO. 113-1.
[29] H.R. 6452, 111th Cong. (2010).

to Pacific Fisheries Act" and also carried amendments to the implementing legislation for the Western and Central Pacific Fisheries Convention (WCPFC). The language amending 16 U.S.C. section 6910 is important, requiring the Secretaries of State and Commerce to "minimize any disadvantage to United States. fishermen in relation to other" countries in United States negotiations, as well as, "maximize the opportunities for fishing vessels of the United States to harvest fish stocks on the high seas."[30]

II. Marine Mammals and the Marine Mammal Protection Act (MMPA)

A. Judicial Developments

1. United States v. Archibald[31]

While aboard a tuna fishing vessel on the high seas, defendant crewman allegedly shot and killed a pilot whale. The defendant argued using a firearm to deter marine mammals is not a crime recognized under the MMPA, and the Government failed to charge section 1387's "intentional killing" mens rea.[32] In reading section 1387's "intentional lethal take" language against section 1375(b)'s explicit mens rea requirement, the court determined "it would be absurd to create … a heightened *mens rea* or 'a separate crime with a separate element of intent' through such implicit, indirect means."[33] The court "discern[ed] no other MMPA provision that may properly be characterized as an element of the instant charges insofar as 'the statutory definition is such that the crime may not be properly described without reference to the exception'"[34]

2. Natural Resource Defense Council v. Pritzker[35]

In considering whether NMFS's 2012 Final Rule, which authorized the Navy's incidental take of a specified number of marine mammals through low frequency sonar systems (LFA), achieved the "least practicable adverse impact," the Ninth Circuit reversed and remanded the district court's ruling which granted summary judgment in NMFS's favor on the MMPA compliance issue and held the "least practicable adverse impact" is a "stringent standard" NMFS is required to adopt even though NMFS has discretion to choose mitigation measures.[36] The circuit court held NMFS "conflated the 'least practicable adverse impact' standard with the required 'negligible impact' finding" and determined the MMPA's least practicable adverse impact standard must be achieved in addition to finding a negligible impact in order to authorize an incidental take.[37]

3. Pacific Ranger, LLC v. Pritzker[38]

Plaintiffs, commercial fishing vessel operators, contended their NOAA-issued incidental take permit allowed them to take marine mammals "in the course of their fishing operations" as long as they did not intentionally do so, and further that the regulations were

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[30] *Id.*
[31] No. 2:15-cr-0134, 2016 U.S. Dist. LEXIS 53871 (D.N.J. Apr. 22, 2016).
[32] *Id.* at *1
[33] *Id.* at *3.
[34] *Id.*
[35] 828 F.3d 1125 (9th Cir. 2016).
[36] *Id.* at 1129, 1133.
[37] *Id.* at 1142.
[38] No. 15-cv-509-KBJ, 2016 U.S. Dist. LEXIS 135543 (D.D.C. Sept. 30, 2016).

unconstitutionally vague in providing "fair warning of what conduct is permitted."[39] The court granted defendants' cross-motion for summary judgment finding the MMPA's plain text prohibits all marine mammal takes and "only certain takings are excepted as incidental."[40] The court held the incidental take definition "must be read narrowly, to give effect to Congress's intent" to protect marine mammals and not to "immunize all but the most flagrant … acts directed toward the marine mammals that … [are] regularly encounter[ed] in the ordinary course of business."[41]

B. Legislative Developments

Senator Dan Sullivan (R-AK) introduced a bill to amend the MMPA to facilitate Native Alaskan marine mammal product imports into the United States.[42] Representative Jaime Herrera Beutler (R-WA) introduced a bill to amend the MMPA to authorize NOAA to issue one-year permits to Washington, Oregon, Idaho, and various Native American tribes to lethally take healthy, non-listed, Columbia River sea lions in order to protect endangered, threatened, and non-listed fish species.[43] Representative Denny Heck (D-WA) introduced a resolution to express support to recognize June 2016 as National Orca Protection Month.[44]

C. Administrative Developments

Numerous administrative developments occurred in 2016, including the following: NMFS issued a proposed rule to list the Gulf of Mexico Bryde's whale (*Balaenoptera edeni*) as threatened or endangered under the ESA;[45] EPA issued notice of a general permit to authorize marine mammal carcass transport from the United States and ocean disposal;[46] NOAA reopened the public comment period on the MMPA's proposed rule to prohibit swimming with and approaching Hawaiian spinner dolphins within fifty yards;[47] NMFS issued a final determination to designate the Sakhalin Bay-Nikolaya Bay-Amur River Stock of beluga whales (*Delphinapterus leucas*) as a depleted marine mammal stock under the MMPA;[48] NMFS and NOAA issued a proposed rule to list the Maui's dolphin (*Cephalorhynchus hectori maui*) as endangered and the South Island Hector's dolphin (*C.*

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[39] *Id.* at *2, *10.
[40] *Id.* at *12.
[41] *Id.* at *14.
[42] S. 2728, 114th Cong. (2016).
[43] The Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes and Bands of the Yakama Nation, and the Columbia River Inter-Tribal Fish Commission; H.R. 564, 114th Cong. (2016).
[44] H.R. Res. 773, 114th Cong. (2016).
[45] Notice of 12-Month Finding on a Petition to List the Gulf of Mexico Bryde's Whale as Endangered Under the Endangered Species Act (ESA), 81 Fed. Reg. 88,639 (Dec. 8, 2016) (to be codified at 50 C.F.R. pt. 224).
[46] General Permit for Ocean Disposal of Marine Mammal Carcasses, 81 Fed. Reg. 87,928 (Dec. 6, 2016).
[47] Protective Regulations for Hawaiian Spinner Dolphins Under the Marine Mammal Protection Act; Reopening of Public Comment Period, 81 Fed. Reg. 80,629 (Nov. 16, 2016) (to be codified at 50 C.F.R. pt. 216) (referring to proposed rule, 81 Fed. Reg. 57,854 (Aug. 24, 2016)).
[48] Designating the Sakhalin Bay-Nikolaya Bay-Amur River Stock of Beluga Whales as a Depleted Stock Under the Marine Mammal Protection Act (MMPA), 81 Fed. Reg. 74,711 (Oct. 27, 2016) (to be codified at 50 C.F.R. pt. 216).

hectori hectori) as threatened under the ESA;[49] NFMS issued a final rule to revise the humpback whales (*Megaptera novaeangliae*) ESA listing status;[50] NMFS issued an interim final rule to prevent humpback whale takes from human approach within 200 nautical miles of the Hawaiian Islands;[51] USDA proposed a rule to amend the Animal Welfare Act regulations regarding captive marine mammal humane handling, care, treatment, and transportation;[52] and NMFS issued a final rule replacing right whale North Atlantic critical
habitat with two new areas.[53]

III. POLAR BEARS, SEA TURTLES, SALMON, AND THE ENDANGERED SPECIES ACT (ESA)

A. Judicial Developments

1. Alaska Oil & Gas Ass'n v. Jewell[54]

The Fish and Wildlife Service (FWS) issued a final rule designating critical polar bear habitat. The district court vacated the final rule holding it violated the APA's arbitrary and capricious standard and FWS did not adequately justify unincorporated State comments. The Ninth Circuit reversed, holding the standard FWS followed was correct, and FWS "drew rational conclusions from the best available scientific data," in designating critical habitat.[55] The court also held FWS provided Alaska with adequate justification for not incorporating the state's comments in the final rule.

2. National Wildlife Federation v. National Marine Fisheries Service[56]

Environmental organizations alleged NMFS violated ESA and APA in issuing a 2014 BiOp on the Federal Columbia River Power System's effects on salmon and steelhead. The court determined NMFS acted arbitrarily and capriciously in concluding the BiOp did not violate ESA, and the United States Army Corps of Engineers violated the National Environmental Policy Act (NEPA) in failing to prepare an environmental impact statement (EIS) for its records of decision implementing the BiOp's reasonable and prudent alternatives. The court found a lengthy analysis was necessary to define those standards because "federal consulting and action agencies must do what Congress has directed them to do."[57]

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[49]Proposed Rule To List the Maui's Dolphin as Endangered and the South Island Hector's Dolphin as Threatened Under the Endangered Species Act, 81 Fed. Reg. 64,110 (Sept. 19, 2016) (to be codified at 50 C.F.R. pts. 223 and 224).
[50]Identification of 14 Distinct Population Segments of the Humpback Whale (Megaptera novaeangliae) and Revision of Species-Wide Listing, 81 Fed. Reg. 62,260 (Sept. 8, 2016) (to be codified at 50 C.F.R. pts. 223 and 224).
[51]Approach Regulations for Humpback Whales in Waters Surrounding the Islands of Hawaii Under the Marine Mammal Protection Act, 81 Fed. Reg. 62,010 (Sept. 8, 2016) (to be codified at 50 C.F.R. pt. 216).
[52]Animal Welfare; Marine Mammals, 81 Fed. Reg. 5629 (Feb. 3, 2016) (to be codified at 9 C.F.R. pts. 1 and 3).
[53]Critical Habitat for Endangered North Atlantic Right Whale, 81 Fed. Reg. 4838 (Jan. 27, 2016) (to be codified at 50 C.F.R. pt. 226).
[54]*Alaska Oil & Gas Ass'n*, 815 F.3d at 544.
[55]*Id.* at 562.
[56]184 F. Supp. 3d 861 (D. Or. 2016). For case origin, *see* Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 254 F. Supp. 2d 1196 (D. Or. 2003).
[57]*Nat'l Wildlife Fed'n*, 184 F. Supp. 3d at 871-72.

3. United States v. Washington [58]

In 1854-1855, Pacific Northwest Indian tribes entered into a series of treaties relinquishing their title to Puget Sound watershed lands in exchange for guaranteed off-reservation fishing rights. Washington later constructed barrier culverts under roads to allow streams to flow underneath; however, such culverts do not allow fish passage and resulted in dramatic salmon stocks decline. The Ninth Circuit held Washington's barrier culvert management violated and continues to violate its treaty obligations and ordered Washington to correct most of its high-priority barrier culverts within seventeen years.[59]

4. DeForest v. City of Ashland [60]

A municipality ordered an environmental study of a property leased to a gun club to "ass[ess] 'chemicals of potential ecological concern.'"[61] While the study found no chemical or other impact, the municipality filed suit claiming ESA violations among others.[62] The municipality alleged the gun club discharged lead shot and other pollutants into an adjacent creek, which constitutes a "take" of endangered Coho salmon. The gun club contended the leased property's wetlands were not salmon habitat and no salmon were killed or injured. In considering the ESA's "harm" definition, the court granted defendant's cross-motion for summary judgment, finding the municipality failed to establish any identifiable harm to salmon lead exposure.

5. Center for Environmental Science Accuracy & Reliability v. National Park Service[63]

The Hetch Hetchy Water and Power Project, located on the Tuolumne River, contains two hydropower facilities. The Tuolumne River flows to the Sacrament-San Joaquin Delta, which is critical habitat for several fish species, including winter-run and spring-run Chinook salmon. Plaintiffs alleged defendants violated ESA section 7 because they approved annual instream flow and other Hetch Hetchy Project operating requirements without first consulting with FWS and/or NMFS and violated NEPA because they failed to prepare an EIS. The court held there was no consultation and thus "no ripe, concrete challenge," even though ESA requires the "best available science."[64]

6. Institute for Fisheries Resources v. Burwell[65]

The Federal Drug Administration (FDA) approved a company's proposal to create genetically-modified salmon. The FDA initially determined the approval "may affect" a listed species, triggering the ESA's consultation requirement; however, the FDA changed its determination to "no effect" at FWS's suggestion.[66] The court granted defendants' motion to dismiss finding FWS's recommendation was not a final APA agency action.

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[58]827 F.3d 836 (9th Cir. 2016).
[59]*Id.* at 865.
[60]No. 1:11-cv-03159-CL, 2016 U.S. Dist. LEXIS 167840 (D. Or. Jul. 25, 2016).
[61]*Id.* at *4.
[62]*Id.* at *2, *4.
[63]No. 1:14-cv-02063-LJO-MJS, 2016 U.S. Dist. LEXIS 115940 (E.D. Cal. Aug. 29, 2016).
[64]*Id.* at *61.
[65]No. 16-cv-01574-VC, 2016 U.S. Dist. LEXIS 116751 (N.D. Cal. Aug 30, 2016).
[66]*Id.* at *3-4.

7. Wild Fish Conservancy v. Irving [67]

NMFS issued a BiOp and incidental take statement (ITS) for the Leavenworth National Fish Hatchery's effects on endangered Chinook salmon and steelhead in Icicle Creek. Plaintiff alleged the BiOp and ITS were arbitrary and capricious, NMFS failed to prepare an EIS, and the BLM and FWS failed to insure hatchery operations did not jeopardize listed species. The court found the following: the BiOp was arbitrary and capricious because NMFS failed to consider potential climate change effects on stream flows in its hatchery's operation and water use analysis; the ITS failed to meet ESA standards because it did not set an adequate take trigger level, lacked adequate take monitoring requirements, and included contradictory provisions; and NMFS was not required to prepare an EIS because BiOp and ITS implementation triggers NEPA, and thus, the action agency, not the consulting agency, is required to prepare an EIS.

B. Legislative Developments

Representative Sheila Jackson Lee (D-TX) introduced an amendment to the SHARE Act bill to strike the exemption to import polar bear trophies taken in sport.[68] Senator Dan Sullivan (R-AK) introduced a bill that would, among other things, require the Department of the Interior to issue permits to allow a hunter to import polar bear parts (other than internal organs) provided the hunter submits proof the bear was legally harvested from an approved Canadian population before the May 15, 2008.[69] Representative Don Young (R-AK) introduced a similar bill in the House.[70]

C. Administrative Developments

FWS issued a proposed rule on regulatory program development and local management structures for carrying out the responsibilities under the Agreement between the United States and the Russian Federation on the Conservation and Management of the Alaska-Chukotka Polar Bear Population and title V of the Marine Mammal Protection Act of 1972, as amended.[71] FWS issued a final rule on the incidental take regulations authorizing the nonlethal, incidental, unintentional take of small numbers of Pacific walruses and polar bears during oil and gas industry activities in the Beaufort Sea and adjacent northern Alaskan coast.[72]

IV. Deep Seabed Mining, Continental Shelf Delineation, the Artic, and Other Issues Under the 1982 U.N. Law of the Sea Convention

A. Deep Seabed Mining

During the twenty-second annual session of the International Seabed Authority (ISA or Authority), contract status for polymetallic nodules, polymetallic sulphides, and cobalt-rich ferromanganese crusts were discussed. As of April 27, 2016, a total of twenty-

[67]No. 2:14-CV-0306-SMJ, 2016 U.S. Dist. LEXIS 162056 (E.D. Wash. Nov 22, 2016).
[68]H. Amdt. 948 to H.R. 2406, 114th Cong. (2016) (amendment failed by recorded vote).
[69]S. 659, 114th Cong. (2016).
[70]*See* H.R. 327, 114th Cong. (2016).
[71]Co-Management of Subsistence Use of Polar Bears by Alaska Natives; Conservation of the Alaska-Chukotka Polar Bear Population, 81 Fed. Reg. 78,564 (Nov. 8, 2016) (to be codified at 50 C.F.R. pt. 18).
[72]Marine Mammals; Incidental Take During Specified Activities, 81 Fed. Reg. 52,276 (Aug. 5, 2016) (to be codified at 50 C.F.R. pt. 18).

four "contracts for exploration had entered into force (15 for polymetallic nodules, 5 for polymetallic sulphides and 4 for cobalt-rich ferromanganese crusts)."[73] Since the twenty-first session in July 2015, several new contracts have been signed, including a contract with Companhia de Pesquisa de Recursos Minerais S.A. covering exploration for cobalt-rich ferromanganese crusts and a contract for exploration for polymetallic nodules with the UK Seabed Resources Ltd.[74] Additionally, ISA and the Cook Islands Investment Corporation signed a fifteen-year contract for polymetallic nodules exploration in the Clarion-Clipperton Fracture Zone,[75] and ISA and the Government of India signed a fifteen-year contract for polymetallic sulphides exploration in the central Indian Ocean.[76]

On July 18, 2016, ISA granted six contracts five-year extensions for polymetallic nodules exploration in the Area.[77] The six contractors are: Yuzhmorgeologiya sponsored by the Russian Federation, the Interoceanmetal Joint Organization sponsored by Bulgaria, Cuba, Czech Republic, Poland, the Russian Federation and Slovakia; the Government of the Republic of Korea; the China Ocean Mineral Resources Research and Development Association sponsored by China; Deep Ocean Resources Development Co. Ltd sponsored by Japan; and the Institut français de recherche pour l'exploitation de la mer.[78]

On July 14, 2016, the ISA issued the initial working draft of regulations for exploitation of polymetallic nodules in the deep seabed beyond the limits of national jurisdiction (the Area), "Regulations and Standard Contract Terms on Exploration for Mineral Resources in the Area," which represents the first phase in the development of comprehensive regulations.[79] ISA requested comments to the draft Regulations by November 25, 2016 and received forty-three comments from stakeholders, including eight governments, ten by Contractors, one by an international organization and nineteen by non-governmental organizations and institutions in response to the draft Regulations.[80] At this time, ISA and International Hydrographic Organization (IHO) also signed an Agreement of Cooperation to specify the scope of cooperation between the IHO and the Authority and help facilitate the exchange of bathymetric survey data, development of compatible digital input in relation to nautical charting requirements, global consistency in the treatment of bathymetric data covering ISA contract areas, development of a global approach to issuance of notices to mariners related to navigational warnings, development of standardized information in nautical publications that draw mariners' attention to

[73] Press Release, Int'l Seabed Auth., International Seabed Authority Opens Twenty-Second Annual Session In Kingston With Agenda, Including Development Of Minerals Exploitation Regulations And Elections Of A Secretary-General And New Members Of Various Organs (July 12, 2016).

[74] *Id*.

[75] *Cook Islands Investment Corporation Signs Exploration Contract with the International Seabed Authority*, INT'L SEABED AUTH. (July 16, 2016).

[76] *The Government of India Signs Exploration Contract with the International Seabed Authority*, INT'L SEABED AUTH. (Sept. 26, 2016).

[77] *Seabed Council Puts Forward Two Candidates for Election of Secretary-General; Approves Six Exploration Contract Extensions; Begins LTC Election Debate*, INT'L SEABED AUTH. (July 18, 2016).

[78] *International Seabed Authority 22nd Session (Background Press Release)*, INT'L SEABED AUTH. (July 4, 2016).

[79] *International Seabed Authority Legal and Technical Commission Issues Working Draft Exploitation Regulations*, INT'L SEABED AUTH. (July 14, 2016).

[80] *Now Online: Comments to Draft Exploration Regulations*, INT'L SEABED AUTH. (Dec. 3, 2016).

installations used by ISA contractors and development of charting policies that address hazards related to concurrent activities in the ISA contract areas.[81]

B. Continental Shelf Delineation

The Commission on the Limits of the Continental Shelf (Commission) considered numerous member state submissions seeking recognition of claims over extended areas of the continental shelf. During its Fortieth Session, the Commission approved the "Recommendations of the Commission on the Limits of the Continental Shelf in regard to the submission made by Iceland in respect of the Ægir Basin area and the western and southern parts of Reykjanes Ridge on 29 April 2009", with amendments[82] and published full recommendations on the limits of Argentina's continental shelf, which were approved by the Commission on March 11, 2016.[83]

During its Forty-first session, the Commission reviewed several submissions, including the following: the Russian Federation regarding the Arctic Ocean; Brazil regarding the Brazilian Southern Region; Uruguay; the Cook Islands concerning the Manihiki Plateau; Norway regarding Bouvetøya and Dronning Maud Land; South Africa concerning the Republic of South Africa's mainland territory; the Federated States of Micronesia, Papua New Guinea and Solomon Islands, jointly, concerning the Ontong Java Plateau; France and South Africa, jointly, in the area of the Crozet Archipelago and the Prince Edward Islands; Kenya; Mauritius, in the region of Rodrigues Island; Nigeria; and Seychelles, regarding the Northern Plateau Region.[84]

In August, "the Commission approved, without a vote, the 'Recommendations of the Commission on the Limits of the Continental Shelf in regard to the submission made by the Oriental Republic of Uruguay on 7 April 2009'" and "'Recommendations of the Commission on the Limits of the Continental Shelf in regard to the submission made by the Cook Islands in respect of the Manihiki Plateau on 16 April 2009', with amendments."[85] The Argentine Republic submitted the only partial revised submission, and it will be included on the Commission's forty-third session agenda.[86]

C. Arctic Developments

In 2016, the United States remained Chair of the Arctic Council. The United States theme for its chairmanship is "One Arctic: Shared Opportunities, Challenges and Responsibilities."[87] The goals for the United States chairmanship remain the same: (1)

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[81] *International Seabed Authority and the International Hydrographic Organization Sign Agreement of Cooperation*, INT'L SEABED AUTH. (July 14, 2016).

[82] Comm'n on the Limits of the Cont'l Shelf, Progress of work in the Commission on the Limits of the Continental Shelf, 40th Sess., N.Y., Feb. 1-Mar. 18, 2016, U.N. Doc. CLCS/93 (Apr. 18, 2016).

[83] Comm'n on the Limits of the Cont'l Shelf, Summary of Recommendation of the Commission on the Limits of the Continental Shelf, Subcomm. of Submission Made by Arg., 24th Sess. (2016).

[84] Comm'n on the Limits of the Cont'l Shelf, Progress of work in the Commission on the Limits of the Continental Shelf, 41st Sess., N.Y., July 11-Aug., 2016, U.N. Doc. CLCS/95 (Sept. 21, 2016).

[85] *Id.*

[86] Comm'n on the Limits of the Cont'l Shelf, Partial Revised Submission by Argentina, 24th Sess. (updated Nov. 4, 2016).

[87] *U.S. Chairmanship of the Arctic Council*, U.S. ST. DEP'T (2015).

Improving Economic and Living Conditions in Arctic Communities; (2) Arctic Ocean Safety, Security and Stewardship; and (3) Addressing the Impacts of Climate Change.[88]

In its Midterm Update, the United States published its list of accomplishments including: the release of procedures for the safe operation of unmanned aircraft systems in the Arctic; advancing emergency preparedness by exercising the Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic and the Agreement on Cooperation on Marine Oil Pollution, Preparedness and Response in the Arctic; and expansion of its observer manual for greater observer engagement.[89] For the remainder of the year, the Council plans to: have a legally-binding agreement to enhance scientific cooperation in the Arctic ready for signature by Ministers at the Fairbanks Ministerial in 2017; develop a report of black carbon and methane emissions from both Arctic and non-Arctic states; and develop a new Arctic Resilience Framework to establish shared priorities for building resilience in the Arctic.[90]

On December 9, 2016, President Barack Obama issued an Executive Order (Order) establishing a Northern Bering Sea Climate Resilience Area.[91] The purpose of the Order is to protect an area encompassing 112,300 square miles that represents a hugely productive, high-latitude ocean ecosystem and supports one of the largest seasonal marine mammal migrations in the world.[92] The Area is delineated to focus a collection of protections related to oil and gas, shipping and fishing. According to the Fact Sheet,[93] the Order also established an inter-agency Task Force to coordinate Federal activities in this area to enhance ecosystem and community resilience, conserve natural resources, and protect the cultural and subsistence values this ecosystem provides for Alaskan native communities. The Order is accompanied by $37 million in private philanthropic funds over the next three years to build in-region capacity of indigenous-led organizations and emerging leaders across the Arctic, among other purposes.[94]

Specifically, with respect to oil and gas development, the Order reiterates that President Obama has withdrawn 40,300 square miles from the Norton basin planning area and portions of the St. Matthew-Hall planning area from future oil and gas leasing in order to protect the regional ecosystem and coastal communities. This decision was previously announced by Secretary of the Interior Sally Jewell on November 18, 2016 in the final five-year Obama Administration Offshore Oil and Gas Leasing Plan for 2017-2022.[95] The final plan offered eleven potential lease sales, including one sale off the coast of Alaska in the Cook Inlet Program Area. The Secretary decided not to include the Beaufort and Chukchi Seas planning areas in the Arctic in the final plan.[96] This decision was ratified by President Obama when, on December 20, 2016, using his authority under Section 12 (a) of the Outer Continental Shelf Lands Act,[97] he permanently withdrew from leasing the Beaufort Sea

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[88] *Id.*

[89] U.S. STATE DEP'T, U.S. CHAIRMANSHIP OF THE ARCTIC COUNCIL MIDTERM UPDATE (2016).

[90] *Id.*

[91] Off. of the Press Sec'y, Executive Order—Northern Bering Sea Climate Resilience (Dec. 9, 2016).

[92] *Id.*

[93] Off. of the Press Sec'y, Fact Sheet: White House Announces Actions to Protect Natural and Cultural Resources in Alaskan Arctic Ocean (Dec. 9, 2016).

[94] *Id.*

[95] U.S. Dept. of Int., Secretary Jewell Announces Offshore Oil and Gas Leasing Plan for 2017-2022 (Nov. 18, 2016).

[96] *Id.*

[97] 43 U.S.C. § 1341(a) (2017).

and Chukchi Sea Planning Areas.[98] Existing leases in both areas were protected from the withdrawals.

D. Implementation of the Polar Code

The United States Coast Guard is making plans to implement the new International Code for Ships Operating in Polar Waters, referred to as the Polar Code enacted through IMO Resolutions MSC.386(94) and MEPC.265(68).[99] Due to the varying completion dates of these amendments the SOLAS-related provisions found in Part I-A of the Polar Code will become effective for all newly constructed ships built on or after January 1, 2017; the MARPOL-related provisions found in Part II-A also become effective on that date.[100] On January 1, 2018, ships constructed before January 1, 2017, will be required to comply with the SOLAS-related provisions contained in Part I-A; and, finally, on July 1, 2018, the International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers (STCW) amendments for training of personnel employed on ships operating in polar waters will enter into force.[101]

On November 22, 2016, the Coast Guard issued a notice of proposed rulemaking to add a new Polar Ship Certificate to the list of existing certificates required to be carried on board all United States and foreign-flagged vessels subject to SOLAS and operating in Arctic and Antarctic waters, generally above sixty degrees north latitude and below sixty degrees south latitude.[102] The proposed rule would apply to commercial cargo ships greater than 500 gross tons, and passenger ships carrying more than twelve passengers when these ships operate within polar waters.[103] Comments on the proposed rule were due on December 22, 2016.

E. 1982 Law of the Sea Convention

On July 12, 2016, an arbitral panel sitting in The Hague issued a significant ruling in the *South China Sea Arbitration (The Republic of the Philippines v. the People's Republic of China)* interpreting UNCLOS for those nations who are party to it. The United States is a not a party, and due to Republican opposition not likely to become one anytime soon. In the South China Sea ruling, a unanimous five-member panel or Permanent Court of Arbitration (PCA) ruled that China, as a party to UNCLOS, was bound by the maritime boundaries established under UNCLOS, including the 12 nm territorial sea and the 200 nm Exclusive Economic Zone (EEZ) provisions, and therefore could not avoid the arbitration by a claim of sovereignty or establish legitimate claims to rocks and other outcroppings in the South China Sea simply by claiming they had historic rights to those rocks.[104] The arbitration was brought to the tribunal by the Philippines as a result of China's alleged interference with traditional Philippine fishing activities at Scarborough Shoal, an island in the South China Sea.

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[98]Off. of the Press Sec'y, Presidential Memorandum - Withdrawal of Certain Portions of the United States Arctic Outer Continental Shelf from Mineral Leasing (Dec. 20, 2016).
[99]Lt. Chris Rabalais, *12/6/2016: Polar Code—Entry into Force*, THE COASTGUARD BLOG FOR MAR. PROFS. (Dec. 6, 2016).
[100]*Id.*
[101]*Id.*
[102]Adding the Polar Ship Certificate to the List of SOLAS Certificates and Certificates Issued by Recognized Classification Societies, 81 Fed. Reg. 83,786 (Nov. 16, 2016) (to be codified at 46 C.F.R. pts. 2 and 8).
[103]*Id.*
[104]The Republic of the Phil. v. The People's Republic of China, PCA Case No. 2014-19 (Perm. Ct. Arb. 2016).

As a threshold matter, the PCA ruled that they had jurisdiction over the dispute under UNCLOS because it pertained to maritime boundaries to which both nations had agreed. The PCA then ruled that protections for pre-existing rights to resources were not adopted in the Convention, and therefore any rights that China claimed to the resources and waters of the South China Sea were extinguished by the entry into force of the Convention and were incompatible with the Convention's system of maritime zones. The islands were temporary outcroppings, not areas that generated either an EEZ or continental shelf. The PCA also ruled that China violated the traditional fishing rights of Philippine fishermen by halting their access to Scarborough Shoal and through its large-scale land reclamation and construction of artificial islands in the Spratly Islands, had caused severe harm to the coral reef environment, thus violating China's obligations under UNCLOS to preserve and protect the marine environment. China did not participate in the proceedings and the PCA cannot enforce this award. In October 2016, Philippine President Rodrigo Duterte decided to enter into bilateral talks with China.[105]

V. COASTAL ZONE MANAGEMENT ACT AND MARINE SPATIAL PLANNING

A. Judicial Developments

In *Pacificans for a Scenic Coast v. California Department of Transportation*,[106] the district court addressed whether the California Department of Transportation's (Caltrans) proposed widening of Highway 1 in Pacifica violated the Coastal Zone Management Act (CZMA). Caltrans had assumed the Federal Highway Administration's (FHA) CZMA obligations, the project affected California's coastal zone, and Caltrans did not submit a consistency determination to the relevant state agency pursuant to CZMA. The court held Caltrans' highway widening project approval, acting in its FHA assumed role, was not subject to CZMA because CZMA applies only to federal agency activity, which does not include federal license or permit issuance or granting of federal assistance to applicant agencies. The project's environmental approval only consisted of issuing licenses, permits, and approvals for the project.

B. Administrative Developments

On November 8, 2016, NOAA published a Notice of Proposed Rulemaking and request for comments seeking to revise CZMA change regulations, associated guidance, and a guidance Addendum in order to develop a more efficient process for making changes to state coastal management programs. The Proposed Rule removes unnecessary requirements in the current regulations, establishes program change documentation all states would adhere to, continues to ensure federal agencies and the public have an opportunity to comment on a state's proposed change to its management program, and ensures compliance with CZMA requirements and other applicable federal law.[107]

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[105]Jane Perlez, *Rodrigo Duterte and Xi Jinping Agree to Reopen South China Sea Talks*, N.Y. TIMES (Oct. 20, 2016).

[106]No. 15-cv-02090-VC, 2016 WL 4585768 (N.D. Cal. Sept. 2, 2016).

[107]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).

C. Marine Spatial Planning Developments

On December 7, 2016, the National Ocean Council, created in 2010 by Executive Order 13547, announced it finalized the Nation's first ocean plans – "a historic collaboration among states, tribes, Federal agencies, and ocean stakeholders."[108]

The first approved ocean plans are the Northeast Ocean Plan and the Mid-Atlantic Ocean Action Plan.[109] The Plans create data portals to allow scientists, stakeholders, and the public to obtain and use information about the marine environment and engage in decision-making processes such as NEPA. In the Northeast, Federal agencies are expected to use the Plan to inform dredging and Federal navigation projects, develop additional regional commercial and recreational fisheries maps and data, and improve outreach to stakeholders related to renewable energy development. In the Mid-Atlantic, Federal agencies will use the Plan to improve consultations with regional Native American tribes, support aquaculture siting and permitting, and engage fishing communities in planning and environmental offshore sand-mining review.

VI. OFFSHORE WIND ENERGY

A. Judicial Developments

1. Fisheries Survival Fund v. Jewell

In the first federal offshore wind energy lease sale challenge, a coalition of fishing advocates, local towns, and municipalities in New Jersey, New York, and Rhode Island filed suit in the Federal District Court for the District of Columbia seeking to enjoin the United States Department of the Interior's Bureau of Ocean Energy Management (BOEM) from issuing a commercial wind energy lease approximately eleven miles offshore of the New York.[110] Plaintiffs' allege BOEM failed to adequately solicit input from the fishing industry and other affected stakeholders regarding the proposed site's suitability for wind development and to identify potential alternative lease locations. Plaintiffs also allege the National Environmental Policy Act requires BOEM to prepare a full environmental impact statement (EIS) considering the effects of a potential project on the lease area prior to issuing a lease. Because the current BOEM lease issuance procedure is now a cornerstone of the United States offshore wind leasing and development process, a decision unfavorable to BOEM may jeopardize other offshore wind leases.

2. Public Employees for Environmental Responsibility v. Hopper

In the most recent federal court decision related to the United States Department of the Interior's 2011 Cape Wind project approval, the D.C. Circuit Court of Appeals reversed a 2013 Federal District Court decision upholding the validity of the project's EIS.[111] The Court found BOEM's EIS deficient because the agency should have obtained and considered certain geophysical and geological information relating to seafloor hazards

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[108]Christy Goldfuss & John P. Holdren, *The Nations' First Ocean Plans*, THE WHITE HOUSE PRESIDENT BARACK OBAMA (Dec. 7, 2016, 9:02 AM).

[109]*The Northeast Ocean Plan*, NORTHEAST REGIONAL PLAN. BODY (last visited Feb. 7, 2017); *Your Ocean Plan*, MID-ATLANTIC REGIONAL COUNCIL ON THE OCEAN (last visited Feb. 7, 2017).

[110]Fisheries Survival Fund v. Jewell, No. 1:1-CV-02409 (D.D.C. Dec. 8, 2016) (BOEM held an auction to sell the lease on December 15, 2016, and Statoil Wind US, LLC submitted the winning $42 million bid).

[111]Public Emps. for Envtl. Resp. v. Hopper, 827 F.3d 1077 (D.C. Cir. 2016).

before approving the project. The Court vacated the EIS and enjoined project construction until BOEM adequately supplements the EIS with the necessary shallow hazard information, but left Cape Wind's federal lease intact. The Court also invalidated the second incidental take statement (ITS) the United States Fish and Wildlife Service (FWS) prepared for the project addressing impacts to threatened and endangered birds.[112] The District Court previously invalidated FWS' ITS because the agency failed to expressly affirm that certain mitigation measures were unnecessary to protect bird populations.[113] The Appeals Court vacated the revised ITS because FWS failed to properly consider environmental groups' input on the revised draft.[114]

3. Town of Barnstable v. O'Connor

On February 14, 2014, the Town of Barnstable, Massachusetts and other Cape Cod organizations brought suit in the District Court for the District of Massachusetts against the Massachusetts Department of Public Utilities, Cape Wind, and NSTAR, alleging that a power purchase agreement between Cape Wind and NSTAR had been coerced by state officials in violation of the Commerce Clause of the United States Constitution and the Federal Power Act.[115] However, during the pendency of the case,[116] NSTAR terminated the power purchase agreement due to Cape Wind's default on a financing milestone, rendering the case moot.[117]

B. Federal and State Project Updates

1. Block Island Wind Project

On December 12, 2016, Deepwater Wind, LLC's 30 MW Block Island Offshore Wind Project, located in Rhode Island state waters about 2.5 nautical miles southeast of Block Island, started generating electricity, making it the first operational offshore wind project in the United States.[118]

2. New Jersey Demonstration Project

On May 3, 2016, New Jersey Governor Chris Christie vetoed S-988, a bill that would have allowed Fishermen's Energy, LLC to go forward with its plans to construct a 25 MW five turbine demonstration project in state waters approximately 2.5 miles off the New Jersey

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[112] *Id.* at 1081-82.
[113] *See* Public Emps. for Envtl. Resp. v. Beaudreau, 25 F. Supp. 3d 67 (D.D.C. 2014).
[114] *Hopper*, 827 F.3d at 1088, 1090.
[115] Town of Barnstable v. O'Connor, No. 1:14-cv-10148-RGS (D. Mass. Jan. 21, 2014) (no written opinion available).
[116] *See* Town of Barnstable v. Berwick, 17 F. Supp. 3d 113 (D. Mass. 2014), *rev'd sub nom.* Town of Barnstable v. O'Connor, 786 F.3d 130 (1st Cir. 2015).
[117] *See* Motion to Alter Judgment, Town of Barnstable v. O'Connor, No. 1:14-cv-10148-RGS, at 2-3 (D. Mass. Filed Feb. 17, 2016) (discussing termination of the power purchase agreement). The cancellation of the PPA with NSTAR also resulted in the dismissal of a state case challenging Cape Wind's transmission line permits; *See* Cape Wind Assocs., LLC v. Energy Facilities Siting Bd., No. SJ-2016-12161 (Mass. Aug. 25, 2016).
[118] *See* Tatiana Schlossberg, *America's First Offshore Wind Farm Spins to Life*, N.Y. TIMES (Dec. 14, 2016).

coast.[119] The project has suffered numerous setbacks over the years, including repeated rejection by the New Jersey State Board of Public Utilities.[120]

3. Maryland Renewable Energy Credits

On November 21, 2016, the Maryland Public Service Commission initiated review of two applications for a $1.9 billion offshore renewable energy credit (OREC) authorized by the 2013 Maryland Offshore Wind Energy Act ("Act").[121] The winner will be virtually guaranteed purchasers for the power it generates. The applicants are US Wind, Inc., which holds a federal lease offshore Ocean City, Maryland, and Skipjack Offshore Energy, LLC, a subsidiary of Deepwater Wind Holdings, LLC,[122] which is in the process of acquiring NRG Bluewater Wind, LLC's federal lease offshore Delaware.[123]

4. Virginia Research Lease

On March 24, 2016, BOEM approved the State of Virginia's Department of Mines, Minerals and Energy's Research Activities Plan for the research lease it acquired in 2015, authorizing installation of two 6-MW turbines on the lease.[124]

5. North Carolina Proposed Sale

On August 12, 2016, BOEM issued a proposed sale notice to sell one commercial wind energy lease offshore Kitty Hawk, North Carolina.[125] BOEM is currently determining whether to hold a competitive sale in the lease area.

6. Florida Lease Relinquishment

On May 31, 2016, Florida Atlantic University's Southeast National Marine Renewable Energy Center (FAU) applied to relinquish its federal research lease offshore Florida. BOEM has not yet approved the relinquishment.[126]

7. California Competition

On January 14, 2016, Trident Winds, LLC submitted an unsolicited application for a commercial wind energy lease offshore California, which included a proposal to construct

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[119] *See* Tom Johnson, *Christie Sinks Wind Turbines off Jersey Shore for Second Time*, N.J. SPOTLIGHT (May 3, 2016).
[120] *See* Tom Johnson, *BPU Blocks Offshore Wind Project for Second Time*, N.J. SPOTLIGHT (Nov. 25, 2014).
[121] *See Maryland Public Service Commission Starts Reviewing Offshore Wind Applications*, OFFSHORE WIND (last visited Feb. 7, 2017); *Background*, OFFSHORE WIND ENERGY RFP (last visited Feb. 7, 2017).
[122] *See* Barry Cassell, *Deepwater Wind Seeks Maryland Approval for 120-MW Skipjack Offshore Project*, RENEWABLE ENERGY WORLD (Dec. 5, 2016).
[123] *See Delaware Activities*, BOEM (last visited Feb. 7, 2017).
[124] *Virginia Offshore Wind Technology Advancement Project* (VOWTAP), BOEM (last visited Feb. 7, 2017).
[125] Atlantic Wind Lease Sale 7 (ATLW-7) for Commercial Leasing for Wind Power on the Outer Continental Shelf Offshore North Carolina (Kitty Hawk)—Proposed Sale Notice and Request for Interest; MMAA104000, 81 Fed. Reg. 54,591 (Aug. 15, 2016).
[126] *Florida Activities*, BOEM (last visited Mar. 6, 2017).

a floating wind turbine array.[127] Statoil Wind US, LLC subsequently expressed competitive interest in acquiring the same lease area. BOEM will determine whether, and under what circumstances, to competitively issue a lease in the proposed area.

8. Hawaii Competition

In response to multiple indications of interest in acquiring commercial wind leases offshore Oahu, Hawaii, on June 24, 2016, BOEM issued a Call for Information and Nominations ("Call") to gauge competitive interest in the proposed lease areas and to seek public input on potential site conditions, resources, existing uses, and environmental impacts. BOEM and has determined that competition exists, and is preparing for a competitive lease sale. [128]

[127] *California Activities*, BOEM (last visited Feb. 7, 2017).
[128] *Hawaii Activities*, BOEM (last visited Feb. 7, 2017).

Chapter 17 • NATIVE AMERICAN RESOURCES
2016 Annual Report[1]

I. LEGAL HEADLINES CONCERNING INDIAN COUNTRY

A. Overall Themes

This year saw the continuation of several issues relating to the Indian Child Welfare Act and the status of Native Hawaiians. The year also saw the emergence of what will likely be a continuing dispute concerning the construction of a pipeline across potential historic sites in North Dakota. Congress passed only one significant piece of legislation relating to Indian tribes, but appellate courts continued to somewhat wrestle with the nuances of tribal sovereignty.

1. Challenges to the Indian Child Welfare Act

One continuing issue from 2015 is litigation challenging the validity of the Indian Child Welfare Act (ICWA).[2] Perhaps the most notable of the cases is *Carter v. Washburn*,[3] also known as the "Goldwater Litigation" because it was filed and funded by the Goldwater Institute. The Goldwater Litigation is a class-action lawsuit challenging ICWA on the theory that it is an unconstitutional race-based law.[4] On September 29, 2016, the Navajo Nation and the Gila River Indian Community were granted permission to intervene.[5] The United States, the State of Arizona, the Navajo Nation and the Gila River Indian Community have all filed motions to dismiss, which are still pending.

In 2015, the Bureau of Indian Affairs (BIA) published updated ICWA guidelines for state courts, representing the first major development in the ICWA guidelines since they were originally published in 1979.[6] The guidelines were challenged in *National Council for Adoption v. Jewell*, in which the Plaintiff argued the new ICWA guidelines raise the placement of Indian children with Indian families above the best interests of the child, thus constituting race-based discrimination and depriving Indian children of equal protection under the law.[7] The case was dismissed in part based on a lack of subject matter jurisdiction, lack of standing, and failure to state a claim because the guidelines are not a

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[1]This 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, and Washington, D.C.: William R. Norman, Jr., Michael D. McMahan, Randi D. Hardin, and Summer J. Wesley.

[2]25 U.S.C. §§ 1901-1963 (2015).

[3]Civil Rights Class Action Complaint for Declaratory and Injunctive Relief, Carter v. Washburn, No. 2:15-cv-01259-DKD (D. Ariz. July 6, 2015).

[4]*Id.* at 2; Plaintiffs' Motion for Class Certification; Oral Argument Requested, Carter v. Washburn, No. 2:15-cv-01259-NVW (D. Ariz. Aug. 21, 2015); *see also* First Amended Civil Rights Class Action Complaint for Declaratory, Injunctive, and Other Relief, No. 2:15-cv-01259-NVW (D. Ariz. Apr. 5, 2016).

[5]*See, e.g.*, Order, Carter v. Washburn, No. 2:15-cv-01259-NVW (D. Ariz. Sept. 29, 2015).

[6]Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146 (Feb. 25, 2015).

[7]Complaint and Prayer for Declaratory and Injunctive Relief, Nat'l Council for Adoption v. Jewell, No. 1:15-cv-00675-GBL-MSN (E.D. Va. May 27, 2015).

final agency action, but rather are non-binding interpretive rules.[8] The case is currently on appeal.[9]

In June of 2016, the Bureau of Indian Affairs published a final rule adding a new subpart to the Department of the Interior's ICWA regulations[10] to address requirements for State courts and ensure proper ICWA implementation.[11] The new regulations became effective December 12, 2016.

2. The Battle Against the Dakota Access Pipeline

In January 2016, Dakota Access, LLC (DA), a company owned by the Texas-based Energy Transfer Partners, received a permit to proceed with construction of the Dakota Access Pipeline (DAPL). The original proposed DAPL route would have crossed the Missouri River north of Bismarck, North Dakota.[12] However, the route was moved south of the city, approximately one half-mile upstream from the Standing Rock Sioux (SRS) Reservation.[13] Despite the SRS voicing concerns and disapproval of the project since 2014, and despite the Advisory Council on Historic Preservation's misgivings,[14] in April 2016, the U.S. Corps of Engineers (Corps) concluded that no historically significant properties would be substantially affected. Following this decision, SRS members and others began an ongoing protest against the project.

On July 25, the Corps issued the final permits required for construction,[15] prompting the SRS to sue for declaratory and injunctive relief, alleging that the passage of DAPL through their ancestral land "threatened the Tribe's environmental and economic well-being, and would damage and destroy sites of great historic, religious, and cultural significance to the Tribe."[16] Eighteen days later, DA sued SRS Chairman Archambault and other tribal members in federal court for interfering with construction.[17]

On September 9, the District Court denied the SRS request for an injunction to halt construction. In response, the Departments of Justice, Army, and Interior issued a joint statement refusing to authorize construction, requesting that DA voluntarily stop all construction within twenty (20) miles of the area until they could revisit the determination made under the National Environmental Policy Act, and declaring that there was a "need for a serious discussion on whether there should be nationwide reform with respect to

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[8]Memorandum Opinion and Order, Nat'l Council for Adoption v. Jewell, No. 1:15-cv-00675-GBL-MSN (E.D. Va. Dec. 9, 2015).

[9]Nat'l Council for Adoption v. Jewell, No. 16-1110 (4th Cir. Feb. 1, 2016).

[10]Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38777, 38,867 (June 14, 2016) (to be codified at 25 C.F.R. pt. 23, Subpt. I).

[11]Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,777 (June 14, 2016) (notice).

[12]DAKOTA ACCESS, LLC, NORTH DAKOTA PUBLIC SERVICE COMMISSION COMBINED APPLICATION FOR CERTIFICATE OF CORRIDOR COMPATIBILITY AND ROUTE PERMIT (Dec. 2014).

[13]Amy Dalrymple, *Pipeline route plan first called for crossing north of Bismarck*, BISMARCK TRIB. (Aug 18, 2016).

[14]Letter from Reid J. Nelson, Dir., Advisory Council on Historic Preservation to John W. Henderson, Dist. Eng'r, U.S. Army Corps of Eng'rs (Mar. 15, 2016).

[15]U.S. ARMY CORPS OF ENG'RS, DECISION DOCUMENT NATIONWIDE PERMIT 12 (2012).

[16]Complaint for Declaratory and Injunctive Relief, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 1:16-cv-01534 (D.D.C. July 27, 2016).

[17]Complaint, Dakota Access LLC v. Archambault, 1:16-cv-00296-DLH-CSM (D.N.D. Aug. 15, 2016).

considering tribes' views on these types of infrastructure projects."[18] After the court again refused to grant an injunction, the Departments issued a second joint statement reiterating their previous request, but construction continued.[19] On December 4, the Department of the Army announced it would not approve an easement necessary to allow DAPL to pass under the river.[20] This decision halted any legal construction in the disputed area and has been challenged by DA.[21]

II. JUDICIAL DEVELOPMENTS

A. United States Supreme Court

1. United States v. Bryant

In this case, the Supreme Court addressed whether prior uncounseled tribal court convictions for domestic abuse could be used for subsequent federal punishment under the provisions of the Violence Against Women Act.[22] Michael Bryant, Jr., an Indian defendant, was indicted on two counts of domestic assault as a habitual offender under 18 U.S.C. section 117(a).[23] Consistent with federal law,[24] the government relied on two prior tribal court convictions for domestic abuse where Bryant was uncounseled by an attorney. Bryant filed a motion to dismiss, arguing that the charges violated his Fifth and Sixth Amendment rights. The district court denied the motion, Bryant entered a guilty plea while preserving his rights to appeal, and he was sentenced to a forty-six month prison term.[25] The Ninth Circuit reversed this decision, holding that, due to the lack of counsel, Bryant's prior tribal court convictions would violate the Sixth Amendment if they occurred in state or federal court.[26]

On appeal, the Supreme Court unanimously rejected Bryant's Sixth Amendment arguments, holding that Bryant's tribal court convictions were proper.[27] The Sixth Amendment's requirement that counsel be appointed for indigent defendants does not apply

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[18]Press Release, Dep't of Justice Office of Pub. Affairs, Joint Statement from the Department of Justice, the Department of Army and the Department of the Interior Regarding Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'r (Sept. 9, 2016).

[19]Press Release, Dep't of Justice Office of Pub. Affairs, Joint Statement from the Department of Justice, the Department of Army and the Department of the Interior Regarding D.C. Circuit Court of Appeals Decision in Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Oct. 10, 2016).

[20]Press Release, U.S. Army, Army will not grant easement for Dakota Access Pipeline crossing (Dec. 4, 2016).

[21]Motion for Summary Judgment, Standing Rock Sioux Tribe & Cheyenne River Sioux Tribe v. U.S. Army Corps of Eng'rs & Dakota Access, LLC, No. 16-cv-1534, 2016 WL 7189652 (D.D.C. Dec. 5, 2016).

[22]United States v. Bryant, 769 F.3d 671, 672-73 (9th Cir. 2014), *cert. granted*, No. 15-420, 2015 WL 5822186 (Dec. 14, 2015); *see also* Violence Against Women Act, 18 U.S.C. § 117(a) (2015).

[23]*Bryant*, 769 F.3d at 673; 18 U.S.C. § 117(a).

[24]Section 117(a) penalizes one "who has a final conviction on at least [two] separate prior convictions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction[,] . . . assault . . . against a spouse or an intimate partner." 18 U.S.C. § 117(a)(1); *Bryant*, 769 F.3d at 673.

[25]*Bryant*, 769 F.3d at 673-74.

[26]*Id.* at 677.

[27]United States v. Bryant, 136 S. Ct. 1954 (2016) (as revised July 7, 2016).

in tribal court proceedings,[28] and Bryant's convictions conformed to the Indian Civil Rights Act of 1968 (ICRA).[29] Because Bryant's convictions did not violate the Sixth Amendment, they did not present a Sixth Amendment violation when used in connection with the subsequent federal court prosecution.[30]

2. Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians

An equally divided Supreme Court let stand the Fifth Circuit's exercise of jurisdiction in a case involving a non-Indian business operating on tribal land. In this case, John Doe (Doe)—a thirteen-year-old member of the Mississippi Band of Choctaw Indians (Tribe)—worked as an unpaid intern at the Dollar General store on the Tribe's Reservation as part of a tribal youth program.[31] Doe accused Dollar General store's manager of sexual molestation and brought a civil tort suit against Dollar General in tribal court, claiming that Dollar General was negligent in hiring, training, and supervising the manager and vicariously liable for the manager's actions.[32]

Dollar General contested tribal jurisdiction, but the Mississippi Choctaw Supreme Court, the United States District Court for the Southern District of Mississippi and the Fifth Circuit Court of Appeals found the Tribe had jurisdiction under the first exception established in *Montana v. United States*,[33] which provides that a Tribe may exercise civil regulatory jurisdiction over non-members on non-Indian fee lands[34] when the non-member's conduct "has a nexus to some consensual relationship between the non-member and the tribe or its members."[35]

3. Menominee Tribe of Wisconsin v. United States

In a unanimous decision, the Supreme Court held that the statute of limitations on the Menominee Indian Tribe of Wisconsin's (Tribe) 1996-1998 claims against the Indian Health Service (IHS) was not equitably tolled. Therefore, the Tribe's claims were filed too late under the Indian Self-Determination Act and the Contract Disputes Act (ISDEAA).[36] Before the federal government's liability for full payment of contract support costs under the ISDEAA had been clearly established by the courts, the Tribe filed a class action suit against the Bureau of Indian Affairs (BIA)[37] and IHS[38] to advance contract support claims against those agencies. The class action litigation against the BIA was successfully certified, but the class certification in the action against IHS was denied. The Menominee Tribe, which was a party to the class actions, did not file individual administrative claims against IHS, but rather relied on the class action suit, which it believed tolled the six-year statute of limitations to bring its claim. After the class certification was denied in the action

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[28] *Id.* at 1962.
[29] 25 U.S.C. § 1301; *See Bryant*, 136 S. Ct. at 1959.
[30] *Bryant*, 136 S. Ct. at 1966.
[31] Dolgencorp Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167, 169 (5th Cir. 2014), *cert. granted sub nom*. Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 135 S. Ct. 2833 (2015).
[32] *Dolgencorp, Inc.*, 746 F.3d at 169.
[33] Montana v. United States, 450 U.S. 544 (1981); *Dolgencorp, Inc.*, 746 F.3d at 169.
[34] *Dolgencorp, Inc.*, 746 F.3d at 170, n.1.
[35] *Id.*
[36] Menominee Indian Tribe of Wis. v. United States, 136 S. Ct. 750 (2016).
[37] Ramah Navajo Chapter v. Jewell, 167 F. Supp. 3d 1217 (D.N.M. 2016).
[38] Cherokee Nation of Okla. v. Shalala, No. 99-CV-92 (E.D. Okla. Mar. 5, 1999).

against IHS, the Tribe filed an individual claim, but the district court found the Tribe filed the claim after the statute of limitations expired.[39]

On appeal, the Tribe advanced two arguments. First, the Tribe argued its claim should have been adjudicated as part of the previous class action, and the statute of limitations should have been tolled while the Tribe pursued that claim. The courts determined the Tribe was not eligible for class action tolling because it should have filed its individual claims *first* before participating in the class action, contrary to the Tribe's experience with its claims against the BIA. Second, the Tribe argued its claims should be subject to equitable tolling in the interest of fairness, based on the Tribe's diligent pursuit of its claims and reasonable reliance on the class action litigation. However, the Supreme Court found the Tribe did not meet the high bar to justify this relief. The Court held that a litigant seeking equitable tolling show that some extraordinary circumstance "stood in his way" and was "outside of his control." The Court held the circumstances faced by the Tribe did not meet this standard because the Tribe's reliance on the class action lawsuits in deciding whether and when to file individual administrative claims was not beyond the Tribe's control.[40]

4. Nebraska v. Parker

This case involved a challenge to the Omaha Tribe's (Tribe) attempted assertion of jurisdiction over liquor sales in the Village of Pender (Village), which was platted from land sold under an 1882 Act calling for sale of surplus lands from the Tribe's Reservation. The Tribe claimed the Village was within Indian Country as it was within the original boundaries of the reservation. Nebraska argued the 1882 Act diminished the Tribe's reservation, thus depriving it of jurisdiction over the Village. The Supreme Court utilized a three-part test by looking at the plain language of the 1882 Act, the historical evidence, and the subsequent demographic history of the land in question. Though there was conflicting evidence regarding the last two factors, the Court held that the plain language of the 1882 Act showed that Congress had not diminished the reservation and, therefore, the Tribe could regulate alcohol within the Village, as the Village was within Indian country.[41]

5. Puerto Rico v. Sanchez Valle

This case applied the Constitution's double jeopardy clause to block Puerto Rico's prosecution of a defendant who had plead guilty to federal charges.[42] The Court compared Puerto Rico's status as a territory to that of Indian tribes, citing the Court's 2004 decision in *United States v. Lara*,[43] which held the double jeopardy principles did not prevent a defendant from being charged and convicted in both tribal and federal court. While not an Indian law case, the result is notable because of Justice Thomas's brief concurring opinion[44] referencing his concurrence in *Lara*. In *Lara*, Justice Thomas urged the Court to resolve what he viewed as inconsistencies in the Court's treatment of tribal governments, stating

[39]Menominee Indian Tribe of Wis. v. United States, 841 F. Supp. 2d 99, 109 (D.D.C. 2012), *aff'd*, 764 F.3d 51 (D.C. Cir. 2014), *aff'd*, 136 S. Ct. 750 (2016).
[40]Menominee Indian Tribe of Wis., 136 S. Ct. at 755-56.
[41]Nebraska v. Parker, 136 S. Ct. 1072, 1080 (2016).
[42]Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1877 (2016).
[43]541 U.S. 193, 214-26 (2004).
[44]Sanchez Valle, 136 S. Ct. 1863, 1877 (2016) (Thomas, J., concurring in part and concurring in the judgment).

that, "[i]n my view, the tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously."[45]

6. Lewis v. Clarke

The United States Supreme Court heard oral arguments in Lewis v. Clarke[46] on January 9, 2017, a case which questions whether the sovereign immunity of the Mohegan Tribe (Tribe) extends to an employee of the Tribe's gaming enterprise. The case arose from an automobile accident involving a limousine driver (Clarke) employed by the Tribe, who crashed into a car driven by Brian and Michelle Lewis.

The plaintiffs filed suit against Clarke and the Tribe in state court, but ultimately dismissed the Tribe from the case and amended to name Clarke in his individual capacity.[47] 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 thus, shielded by tribal sovereign immunity.[48] The trial court denied the motion, and Clarke appealed.

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.[49] The Lewises appealed, and the Supreme Court granted their petition for a writ of certiorari on September 29, 2016.

7. Patchak v. Jewell

On October 13, 2016, the Supreme Court granted certiorari in Patchak v. Jewell.[50] This matter originated in 2009, when 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." [51]

In 2014, before the case was resolved, Congress enacted the Gun Lake Trust Land Reaffirmation Act,[52] which directed that any pending (or future) case relating to the Bradley Property be dismissed. Patchak sought Supreme Court review to determine the constitutionality of the statute, alleging it violated Constitutional separation of powers, due process, and Fifth Amendment principles.[53]

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[45]*Lara*, 541 U.S. at 215 (2004) (Thomas, J., concurring).
[46]Lewis v. Clarke, 135 A.3d 677 (Conn. 2016), *cert. granted*, 137 S. Ct. 31 (2016).
[47]*Lewis*, 125 A.3d at 678, n.2.
[48]*Id*. at 679.
[49]*Id*. at 682.
[50]Patchak v. Jewell, 828 F.3d 995 (D.C. Cir. 2016).
[51]Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patcheck, 132 S. Ct. 2199, 2203 (2012) (*Patchak I*).
[52]Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, 128 Stat. 1913 (Sept. 26, 2014).
[53]*Patchak*, 828 F.3d at 1004.

B. Appellate Opinions

1. Williams v. Poarch Band of Creek Indians

Plaintiff filed suit alleging she was terminated from her job as the laboratory manager and chief medical technologist in the Health Department operated by the Poarch Band of Creek Indians (Tribe) and was replaced by a younger employee in violation of the Age Discrimination in Employment Act of 1967 (ADEA).[54] Both the district court and the Eleventh Circuit rejected the plaintiff's arguments that the failure of Congress to expressly exclude Indian tribes from the definition of "employer" in the ADEA abrogated tribal sovereign immunity.[55] While the ADEA applied to the Tribe as a statute of general applicability, the doctrine of tribal sovereign immunity protected the Tribe from suits under the statute.[56] The Eleventh Circuit stated "[t]he difference between being subjected to the requirements of a statute and the right to commence a suit demanding compliance with (or damages for violations of) that same statute may be razor-thin, but it is a distinction that has been acknowledged consistently."[57]

2. Meyers v. Oneida Tribe of Indians of Wisconsin

Plaintiff filed a putative class-action lawsuit alleging violations of the Fair and Accurate Credit Transaction Act (FACTA)[58] after he made purchases at two stores owned by the Oneida Tribe of Indians of Wisconsin (Tribe) and received receipts that violated the FACTA's rules concerning printing credit card information.[59] 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."[60]

3. Akiachak Native Community v. United States Department of Interior

In this case, Alaska Native tribes challenged the Secretary of the Interior's decision to maintain the "Alaska Exception" to the Department of the Interior's land-into-trust regulations interpreting the Indian Reorganization Act (IRA).[61] The 1971 Alaska Native Claims Settlement Act meant to settle all land claims of Alaska Natives and extinguished certain land rights for Alaska Natives, including the right to have land held in trust by the United States, thus resulting in the development of the Alaska Exception. However, Congress never repealed the IRA's provision regarding Alaska Natives, and the Akiachak sued to challenge the Alaska Exception by claiming it violated the IRA's anti-

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[54]Williams v. Poarch Band of Creek Indians, 839 F.3d 1312 (11th Cir. 2016); Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602.
[55]*Williams*, 839 F.3d at 1322.
[56]*Id.*
[57]*Id.* at 1324.
[58]Pub. L. No. 108-159, 117 Stat. 1952 (2003).
[59]Meyers v. Oneida Tribe of Indians of Wis., 836 F.3d 818, 820 (7th Cir. 2016).
[60]*Meyers*, 836 F.3d 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.").
[61]Akiachak Native Cmty. v. U.S. Dept. of Interior, 827 F.3d 100 (D.C. Cir. 2016).

discrimination provision. The district court agreed with the Akiachak, severed the Alaska Exception from the land-into-trust regulations, and granted Alaska's motion to enjoin Interior from taking land into trust, pending appeal.

Both the Department of the Interior and the State of Alaska appealed. The Department then promulgated new regulations and finalized new regulations removing the Alaska Exception from the land into trust regulations. The appeals were dismissed.

4. Kelsey v. Pope

In *Oliphant v. Suquamish Indian Tribe*[62] and *Duro v. Reina*,[63] the Supreme Court held tribes hold power to prosecute crimes committed by Indians within their jurisdiction. In this case, Kelsey, who is a member of the Little River Band of Ottawa Indians (the Band) and who was, at the time, a member of the Band's governing council, was prosecuted by the Band for acts taking place outside the Band's territory.[64] Kelsey filed a writ of habeas corpus in federal court, claiming the Band violated Kelsey's due process rights and the Indian Civil Rights Act (ICRA).[65] The district court granted Kelsey's writ of habeas corpus, but the Court of Appeals vacated that decision, holding that the band had inherent authority to prosecute tribal members for offenses substantially affecting tribal self-governance interests, even when such offenses took place outside of Indian country. The Supreme Court denied Kelsey's petition for certiorari.

5. Ramona Two Shields v. United States

Plaintiff filed a putative class action suit against the United States asserting claims for breach of fiduciary duties relating to approval of oil-and-gas leases on allotment lands. The Court of Federal Claims[66] granted the government's motion for summary judgment and dismissed. On appeal the circuit court affirmed, holding the Cobell settlement[67] agreement released plaintiff's claims against the government, the government did not have a fiduciary duty to disclose all information related to the administration of Indian trusts in connection with the settlement, and the Claims Resolution Act[68] passed by Congress which ratified the settlement was not a legislative taking.[69]

6. Navajo Nation v. United States Department of Interior

On April 6, 2016, the United States Court of Appeals for the Ninth Circuit reversed[70] a district court decision that the Native American Graves Protection and Repatriation Act (NAGPRA)[71] was inapplicable to the Navajo Nation's lawsuit seeking the return of 303 sets of human remains and associated funerary objects the National Park Service (NPS) removed from Canyon de Chelly National Monument from 1931 to 1990. The Navajo Nation asserted it was the lawful owner of the remains and funerary objects

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[62]Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
[63]Duro v. Reina, 495 U.S. 676 (1990).
[64]Kelsey v. Pope, 809 F.3d 849 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 183 (2016).
[65]25 U.S.C. §§ 1301-1303.
[66]Two Shields v. United States, 119 Fed. Cl. 762 (2015), *aff'd sub nom.* Ramona Two Shields v. United States, 820 F.3d 1324 (Fed. Cir. 2016).
[67]Cobell v. Salazar, 573 F.3d 808 (D.C. Cir. 2009).
[68]Claims Resolution Act of 2010, Pub. L. No. 111–291, 124 Stat. 3064 (Dec. 8, 2010).
[69]*Ramona Two Shields*, 820 F.3d at 1333.
[70]Navajo Nation v. U.S. Dep't of Interior, 819 F.3d 1084, 1091 (9th Cir. 2016).
[71]Navajo Nation v. U.S. Dep't of Interior, No. CV-11-08205-PCT-PGR, 2013 WL 530302, at *3 (D. Ariz. Feb. 12, 2013), *rev'd and remanded*, 819 F.3d 1084 (9th Cir. 2016).

based on the Nation's recognized ownership of the land from which the remains and objects were removed. The district court had dismissed the claim based on the federal government's sovereign immunity. On appeal, the Ninth Circuit held the waiver of federal sovereign immunity in the Administrative Procedures Act (APA)[72] applied based on actions taken by the NPS in 2011.[73]

C. District Court Opinions

1. United States v. Nealis

The United States District Court for the Northern District of Oklahoma denied a defendant's motion to suppress evidence that resulted from a warrantless search of her purse by staff at a hotel owned by the Eastern Shawnee Tribe.[74] The court rejected the defendant's argument that the hotel's employees, including its housekeeping and security staff, were tribal government officials subject to the Indian Civil Rights Act[75] and ruled certain evidence from the search was admissible pursuant to the "plain view doctrine."[76]

2. Pro-Football, Inc. v. Blackhorse

In this case, the United States District Court for the Eastern District of Virginia upheld the decision of the Trademark Trial and Appeal Board (TTAB) to cancel the "Redskins" trademark registration of Pro-Football, Inc. (PFI), as it violated the "may disparage" provision of the Lanham Act. The district court reviewed the case de novo and was presented with cross-motions from both parties for summary judgment. The PFI claimed the Lanham Act violated: (1) the First Amendment; (2) the notice requirement of the Fifth Amendment; and (3) the Due Process and Taking clause of the Fifth Amendment. The PFI also claimed under the Lanham Act, Blackhorse failed to show, based on preponderance of evidence, that a substantial composition of Native Americans believed "Redskins" may disparage them, and additionally that latches would apply. The district court found for Blackhorse on every claim.[77]

PFI appealed to the Fourth Circuit Court of Appeals,[78] but on November 26, 2016, the court placed the case in abeyance pending the Supreme Court's[79] decision in a similar case, *Lee v. Tam*,[80] in which the United States Court of Appeals for the Federal Circuit held that the disparagement clause of the Lanham Act[81] is facially invalid as an unconstitutional violation of the First Amendment. *Tam* is set for argument on January 18, 2017.

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[72]5 U.S.C. §§ 701-706.
[73]*Navajo Nation*, 819 F.3d at 1086.
[74]United States v. Nealis, 180 F. Supp. 3d 944, 948 (N.D. Okla. 2016).
[75]25 U.S.C. §§ 1301-1304.
[76]*Nealis*, 180 F. Supp. 3d at 950.
[77]Pro-Football, Inc. v. Blackhorse, 112 F. Supp. 3d 439, 447-48 (E.D. Va. 2015).
[78]Pro-Football, Inc. v. Blackhorse, No. 15-1874 (4th Cir. Aug. 6, 2015).
[79]PFI also filed a petition for certiorari to the Supreme Court, which was denied. Pro-Football, Inc. v. Blackhorse, No. 15-1311, *cert. denied*, 137 S. Ct. 44 (2016).
[80]*In re* Tam, 808 F.3d 1321, 1357 (Fed. Cir. 2015).
[81]Lanham Act, 15 U.S.C. § 1052(a) provides that no trademark shall be refused registration on account of its nature unless, inter alia, it "[c]onsists of . . . matter which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute[.]"

D. State Court Opinions

1. People ex rel. Owen v. Miami Nation Enterprises

This decision was the latest in a series concerning payday lending businesses "associated with two Indian tribes, the Miami Tribe of Oklahoma and the Santee Sioux Nation."[82] "In August 2006, the Commissioner of the California Department of Corporations . . . issued a desist and refrain order to various online" payday lenders, including the two tribal defendants, "directing them to cease 'engaging in unlicensed deferred deposit transaction business.'"[83] "The lenders did not heed the desist and refrain order."[84] The California Supreme Court granted review to determine whether the tribal defendants were protected by sovereign immunity.[85]

The Court concluded that "an entity asserting immunity bears the burden of showing by a preponderance of the evidence that it is an 'arm of the tribe' entitled to tribal immunity."[86] To make that determination, the court applied a five-factor test that considered "(1) the entity's method of creation, (2) whether the tribe intended the entity to share in its immunity, (3) the entity's purpose, (4) the tribe's control over the entity, and (5) the financial relationship between the tribe and the entity."[87] The Court said that in applying the test, courts should take "into account both formal and functional considerations—in other words, not only the legal or organizational relationship[s] between the tribe and the entity, but also the practical operation of the entity in relation to the tribe."[88] "Once the entity demonstrates that it is an arm of the tribe, it is immune from suit unless the opposing party can show that tribal immunity has been abrogated or waived."[89]

After applying the test, the Court found that the lending operations – of which the respective tribes received roughly one percent of the profits – were insufficiently tied to the tribes and were, therefore, not entitled to assert the defense of sovereign immunity.[90] The Court expressed its concern about situations in which "a tribal entity may engage in activities which are so far removed from tribal interests that it no longer can legitimately be seen as an extension of the tribe itself…. [i]n such cases, extending immunity to the entity would not 'promote the federal policies of tribal self[-]determination, economic development, and cultural autonomy.'"[91]

III. LEGISLATIVE AND EXECUTIVE DEVELOPMENTS

A. Legislative Developments

On June 3, 2016, the President signed S. 184 as P.L. 114-165, the Native American Children's Safety Act (Act). The Act requires background checks by tribal social service agencies for tribal court-ordered foster care placements. The background checks are to

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[82]People v. Miami Nation Enter., No. S216878, 2016 WL 7407327, at *1 (Cal. Dec. 22, 2016).
[83]*Id.* at *2.
[84]*Id.*
[85]*Id.* at *3.
[86]*Id.* at *5.
[87]*Miami Nation Enter.*, 2016 WL 7407327, at *5.
[88]*Id.*
[89]*Id.*
[90]*Id.* at *15.
[91]*Id.* (internal citations and quotations omitted).

include fingerprint-based checks of national crime information data bases and checks of abuse registries maintained by the relevant tribe and/or state.[92]

B. Regulatory Actions

On September 23, 2016, the Department of the Interior announced a final rule providing an administrative procedure and criteria the Secretary would use to establish a formal government-to-government relationship with the Native Hawaiian community, which must first form a unified government. The rule does not provide a process for reorganizing a Native Hawaiian government, but rather leaves this to the Native Hawaiian community to determine for itself, consistent with the federal policy of self-determination and self-governance for indigenous communities. The rule became effective November 14, 2016.[93]

C. Executive Actions

On December 28, 2016, the Obama Administration extended protection to two areas owned by the Bureau of Land Management, preventing future development. President Obama designated the Bears Ears National Monument in Utah (1.35 million acres) and the Gold Butte National Monument in Nevada (300,000 acres) for protection using his unilateral authority under the American Antiquities Act of 1906.[94] President Obama said in a statement that the designations "protect some of our country's most important cultural treasures, including abundant rock art, archaeological sites, and lands considered sacred by Native American tribes."[95]

[92]Pub. L. No 114-165, 130 Stat. 415 (2016).
[93]43 C.F.R. § 50 (2016).
[94]Nathan Rott, *Obama Designates Two New National Monuments In Nevada and Utah*, NPR (Dec. 28, 2016); 16 U.S.C. §§ 431-433.
[95]Rott, *supra* note 93.

Chapter 18 • NUCLEAR LAW
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I. JUDICIAL DEVELOPMENTS

A. Continued Storage Rule Appeal – New York v. NRC II[2]

On June 3, 2016, the United States Court of Appeals for the D.C. Circuit rejected challenges to the Nuclear Regulatory Commission (NRC) Continued Storage Rule (CSR) and supporting Generic Environmental Impact Statement (GEIS) related to storage of spent nuclear fuel. The case stems from a 2010 challenge by several states and environmental groups to the NRC's 2010 update to its Waste Confidence Decision and Temporary Storage Rule. In 2012, the D.C. Circuit vacated and remanded elements of the 2010 rule to the agency for further consideration under NEPA.[3] To address the remand, the NRC developed a GEIS, evaluating the environmental impacts of continued storage of spent nuclear fuel. The GEIS supported a revised rule—the CSR—which the NRC promulgated in September 2014. Shortly thereafter, four states, a tribe, and nine public interest organizations challenged the CSR and supporting GEIS in the D.C. Circuit.

In its June 3 ruling, which found the NRC's actions were neither arbitrary nor capricious and denied the petitions for review, the court acknowledged "the political discord surrounding our nation's evolving nuclear energy policy,"[4] and suggested petitioners' "concerns should be directed to Congress."[5] The court made clear the CSR "is not a licensing action," and "the GEIS is only an input for future site-specific reactor licensing . . . [thus], the NRC need not have considered the alternative of ceasing licensing in the GEIS."[6] Finally, the court explained the GEIS sufficiently analyzes the impacts of continued storage because the NRC thoroughly and reasonably evaluated: (1) "essentially common risks"[7] to reactor sites; (2) the probability of a failure to site a repository; and (3) the cumulative impacts of the continued storage of used fuel.

B. Fire Protection Exemptions – Brodsky v. U.S. Nuclear Regulatory Commission[8]

On June 2, 2016, the United States Court of Appeals for the Second Circuit affirmed a district court ruling in favor of the NRC on a claim brought by Richard Brodsky, a former New York State Assemblyman. The case stems from a longstanding dispute over exemptions the NRC granted in 2007 for the Indian Point Nuclear Power Plant Unit 3 fire safety program.[9]

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[2]New York v. U.S. Nuclear Regulatory Comm'n II, 824 F.3d 1012 (D.C. Cir. 2016).

[3]New York v. U.S. Nuclear Regulatory Comm'n I, 681 F.3d 471 (D.C. Cir. 2012).

[4]*U.S. Nuclear Regulatory Comm'n II*, 824 F.3d at 1023.

[5]*Id.*

[6]*Id.* at 1017.

[7]*Id.* at 1019.

[8]Brodsky v. U.S. Nuclear Regulatory Comm'n, No. 15-1330-cv, 2016 U.S. App. LEXIS 9991 (2d Cir. 2016).

[9]Mr. Brodsky took his original challenge to the exemptions directly to the Second Circuit, which dismissed for lack of jurisdiction. Brodsky v. U.S. Nuclear Regulatory Comm'n, 578 F.3d 175 (2d Cir. 2009). Mr. Brodsky then went to district court, which granted

In 2013, the Second Circuit resolved most of Mr. Brodsky's claims in favor of the NRC, but found the lower court record was insufficient on whether the NRC should have solicited public comment on the environmental assessments (EAs) it prepared for the exemptions.[10] On remand, the NRC chose to invite public comment on the EAs, rather than explain its prior decision not to do so. The NRC considered the public comments and reissued the exemptions. Mr. Brodsky returned to district court, arguing that the NRC failed to evaluate the impacts of a terrorist attack and that NEPA required it to do so. The district court again granted summary judgment in favor of the NRC.[11] In April 2015, Mr. Brodsky again appealed to the Second Circuit. On June 2, the Second Circuit again affirmed the district court's ruling.

Although the Second Circuit rejected Mr. Brodsky's petition on narrow procedural grounds, it found that his argument also would fail "on the merits because the NRC *did* consider the risks from terrorism in determining that its exemption decision would have no significant environmental impact."[12] The court pointed to, inter alia, the agency's response to a comment submitted by Mr. Brodsky in which the NRC discussed "the enhanced security requirements imposed on plant operators after the September 11, 2001 terror attacks."[13]

C. Severe Accident Mitigation Alternatives – Natural Resources Defense Council v. Nuclear Regulatory Commission[14]

The Natural Resources Defense Council (NRDC) requested a hearing before the NRC on the license renewal application for the Limerick Generating Station, claiming that the applicant failed to adequately consider new and significant information related to Severe Accident Mitigation Alternatives (SAMAs) since the original SAMA evaluation.[15] The NRC regulations at 10 C.F.R. section 51.53(c)(3)(ii)(L) only require consideration of SAMAs for license renewal if no such analysis was conducted during the initial licensing phase. The Commission denied the hearing request, ruling the NRDC must obtain a waiver of that regulation under 10 C.F.R. section 2.335. The Commission denied the NRDC's subsequent waiver request because it failed to present any issues unique to Limerick. The NRDC petitioned the D.C. Circuit for review of these decisions.

On April 26, 2016, the D.C. Circuit denied NRDC's challenges to Commission decisions refusing to grant NRDC's hearing request and waiver petition. The court found that

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summary judgment in favor of the NRC. Brodsky v. U.S. Nuclear Regulatory Comm'n, 783 F. Supp. 2d 448 (S.D.N.Y. 2011).

[10]Brodsky v. U.S. Nuclear Regulatory Comm'n, 704 F.3d 113 (2d Cir. 2013). The court directed the NRC to either "(1) supplement the administrative record to explain why allowing public input into the exemption request was inappropriate or impracticable, or (2) take such other action as it may deem appropriate to resolve this issue." *Id.* at 115. *See also* Brodsky v. U.S. Nuclear Regulatory Comm'n, No. 11–2016–cv, 2013 WL 57864 (2d Cir. Jan. 7, 2013).

[11]Brodsky v. U.S. Nuclear Regulatory Comm'n, No. 09-CV-10594, 2015 WL 1623824 (S.D.N.Y. Feb. 26, 2015).

[12]*Brodsky*, 2016 U.S. App. LEXIS 9991, at *5.

[13]*Id.* at *7.

[14]Nat'l Res. Def. Council v. U.S. Nuclear Regulatory Comm'n, 823 F.3d 641 (D.C. Cir. 2016).

[15]A SAMA is "a cost benefit analysis that addresses whether the expense of implementing a mitigation measure not mandated by the NRC is outweighed by the expected reduction in environmental cost it would provide in a core damage event." *Id.* at 650 (citing Massachusetts v. Nuclear Regulatory Comm'n, 708 F.3d 63, 68 (1st Cir. 2013).

> the Commission reasonably concluded NRDC's request to intervene was a challenge to a general rule—10 C.F.R. section 51.53(c)(3)(ii)(L) (Rule (L))—improperly raised in an individual adjudication; and, contrary to NRDC's view, while NEPA requires agencies to take a hard look before approving a major federal action, it does not mandate adoption of a particular process for doing so.[16]

The court further concluded neither the NEPA nor the Atomic Energy Act (AEA) precludes the Commission from requiring the NRDC go through the waiver process when it seeks a hearing on an issue generically resolved through rulemaking and to conclude otherwise would remove the Commission's "ability to streamline its relicensing process via generic rulemaking."[17]

D. Recovery of Spent Fuel Cask Loading Costs – System Fuels, Inc. v. United States[18]

The government's failure to accept and dispose of spent nuclear fuel from commercial nuclear power plants pursuant to a "Standard Contract" continues to result in significant litigation. In recent related appeals, System Fuels, Inc. and related companies appealed two judgments of the Court of Federal Claims denying certain cask loading costs as arising from the government's partial breach of the Standard Contracts for the Grand Gulf and Arkansas Nuclear One power stations. For Grand Gulf, the Court of Federal Claims denied the entire amount claimed for loading "because it determined that System Fuels 'failed to establish the projected costs of preparing and packaging [spent nuclear fuel] for dry storage in DOE casks.'"[19] For Arkansas Nuclear One, "the Court of Federal Claims found that the government will not accept canistered spent nuclear fuel as stored by System Fuels at Arkansas Nuclear One under the current terms of the Standard Contract."[20]

The Federal Circuit found that the Court of Federal Claims "clearly erred in both decisions when it denied damages for costs incurred to load the storage casks and/or canisters, regardless of the type of fuel loaded."[21] The Federal Circuit made a clear distinction between storage casks, canisters, and transportation casks:

> System Fuels is obligated under the Standard Contracts to load the government-provided *transportation* casks. It is undisputed that under the Standard Contracts, the government will not allow the *storage* casks used by System Fuels to be used as *transportation* casks. Thus, the costs of loading future transportation casks, or the difference between the costs of loading these storage casks and loading transportation casks, are irrelevant to System Fuels' entitlement to the expenses it incurred for loading these *storage* casks. These are expenses incurred entirely for storage due to the government's breach.[22]

Thus, the Federal Circuit reversed the Court of Federal Claims' denial of damages for loading spent fuel into storage casks at both Grand Gulf and Arkansas Nuclear One.

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[16] *Id.* at 642.
[17] *Id.* at 652.
[18] Sys. Fuels, Inc. v. United States, 818 F.3d 1302 (Fed. Cir. 2016).
[19] *Id.* at 1305.
[20] *Id.*
[21] *Id.* at 1306.
[22] *Id.* at 1306-07.

A. New NRC-Licensed Facility Developments

The past year was an active one for new commercial nuclear power plants and other facilities licensed by the NRC. Of primary importance, in October 2016, the Tennessee Valley Authority (TVA) declared the start of commercial operation of Watts Bar Nuclear Plant, Unit 2 (following NRC issuance of an operating license in October 2015).[23] Commercial operation marked the final step in the licensing and start-up process for the first new nuclear generation in the United States in more than twenty years.

The NRC issued combined licenses (COLs) authorizing the construction and operation of six new commercial nuclear power reactors for South Texas Project Units 3 & 4[24] in February 2016; Levy Nuclear Plant Units 1 & 2[25] in October 2016; and William States Lee III Plant Units 1 & 2[26] in December 2016. The NRC also issued an Early Site Permit to PSEG Power, LLC and PSEG, Nuclear LLC in May 2016, resolving certain siting issues for potential future licensing and construction of a new nuclear power plant at a PSEG site in Salem County, New Jersey.[27]

This past year has seen further licensing activities for small modular reactors. This included TVA's submittal of an Early Site Permit application in May 2016 for the Clinch River site near Oak Ridge, Tennessee.[28] Additionally, NuScale Power completed a design certification application in December 2016 for its small modular reactor design.[29] Interest in other advanced reactor projects has continued to grow, and the NRC recently published a vision and strategy document for non-light water reactor mission readiness.[30]

Aside from the commercial nuclear power plant projects discussed above, the NRC also issued a construction permit in February 2016 to SHINE Medical Technologies, Inc. for a first-of-a-kind facility dedicated to medical isotope production in Wisconsin.

B. Backfitting Appeal (Byron and Braidwood Stations)

The NRC's Backfitting Rule requires the agency to ensure that certain new or amended requirements or interpretations (i.e., "backfits") will yield a substantial increase in the overall protection of the public health and safety or security; and, if so, the direct and indirect costs associated with implementation of such backfits are justified.[31] There are three exceptions to the requirements of the Backfitting Rule.[32] One such exception, known as the "Compliance Exception," allows the NRC to forgo the cost-justified, substantial-

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[23] *Watts Bar Nuclear Plant*, TENN. VALLEY AUTH. (last visited Jan. 19, 2017).
[24] *Issued Combined Licenses for South Texas Project, Units 3 and 4*, U.S. NUCLEAR REGULATORY COMM'N (last updated Oct. 11, 2016).
[25] *Issued Combined Licenses for Levy Nuclear Plant, Units 1 and 2*, U.S. NUCLEAR REGULATORY COMM'N (last updated Nov. 2, 2016).
[26] *Issued Combined Licenses for William States Lee III Nuclear Station, Units 1 and 2*, U.S. NUCLEAR REGULATORY COMM'N (last updated Jan. 6, 2017).
[27] *Issued Early Site Permit - PSEG Site*, U.S. NUCLEAR REGULATORY COMM'N (last updated Oct. 11, 2016).
[28] *TVA Submits Early Site Permit Application For Clinch River SMRs*, TENN. VALLEY AUTH. (May 13, 2016).
[29] *NuScale Submits First Ever Small Modular Reactor Design Certification Application (DCA)*, NUSCALE POWER (Jan. 12, 2017).
[30] U.S. NUCLEAR REGULATORY COMM'N, NRC VISION AND STRATEGY: SAFELY ACHIEVING EFFECTIVE AND EFFICIENT NON-LIGHT WATER REACTOR MISSION READINESS (2016).
[31] *See* 10 C.F.R. § 50.109 (2017).
[32] *Id.* § 50.109(a)(4)(i)-(iii).

increase analysis when a backfit is "necessary to bring a facility into compliance with a licenses or the rules or orders of the Commission, or into conformance with written commitments by the licensee."[33] Proper application of the Compliance Exception hinges on distinguishing situations where the NRC seeks to impose new or different interpretations of known and established standards, from situations where backfitting is required to ensure compliance with unchanged standards.[34]

Late in 2015, Exelon initiated an appeal, challenging the NRC's proposed use of the Compliance Exception to impose a new interpretation of the design requirements applicable to the Byron and Braidwood nuclear power plants.[35] The appeal challenged a position taken by the NRC's Office of Nuclear Reactor Regulation (NRR), which asserted that the Updated Final Safety Analysis Reports (UFSARs) for the plants predicted water relief through a valve that was not properly qualified for that purpose. Therefore, NRR concluded that the plants' UFSARs failed to demonstrate compliance with the criterion used to design the plants. NRR acknowledged that this position was different from previous agency positions on the applicable design requirements and, thus, constituted backfitting. Specifically, the issue of passing water through the valves in question had been reviewed and approved by the NRC on multiple occasions – most notably in context of license amendment requests reviewed in 2001 and 2004.

Exelon's initial appeal was denied by the Director of NRR.[36] Following the process provided in the NRC's internal procedures,[37] Exelon filed a second-level appeal with the Executive Director for Operations (EDO).[38] On September 15, the EDO granted Exelon's second-level appeal, overturning the decision by the Director of NRR.[39] The EDO determined that while the new and different staff views on how to address pressurizer safety valve performance following water discharge "are conservative approach[es] that could provide additional safety margin, … [they do] not provide [an appropriate] basis for a [C]ompliance [B]ackfit."[40] The EDO's conclusion was based on the following findings:

- Exelon's 2001 and 2004 license amendments were based on reasonable and well-informed engineering judgment of the NRC staff, not a mistake.
- The relevant "known and established" standard in place in 2001 and 2004 (and at present) is that failures of pressurizer safety valves to reclose need not be assumed to occur following water discharge if the likelihood is sufficiently small, based on well-informed staff engineering judgment.

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[33] *Id.* § 50.109(a)(4)(i).

[34] *See* Revisions of Backfitting Process for Power Reactors, 50 Fed. Reg. 38,097, 38,103 (Sept. 20, 1985).

[35] *See* Letter from Exelon Generation to U.S. Nuclear Regulatory Comm'n (Dec. 8, 2015).

[36] Letter from William M. Dean, Director, Office of Nuclear Reactor Regulation, to J. Bradley Fewell, Sr. Vice President of Regulatory Affairs, Exelon Generation Co. (May 3, 2016) (On file with NRC archives).

[37] U.S. NUCLEAR REGULATORY COMM'N, MANAGEMENT OF FACILITY-SPECIFIC BACKFITTING AND INFORMATION COLLECTION, MANAGEMENT DIRECTIVE 8.4 (Oct. 9, 2013) (maintained in the NRC archives).

[38] Letter from J. Bradley Fewell, Sr. Vice President, Regulatory Affairs, Exelon Generation Co., to Victor M. McCree, Exec. Dir. for Operations, U.S. Nuclear Regulatory Comm'n (June 2, 2016) (On file with NRC archives).

[39] Memorandum from Victor M. McCree, Exec. Dir. for Operations, U.S. Nuclear Regulatory Comm'n to William M. Dean, Dir., Office of Nuclear Reactor Regulation (Sept. 15, 2016) (On file with NRC archives); *see also* Memorandum from Gary M. Holahan et al., to Victor M. McCree Exec. Dir. for Operations, Report of the Backfit Appeal Review Panel Chartered by the Executive Director for Operations to Evaluate the June 2016 Exelon Backfit Appeal (Aug. 24, 2016).

[40] Holahan, *supra* note 39, at 26.

- For the specific technical issues reviewed by the Panel, the current licensing basis for Byron and Braidwood complies with the applicable regulations and provides adequate protection of the public health and safety.

The EDO concluded that, in the absence of an assumed failure of the valves in question, the compliance and design concerns that were the subject of the appeal are no longer at issue.

C. Significant NRC Adjudicatory Developments

On June 2, 2016, in Order CLI-16-09, the Commission affirmed an Atomic Safety and Licensing Board decision that rejected a so-called de facto license amendment hearing request by Friends of the Earth (FOE) dealing with seismic issues at the Diablo Canyon nuclear power plant.[41] FOE claimed that the NRC was conducting a de facto license amendment proceeding by allowing Pacific Gas & Electric Company to address new seismic information in its response to NRC's request for a seismic hazard reevaluation under 10 C.F.R. section 50.54(f). The Commission held that FOE "has not shown that the Board committed error of law or abused its discretion in determining that there has been no *de facto* amendment of the Diablo Canyon operating licenses and therefore that no opportunity to request a hearing has accrued."[42] The Commission explained that FOE's argument had conflated regulatory oversight with a licensing action, and found that "[t]o gain an adjudicatory hearing on a claim of a *de facto* license amendment, [FOE] must show that an alteration in the license has taken place."[43]

In a second case, on October 27, 2016, in Order CLI-16-17, the Commission denied a hearing request by Vermont, Vermont Yankee Nuclear Power Corp., and Green Mountain Power associated with the use of decommissioning trust funds at the Vermont Yankee Nuclear Power Station.[44] The Commission rejected the petitioners' claim that Entergy planned to use the fund for impermissible purposes, and this allegedly impermissible use constituted a de facto license amendment. As the Commission explained, "any unilateral action taken by Entergy—including a disbursement from the trust fund—cannot in and of itself constitute a *de facto* license amendment."[45] The Commission also rejected petitioners' claim that Entergy was not entitled to an exemption allowing decommissioning trust funds to be used for irradiated fuel management. After confirming no hearing right attached to the exemption request, the Commission found the NRC staff reasonably determined Entergy satisfied the requirements for the exemption in 10 C.F.R. section 50.12. The Commission, however, also directed the staff to conduct an EA to examine any environmental impacts associated with the exemption, rather than rely on a categorical exclusion.

III. STATE CLEAN ENERGY INITIATIVES

As nuclear plants in competitive electricity markets struggle to compete with low-cost natural gas generation, states risk dramatic increases in carbon emissions should market forces drive these plants out of business. Two states have taken proactive steps to ensure electricity prices reflect the benefit of carbon-free power generation. Both New York and Illinois recently incorporated zero emissions credits (ZECs) into their renewable

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[41] *In re* Pac. Oil & Gas Elec. Co., Nos. 50-275, 323, 2016 NRC LEXIS 17 (NRC June 2, 2016).
[42] *Id*. at 31.
[43] *Id*. at 19.
[44] In re Entergy Nuclear Vt. Yankee, LLC, No. 50-271, 2016 NRC LEXIS 29 (NRC Oct. 27, 2016).
[45] *Id.* at 12.

energy programs to allow struggling nuclear plants to receive compensation for clean energy benefits not otherwise recognized in a competitive market.

On December 7, 2016, Illinois Governor Bruce Rauner signed S.B. 2814 into law. The new law adds zero emissions standards to the Illinois Public Utility Act.[46] For the next ten years, starting in June of 2017, the standards require utilities to procure ZECs from qualifying nuclear power plants for approximately 16% of the electricity each utility delivers to its retail customers.[47] The ZECs will initially be priced at $16.50 per megawatt-hour—corresponding to the Social Cost of Carbon as determined by the U.S. Interagency Working Group on Social Cost of Carbon's August 2016 Technical Update.[48] To qualify for the ZECs, nuclear power plants must meet the "public interest criteria" to be established by the Illinois Power Agency that include, but are not limited to, "minimizing carbon dioxide emissions that result from electricity consumed in Illinois and minimizing sulfur dioxide, nitrogen [di]oxide, and particulate matter emissions that adversely affect the citizens of this State."[49]

The Illinois law follows a similar New York program put forth in August 2016. New York's Clean Energy Standard provides the State is committed to obtaining 50% of its electricity from renewable sources by 2030. However, starting in 2017, New York will rely on ZECs to "pay for the intrinsic value of carbon-free emissions from nuclear power plants" and ensure that financially-struggling nuclear plants remain in operation as the State makes its transition to 50% renewables by 2050.[50]

As these ZEC programs develop, more states may follow suit. The Chairman of the Arizona Corporation Commission, the state entity responsible for regulating public utilities, recently proposed treating nuclear power similar to other zero-emission sources. The Chairman proposed changing Arizona's 2006 Renewable Energy Standard, which requires utilities to obtain 15% of its power from renewable sources such as solar, wind and geothermal by 2025, to a "Clean Peak Standard" that would include nuclear power.[51]

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[46] *See* S.B. 2814, 99th Gen. Assemb., Reg. Sess. (Ill. 2016) (amending Public Act 99-906).
[47] *Id.* at (d-5)(1).
[48] *Id.* at (d-5)(1)(B).
[49] *Id.* at (d-5)(1)(C).
[50] *Governor Cuomo Announces Establishment of Clean Energy Standard that Mandates 50 Percent Renewables by 2030*, N.Y. ST. (Aug. 1, 2016).
[51] *Utility regulator wants nuclear energy to count as renewable*, ARIZ. CAPITOL TIMES (Dec. 13, 2016).

Chapter 19 • OIL AND GAS
2016 Annual Report[1]

As a preliminary caveat, the ongoing growth of legal challenges and litigation 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 approved H.B. 247,[2] which among other things, phased out and capped certain oil and gas exploration tax credits and increased the interest rates charged on delinquent or assessed production taxes for the first three years that the tax is delinquent. The majority of the phase-outs and caps take effect on January 1, 2017. Gov. Bill Walker signed the bill into law but vetoed the $430 million appropriation for the payment of tax credits from the FY 2017 budget.

B. Judicial Developments

In *Chevron U.S.A. Inc. v. Department of Revenue*,[3] oil producers challenged an Alaska Department of Revenue (DOR) decision "to treat separate oil and gas fields operated by common working interest owners as a single entity when calculating the … oil production tax obligations" because they were "economically interdependent oil or gas production operations" under former Alaska Statute section 43.55.013.[4] The producers asserted that, by "interpreting … [a statutory] phrase 'economically interdependent' in the [d]ecision, DOR effectively promulgated a regulation without following the procedures established in the Alaska Administrative Procedure Act and, as a result, DOR's [d]ecision

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[2]H.R. 247, 29th Leg., 4th Spec. Sess. (Alaska 2016).

[3]Chevron U.S.A., Inc. v. Dep't of Revenue, No. S-15891, 2016 Alas. LEXIS 138 (Dec. 16, 2016).

[4]*Id.* at *1; ALASKA STAT. § 43.55.013 (2016).

was invalid."[5] In upholding the superior court, the Alaska Supreme Court held that the DOR's decision was not a regulation but instead a "common sense" interpretation of the statute, and thus, not a regulation.[6]

In *Alaska Oil & Gas Ass'n v. Pritzker*,[7] the United States Court of Appeals for the Ninth Circuit reversed a district court's ruling that the National Marine Fisheries Service (NMFS) use of long-term climate projections as a basis for protecting bearded seals in Alaska was arbitrary and capricious. In reinstating the NMFS decision, the Ninth Circuit held that the Endangered Species Act (ESA)

> does not require NMFS to base its decision on ironclad evidence when it determines that a species is likely to become endangered in the foreseeable future; it simply requires the agency to consider the best and most reliable scientific and commercial data and to identify the limits of that data when making a listing determination.[8]

Thus, NMFS did not act arbitrarily or capriciously in concluding that the effects of global climate change on sea ice would endanger the [bearded seal population] in the foreseeable future.[9]

In *City of Kenai v. Cook Inlet Natural Gas Storage Alaska, LLC*, Cook Inlet Natural Gas Storage Alaska, LLC (CINGSA) had leases with the holders of the mineral rights, which allowed it to use a mile-deep "porous formation as a reservoir for storing injected natural gas."[10] The City of Kenai, which owns a significant part of the surface estate above the reservoir, claimed an ownership interest in the storage rights and brought suit against CINGSA, seeking compensation. The superior court granted summary judgment in favor of CINGSA. In upholding the superior court, that Alaska Supreme Court held that under a plain reading of the state reservation statute, Alaska Statute section 38.05.125, the pore space and attendant storage rights were reserved to the State of Alaska, and therefore, the holders of the leasehold interest in the mineral estate own the storage rights.[11]

In *City of Valdez v. Alaska*, three municipalities challenged an Alaska Revenue regulation that all appeals of oil and gas property tax valuation must be heard by the State Assessment Review Board (SARB), while appeals of oil and gas property taxability must be heard by the Revenue. The municipalities argued that Alaska Statutes section 43.56.120 and section 43.56.130 "grant[] SARB exclusive jurisdiction over all appeals from [Revenue's] assessments of oil and gas property."[12] The superior court upheld the regulation as valid. In reversing the superior court, the Alaska Supreme Court held that that the regulation is inconsistent with the plain text, legislative history, and purpose of the statute, and thus, the regulation was invalid and "falls outside of Revenue's statutory authority."[13]

In *Alaska Oil & Gas Ass'n v. Nat'l Marine Fisheries Serv.*, the Alaska Oil and Gas Association (AOGA) challenged the NMFS and National Oceanic and Atmospheric Administration decision listing the Arctic subspecies of ringed seal as threatened under the ESA. AOGA argued that it was unreasonable for NMFS to list the Arctic ringed seals as a

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[5] *Chevron U.S.A., Inc.*, 2016 Alas. LEXIS 138, at *2.
[6] *Id.* at *39.
[7] 840 F.3d 671 (9th Cir. 2016).
[8] *Id.* at 681.
[9] *Id.*
[10] City of Kenai v. Cook Inlet Nat. Gas Storage Alaska, LLC, 373 P.3d 473, 475 (Alaska 2016).
[11] *Id.* at 480.
[12] City of Valdez v. Alaska, 372 P.3d 240 (Alaska 2016).
[13] *Id.* at 256.

"'threatened species,' while the population is strong and healthy," based on projected decreases in sea ice and snow cover in the arctic eighty to 100 years in the future.[14] In vacating the listing, the court held that the listing was arbitrary and capricious because of "the lack of any articulated discernable, quantified threat of extinction within the reasonably foreseeable future", the express finding by NMFS that the listing was not necessary for the conservation of the seal at this time, and that it was unlikely that it would provide appreciable conservation benefits.[15]

In *Alaska Oil & Gas Ass'n v. Jewell*, the Ninth Circuit reversed a district court order vacating a United States Fish & Wildlife Service (FWS) designation of critical habitat in Alaska for the endangered polar bear. In reversing the district court, the Ninth Circuit held that FWS's designation of polar bear habitat was not arbitrary, capricious or otherwise in contravention of applicable law—even in areas where polar bears were not actually present—because "FWS drew rational conclusions from the best available scientific data…."[16]

C. Administrative Developments

Citing authority under section 12(a) of the Outer Continental Shelf Lands Act, 43 U.S.C. 1341(a) (OCSLA), President Obama issued a Presidential Memorandum withdrawing 125 million acres of the Arctic Ocean and its estimated twenty-seven billion barrels of oil from disposition by leasing, effective for an indefinite period.[17] The withdrawal does not affect rights under existing leases in the withdrawn area and excludes a nearshore area of the Beaufort Sea, which is adjacent to existing state oil and gas activity and infrastructure.

Also citing authority under section 12(a) of the OCSLA, President Obama signed an Executive Order[18] creating the Northern Bering Sea Climate Resilience Area and withdrawing 112,300 square miles in Norton Sound and near St. Lawrence Island from future oil and gas leasing. The withdrawal does not affect rights under existing leases in the withdrawn area and is effective for a period without specific expiration.

II. ARKANSAS

A. Judicial Developments

In *Union Pacific Railroad Co. v. Seeco, Inc.*[19] the court dealt with issues of adverse possession, as well as the standard of proof required to establish a missing deed. The tract in question was originally patented to the railroad predecessor of Union Pacific. It later came into possession of the Tyus family Tyus family members have lived there since at least 1941. However, no deed out of the original patentee could be found. Recent natural gas production triggered this dispute over the tract's mineral ownership. Union Pacific claimed mineral ownership via a reservation in a lost deed. Indeed, it produced a document purporting to be an unexecuted file copy of such a deed, containing a reservation of all minerals, but offered no proof that the original of that document was ever executed. The

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[14]Alaska Oil & Gas Ass'n v. Nat'l Marine Fisheries Serv., No. 4:14-cv-00029-RRB, 2016 U.S. Dist. LEXIS 34848, at *5 (D. Alaska Mar. 17, 2016).
[15]*Id.* at *47.
[16]815 F.3d 544, 556, 562 (9th Cir. 2016).
[17]43 U.S.C. § 1341 (2016); Presidential Memorandum, Withdrawal of Certain Portions of the United States Arctic Outer Continental Shelf from Mineral Leasing, 2016 WEEKLY COMP. PRES. DOC. 860 (Dec. 20, 2016).
[18]Exec. Order No. 13,754, 81 Fed. Reg. 90,669 (Dec. 9, 2016).
[19]504 S.W.3d 614 (Ark. Ct. App. 2016).

trial court, affirmed by the Arkansas Court of Appeals, held that the file copy, standing alone, did not satisfy Arkansas' requirement of clear satisfactory and convincing proof. Thus, the minerals beneath the tract were never effectively severed from the surface, and the Tyus family's adverse possession of the surface caused it to also become owner of the minerals.

Ark. Code Ann. section 15-72-305[20] requires each working interest owner who sells gas produced from a dry-gas well to remit one-eighth of the *net proceeds* thereof to the well's operator. The operator then distributes the blended one-eighth share to all unit royalty owners, proportionate to their respective net acreage within the unit. Any royalty in excess of one-eighth remains the responsibility the working interest owner burdened by the excess royalty. In *Whisenhunt Investments, LLC v. ExxonMobil Corp.*,[21] the court, applying Arkansas Law, considered whether the plaintiff, whose lease provided for royalty based upon gross sale proceeds, was entitled to be paid the difference between net and gross proceeds by its lessee. The district court held that the statutory language displaced the plaintiff's inconsistent lease provision, since the force majeure clause of the lease expressly made it subject to state law. Therefore, its payment of one-eighth of net proceeds to the unit operator fully discharged the lessee from any further responsibility for the one-eighth portion of the royalty. This ruling is currently on appeal.

Roberts and McShane v. Unimin Corp.[22] involved a mining lease but has implications to oil and gas law as well. The lease in question had both primary and secondary terms. The secondary term was for as long thereafter as mining and/or mining operations are prosecuted. Relying upon a single Alabama decision,[23] the plaintiffs contended that this language created an indefinite term which was thus terminable at will.

The United States district court determined that the issue had never been directly decided by the Arkansas Supreme Court and thus attempted to certify the question to that court. Then, Arkansas court declined to accept the certification request. The federal court predicted that Arkansas would follow the majority rule that the words "so long thereafter" validly created a terminable fee mineral interest in the lessee.[24]

B. Administrative Developments

As is its practice, the Arkansas oil and Gas Commission made certain revisions to several of its regulations during 2016. Since these regulations are constantly in revision, those interested are advised to regularly check these regulations.[25]

III. CALIFORNIA

A. Legislative Developments

In response to high profile events, such as the October 2015 leak from a gas injection and withdrawal well in the Aliso Canyon storage facility operated by Southern California Gas Company in Los Angeles County, the California Legislature continued to focus in 2016 on expanding the State's regulation of oil and gas exploration, production, storage and transportation operations. Following the Governor's Proclamation of a State

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[20] ARK. CODE ANN. § 15-72-305 (West 2016).
[21] No. 4:13-cv-00656 (8th Cir. Sept. 9, 2016).
[22] Roberts v. Unimin Corp., No. 1:15-CV-00071-JLH, 2016 WL 5920892 (E.D. Ark. Oct. 7, 2016).
[23] Linton Coal Co., Inc v. S. Cent Res. Inc., 590 So.2d 911 (Ala. 1991).
[24] *Roberts*, 2016 WL 5920892 at *4.
[25] *Main Page*, STATE OF ARK. OIL & GAS COMM'N (last visited Mar. 12, 2017).

of Emergency on January 6, 2016,[26] the Legislature passed a trio of bills to address the Aliso Canyon gas leak. Senate Bill 380,[27] enacted as emergency legislation in May 2016, required the State Oil and Gas Supervisor to immediately institute a moratorium on injection of natural gas into any wells in the storage facility until specified conditions were met and a comprehensive safety review of all of the wells was completed. The bill also required the California Public Utilities Commission to open a proceeding to determine the feasibility of minimizing or eliminating use of the Aliso Canyon storage facility while still maintaining energy and electric reliability for the region.

Senate Bill 887[28] requires the Division of Oil, Gas and Geothermal Resources within the California Department of Conservation (DOGGR) to inspect all storage wells serving, or located in, a natural gas storage facility commencing January 1, 2018, and annually thereafter. The bill requires DOGGR to "perform unannounced random onsite inspections of some gas storage wells annually."[29] The bill extended DOGGR's emergency regulations for underground gas storage projects until January 1, 2019 and directed DOGGR to adopt final regulations establishing standards for the design, construction, and maintenance of all gas storage wells. The bill also added Public Resources Code section 3180, requiring operators of all gas storage wells to commence a mechanical integrity testing regime before January 1, 2018.[30]

Senate Bill 888[31] designated the California Office of Emergency Services (Cal OES) as the lead agency for emergency response to a leak of natural gas from a natural gas storage facility and requires the Cal OES to coordinate among other state and local agencies emergency response, public health and environmental assessment, monitoring, and long-term management and control of the leak.[32] The bill also created the Gas Storage Facility Leak Mitigation Account into which any penalties assessed as a result of a gas storage facility leak will be deposited. The bill requires that those funds be expended to achieve a reduction in greenhouse gases that will fully offset the impact on the climate from those gases emitted by a leak.[33]

DOGGR sponsored Assembly Bill 2756[34] which substantially revised the civil penalty structure for violations and procedures for appeals of DOGGR orders. Public Resources Code section 3236.5 now sets forth factors to be considered in imposing a penalty, including, any economic benefit to the violator, and establishes both "major" and "minor" violations.[35] Since the Division had no established general formal policy for the handling of proprietary information, the bill also requires the Division to keep certain confidential material from public release.

B. Judicial Developments

In an unreported decision in *Los Padres ForestWatch v. United States Bureau of Land Management*, the district court held that the BLM failed to fully consider the potential environmental impact of hydraulic fracturing in its resource management plan for the

[26]Press Release, Office Governor of Cal., Edmond G. Brown, Aliso Canyon Gas Leak (Jan. 6, 2016).
[27]S.B. 380, 2015-2016 Reg. Sess. (West 2016) (adding and repealing CAL. PUB. RES. CODE § 3180, and adding and repealing CAL. PUB. UTIL. CODE §§ 714 and 715).
[28]S.B. 887, 2015-2016 Reg. Sess. (West 2016).
[29]CAL. PUB. RES. CODE § 3185 (West 2016).
[30]CAL. PUB. RES. CODE § 3180(b) (West 2016).
[31]S.B. 888, 2015-2016 Reg. Sess. (West 2016).
[32]CAL. GOV'T CODE § 8585.1 (West 2016).
[33]CAL. PUB. UTIL. CODE § 972(a) (West 2016).
[34]A.B. 2756, 2015-2016 Reg. Sess. (West 2016).
[35]CAL. PUB. RES. CODE § 3236.5 (West 2016).

planning area of seventeen million acres of onshore federal lands in the counties of "Kings, San Luis Obispo, Santa Barbara, Tulare, Ventura, Madera, eastern Fresno, and western Kern." [36]

C. Administrative Developments

DOGGR responded to the Aliso Canyon leak by the adoption of emergency regulations in February 2017.[37] The Governor's January 6, 2016 emergency proclamation directed DOGGR to promulgate emergency regulations imposing safety and reliability standards for all underground gas storage facilities in California. Those regulations require (i) at least a daily inspection of gas storage well heads, using gas leak detection technology such as infrared imaging; (ii) ongoing verification of the mechanical integrity of all gas storage wells; (iii) measurement of annular gas pressure or annular gas flow within wells; (iv) regular testing of all safety valves used in wells; (v) establishing comprehensive risk management plan; and (vi) establishing minimum and maximum pressure limits for each gas storage facility in the state. DOGGR has circulated draft permanent regulations[38] which will replace the emergency regulations and is conducting public workshops on those regulations.[39]

On November 15, 2016, DOGGR, in consultation with the State Water Resources Control Board, gave public notice that it intended to advise the United States Environmental Protection Agency (EPA) that ten aquifers used for the injection and disposal of fluids associated with oil and gas production, and historically treated as exempt, did not meet the federal regulatory criteria for exemption from the federal Safe Drinking Water Act and that it intended to request an amendment to its Memoranda of Agreement with the EPA for the purpose of clarifying that these aquifers are not exempt.[40]

The Office of Spill Prevention and Response adopted emergency regulations for inland facilities, including oil pipelines, which were approved by the Office of Administrative Law on September 3, 2015.[41] These temporary regulations were readopted on September 1, 2016 for another twelve months.[42] OSPR intends to finalize the emergency regulations through the formal rulemaking process.

The United States Department of the Interior's Bureau of Ocean Energy Management and Bureau of Safety and Environmental Enforcement prepared a final programmatic environmental assessment (PEA) [43] to evaluate the potential environmental impacts of the proposed approval of the use of selected well stimulation treatments on the forty-three current leases and twenty-three platforms currently in operation on the Southern

[36]No. CV-15-4378-MWF (JEMx), 2016 WL 5172009, at *2 (C.D. Cal. Sept. 6, 2016).
[37]CAL. CODE REGS. tit. 14, § 1724.9 (2016).
[38]CAL. CODE REGS. tit. 14, § 1726 (2016)
[39]Press Release, Dept. of Conservation, State Seeks Public Comment on Early Draft of Permanent Natural Gas Storage Regulations (July 8, 2016).
[40]Memorandum from Division of Oil, Gas & Geothermal Resources on Aquifer Exemption Information to Env. Prot. Agency (Feb. 17, 2016).
[41]CAL. CODE REGS. tit. 14, §§ 790, 817.04 (2016).
[42]STATE OF CAL., OFFICE OF ADMIN. LAW, NOTICE OF FILING AND PRINTING ONLY OF EMERGENCY REGULATIONS (Sept. 1, 2016).
[43]Press Release, Bureau of Ocean Energy Mgmt., BSEE and BOEM Publish Joint Environmental Assessment on Use of Well Stimulation Treatments in Federal Waters off California (May 27, 2016).

California OCS Planning Area.[44] The PEA[45] concluded that offshore hydraulic fracturing and acidizing from the California offshore oil platforms would have no environmental impact. The assessment also concluded that wastewater discharges from proposed well stimulation activities would not have a significant impact on the environment and that the possibility of accidental releases of well stimulation fluids was small. The California Attorney General, the California Coastal Commission, and two environmental groups have filed suit challenging the BOEM and BSEE action.[46]

IV. COLORADO

A. Legislative Developments

Although several pieces of legislation dealing with local control of the oil and gas industry were introduced, the Colorado legislature did not pass any legislation directly relating to the oil and gas industry during the 2016 legislative session.

B. Judicial Developments

As reported in the 2015 report, the Colorado Supreme Court accepted certiorari in cases stemming back to 2012 and 2013 local controls of hydraulic fracturing on the question: "Whether home-rule cities are preempted from promulgating local land-use regulations that prohibit the use of hydraulic fracturing in oil and gas operations and the storage of such waste products within city limits when the Colorado Oil and Gas Conservation Commission regulates hydraulic fracturing within the state."[47] In May the Colorado Supreme Court affirmed the court of appeals in both cases, concluding that, because fracking is a matter of mixed state and local concern, local control is subject to preemption by state law.[48] Because the five-year moratorium in Fort Collins and the Longmont ban of both fracking and the storage and disposal of fracking waste operationally conflict with state law, the Court affirmed the district court's order in each case and held that the local control in each case is "invalid and unenforceable."[49]

In *Grant Bros. Ranch, LLC v. Antero Res. Piceance Corp.*,[50] the court affirmed dismissal of a claim for proceeds from production and sale of oil and gas for failure to exhaust administrative remedies provided under the Oil and Gas Conservation Act. Antero "received approval from the Colorado Oil and Gas Conservation Commission (COGCC) to establish … [two] drilling and spacing units to produce oil and gas in Garfield County",

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[44]Notice of Availability of Draft Programmatic Environmental Assessment To Evaluate Potential Environmental Effects of Well Stimulation Treatments on the Pacific Outer Continental Shelf, 81 Fed. Reg. 8743 (Feb. 22, 2016).

[45]ARGONNE NAT'L LAB. ET AL., PROGRAMMATIC ENVIRONMENTAL ASSESSMENT OF THE USE OF WELL STIMULATION TREATMENTS ON THE SOUTHERN CALIFORNIA OUTER CONTINENTAL SHELF (May 2016).

[46]Press Release, State of Cal., Dep't of Justice, Attorney General Kamala D. Harris, California Coastal Commission Challenge Fracking Off California Coast (Dec. 19, 2016).

[47]City of Fort Collins v. Colo. Oil & Gas Ass'n, No. 15SC668, 2015 WL 5554358, at *1 (Colo. Sept. 21, 2015); Food & Water Watch v. Top Operating Co., No. 15SC667, 2015 WL 5554333, at *1 (Colo. Sept. 21, 2015).

[48]City of Fort Collins v. Colo. Oil, 2016 CO 28, ¶ 2, 369 P.3d 586, 589 (Colo. 2016); City of Longmont v. Colo. Oil & Gas Ass'n, 2016 CO 29, ¶ 3, 369 P.3d 573, 577 (Colo. 2015).

[49]*City of Fort Collins*, 2016 CO 28, ¶ 2, 369 P.3d at 589; *City of Longmont*, 2016 CO 29, ¶ 3, 369 P.3d at 577.

[50]Grant Bros. Ranch, LLC v Antero Res. Piceance Corp., 2016 COA 178, 2016 WL 7009138 (Colo. Dec. 1, 2016).

including the forced pooling of all nonconsenting interests in the units over the objection of Plaintiffs Grant Brothers.[51] Three years after the last pooling order was issued, and after its request to audit the books of Antero was refused, Grant Brothers sued Antero in district court, seeking an equitable accounting and alleging that the wells had reached payout so the nonconsenting owners were entitled to a share of the proceeds. The court concluded that, because Grant Brothers's interests were forcibly pooled and no dispute of interpretation of a contract was involved, the legislature intended that a proceeding before the COGCC would be the primary remedy for the claims at issue. The court explained that this allows the COGCC to exercise its expertise and would develop an administrative record in the event that judicial review is then sought.

BP American Production Co. v. Colorado Department of Revenue,[52] involved deductions from revenue in valuing oil and gas resources for purposes of calculating state severance tax. Colorado's severance tax statute permits taxpayers to deduct "any transportation, manufacturing, and processing costs" from revenue C.R.S. section 39-29-102(3)(a). BP sought to deduct the amount of money they could have earned had they invested in other ventures as the cost of the capital invested to generate the revenue being taxed. The Department of Revenue did not allow the deduction because "cost of capital is not an actual cost" but a "benefit forgone."[53] Reversing the court of appeals, the Colorado Supreme Court held that the cost of capital is a deductible cost under the broad language of the statute and remanded with instructions to return the case to the district court.

In *Lindauer v. Williams Production RMT Co.*,[54] the court considered whether costs incurred to transport natural gas to markets beyond the first commercial market must enhance the value of that gas and increase actual royalty revenue to be deductible from royalty payments. The court analyzed its precedent involving the implied covenant to market, and specifically what it referred to as the "enhancement test," allowing deduction of costs that enhance the value of gas that is already a marketable product. The court concluded that the enhancement test did not apply to transportation costs so that transportation costs beyond the first commercial market need not enhance the value of the gas to be deductible from royalty payments.

Youngquist Bros. Oil & Gas, Inc. v. Industrial Claim Appeals Office of the State of Colorado,[55] involved a company with no business operations in Colorado that hired employees from Colorado to work on oil rigs in North Dakota. A worker from Grand Junction was hired after submitting an on-line application and participating in a telephonic interview. Within six months of flying to North Dakota, the worker was injured, and subsequently applied for and was awarded workers' compensation benefits in Colorado. The court of appeals affirmed, finding that Colorado had jurisdiction because the worker was hired in Colorado. The Supreme Court granted certiorari on the reframed question:

> Whether the court of appeals erred in concluding that Colorado has jurisdiction to award benefits for out-of-state work-related injuries and impose a statutory penalty on the employer under the Worker's Compensation Act, section 8–41–204, C.R.S. (2015), when the employer is not a citizen of Colorado, has no offices or operations in Colorado, but hired a Colorado citizen within the state.[56]

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[51] *Grant Bros. Ranch, LLC*, 2016 COA 178, ¶ 2, 2016 WL 7009138, at *1.
[52] 2016 CO 23, 369 P.3d 281 (Colo. 2016).
[53] *BP Am. Prod. Co.*, 2016 CO 23, ¶ 24, 369 P.3d at 287.
[54] 381 P.3d 378, 379 (Colo. App. 2016), *cert. denied*, 2016 WL 4627403 (Colo. Sept. 6, 2016).
[55] No. 15CA1165, 2016 WL 736279 (Colo. App. Feb. 25, 2016).
[56] No. 16SC283, 2016 WL 4099264 (Colo. Aug. 1, 2016).

C. *Administrative Developments*

Although the Colorado Oil and Gas Conservation Commission published guidance on a number of rules, including guidance on Floodplain Rule 603 reported on in last year's report, there were no significant rules adopted during 2016.[57]

V. KANSAS

A. *Legislative Developments*

Kansas Statutes Annotated section 79-331, regarding valuation of producing oil and gas leases for ad valorem taxation, was amended to establish specific time frames production information can be used to value a newly completed well.[58]

B. *Judicial Developments*

The most significant 2016 development in Kansas oil and gas law is a limestone mining case, *Armstrong v. Bromley Quarry & Asphalt, Inc.*,[59] addressing subsurface trespass issues equally applicable to oil and gas. The Kansas Supreme Court held that Quarry failed to carry its burden of proving that its subsurface mining of limestone from under Armstrong's land was done by accident in both subjective and objective good faith. Therefore, Quarry was liable for the value of the extracted limestone without reduction for Quarry's extraction costs. This would increase Armstrong's damages ten-fold. The Court also held there was a material issue of fact when Quarry's illegal mining would have been "reasonably ascertainable" so as to trigger the discovery provisions of the Kansas statute of limitations for trespass and conversion. The Court suggested that because Quarry, from 1992 through 2010, had filed false maps with the state indicating it had not mined under Armstrong's land, the trespass did not become reasonably ascertainable until 2011 when an accurate map was filed showing the encroachment into Armstrong's land. Armstrong filed suit in 2011.

The importance of language in a divorce decree regarding title is highlighted by the Kansas Supreme Court's holding in *Einsel v. Einsel*.[60] In a 1993 journal entry of divorce the husband was given the option to pay a specified sum to the wife to exclude her from any rights in a remainder interest the husband had obtained during the marriage. If he failed to exercise the option, then the wife was given "Forty percent … of the remainder interest of the inheritance received by [husband] during the marriage . . . ."[61] The husband did not exercise the option and the remainder interest was ignored until 2008 when the life tenant died and the owners of the remainder interest obtained their fee possessory interests. Oil and gas development in the area had increased land values. In a 2010 partition action by the wife the district court ordered the husband to make a cash payment to the wife reflecting the husband's 40% interest. The Supreme Court reversed the district court holding the journal entry clearly established the wife's entitlement to 40% of the husband's remainder interest.

In *Nickelson v. Bell*,[62] the court of appeals held a person can file a statement of claim to preserve an unused mineral interest even though his or her ownership claim arises

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[57] *CWCB Floodplain Rules and Regulations*, COLO. DEP'T OF NAT. RES. (last visited Feb. 18, 2017).
[58] KAN. STAT. ANN. § 79-331(b) (2016).
[59] 378 P.3d 1090 (Kan. 2016).
[60] 374 P.3d 612 (Kan. 2016).
[61] *Id.* at 615-16.
[62] 382 P.3d 471 (Kan. Ct. App. 2016).

from the alleged but unestablished status as an heir. The court concluded that to be an "owner" under the Kansas Mineral Lapse Act the interest need not be shown of record in the owner's name. "[A]n owner of an unused mineral interest, as the term is used in K.S.A. 55-1604, is simply one who has acquired the right to possess, use, and control the subject mineral interests."[63]

A significant but unreported case is the court of appeals opinion in *Jenkins v. Chicago Pacific Corp*.[64] The court does an expert job of sorting through the Kansas cases that limit railroad ownership of strips of land acquired for right-of-way purposes to easements as opposed to fee interests. The court properly applies the Kansas Supreme Court's analysis in *Abercrombie v. Simmons.*[65] This is important because the Federal Circuit Court of Appeals, in *Biery v. United States*,[66] failed to apply the teaching of *Abercrombie* and in the process took, without compensation, the fee ownership in lands owned by Kansas farmers.

C. Administrative Developments

Kansas has experienced a significant increase in seismic activity that has been associated with the disposal of produced saltwater in conjunction with oil and gas development. Rex Buchanan, interim director of the Kansas Geological Survey, in his 20 January 2016 testimony before the Kansas House Standing Committee on Energy and Environment, addressed the potential source of increased earthquake activity in Kansas stating: "[T]he issue appears to be one of disposal of large volumes of saltwater that has activated critically stressed faults in the deep subsurface."[67] The Kansas Corporation Commission responded to the situation by issuing a series of orders reducing injection rates for saltwater disposal wells in the areas where increased seismic activity has been recorded.[68]

The Kansas Corporation Commission, responding to complaints by landowners raised during a proceeding to interpret Commission spacing rules as to a particular operator, created a new 165-foot surface-use setback limitation from "any currently-existing residence or building" and that applied to "any well or installing any associated facilities (including but not limited to lease roads, tank batteries, or lead lines) . . . ."[69] The practical effect of these limitations was to, in some cases, prevent further development of the leased lands. The operator sought judicial review and the Commission's order was reversed and remanded because there was no evidence in the administrative record to support the order.[70]

On November 30, 2016 the Kansas Corporation Commission convened a proceeding to discuss draft regulations being considered by Commission staff interpreting

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[63]*Id.* at 475-76.
[64]Jenkins v Chi. Pac. Corp., 366 P.3d 664 (Kan. 2016) (unpublished decision).
[65]71 Kan. 538 (Kan. 1903).
[66]753 F.3d 1279 (Fed. Cir. 2014).
[67]Rex Buchanan, Testimony, House Standing Committee on Energy and Environment (Jan. 20, 2016).
[68]Order Reducing Saltwater Injection Rates, In the Matter of an Order Reducing Saltwater Injection Rates into the Arbuckle Formation, Applicable to Wells in Defined Areas of Increased Seismic Activity in Harper and Sumner Counties, Docket No. 15-CONS-770-CMSC (Kan. Corp. Comm'n Aug. 9, 2016).
[69]*In re* R.T. Enterprises of Kansas, Inc. for Multiple Well Location Exceptions, No. 14-CONS-550-CWLE (Kan. Corp. Comm'n Oct. 28, 2014).
[70]Memorandum Decision and Order, R.T. Enterprises of Kansas, Inc. v. State Corp. Comm'n, No. 2015-CV-48 (Kan. Dist. Ct. – Shawnee Cnty. Apr. 15, 2016).

K.S.A. section 55-179 governing liability for unplugged abandoned wells.[71] It has been disputed for over twenty years whether the Commission has the authority to hold anyone who takes a new lease on lands liable for unplugged abandoned wells that may be found on the leased lands. The perennial issue has been whether the Commission must establish some level of culpability before holding a lessee, having no association with the well, or to those who drilled or abandoned the well, liable for their plugging.

VI. LOUISIANA

A. Legislative Developments

Louisiana's risk-fee statute governs the relationship between a compulsory unit operator and various types of owners within the geographical boundaries of that unit.[72] Among other things, this statute allows an operator to notify, and under certain circumstances, impose a risk-fee on unit owners. Effective June 13, 2016, the Louisiana Risk-Fee Statute was amended by Act No. 524 to address a number of previously undefined issues.[73] The amendment removed language that required an operator of the unit well to send the risk-fee notice to all unit owners "prior to the actual spudding" of the well.[74] Correspondingly, with the removal of this language, La. R.S. 30:10 now provides that payment of the authorization for expenditure sent with the risk-fee notice is timely if received by the operator within sixty (60) days of the actual spudding of the well or receipt by the notified owner of the notice, whichever is later.[75] Likewise, the amendment has eliminated the sixty (60) day temporal limitation when sending risk-fee notices after a unit is created around a well drilled or drilling or when a unit order is revised.[76] Finally, the amendment to La. R.S. 30:10[77] expressly addresses the consequences of failing to send a risk-fee notice to all owners in a unit.

B. Judicial Developments

Louisiana is one of a number of states that has dealt with local government's resistance to oil and gas operations in the community. In *St. Tammany Parish Government v. Welsh*, the court was faced with a local zoning ordinance enacted by St. Tammany Parish Government. That local ordinance conflicted with the State's issuance of a permit to drill a unit well in a drilling and production unit via its primary administrative head, the Commissioner of Conservation.[78] In analyzing this conflict, the court looked to the express language of La. R.S. 30:28(F), which is the statute in which the legislature bestowed the power to issue drilling permits upon the Commissioner of Conservation. In so doing, the court found that the local ordinance was expressly preempted to the extent it affected the State's regulation of oil and gas operations. Furthermore, the court opined that the local ordinance was impliedly preempted due to (1) the pervasiveness of the state's statutory scheme affecting oil and gas operations, (2) the need for uniformity throughout the state on matters of such nature, and (3) the danger of conflict between local laws and the

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[71] *In re* General Investigation into Potential Commission Rulemaking Regarding Responsibility for Abandoned Wells, No. 17-CONS-3362-CINV (Kan. Corp. Comm'n Nov. 30, 2016).
[72] LA. STAT. ANN. § 30:10 (2016).
[73] *Id.*
[74] *Id.* § 30:10(A)(2)(a)(i).
[75] *Id.* § 30:10(A)(2)(b)(i).
[76] *Id.* § 30:10(A)(2)(c)-(d).
[77] LA. STAT. ANN. § 30:10 (A)(2)(a)(ii).
[78] 199 So. 3d 3 (La. Ct. App. 2016), *writ denied*, 194 So. 3d 1108 (La. 2016).

administration of the state's program.

Pursuant to Louisiana Civil Code article 2679, the term of a lease may not exceed ninety-nine years.[79] In *Regions Bank v. Questar Exploration & Production Corp.*, the court examined whether this rule of Louisiana lease law applied to mineral leases that were maintained by production in paying quantities beyond a period of ninety-nine years.[80] As an initial matter, the court noted that Mineral Code article 2 provides that when a conflict exists between other laws and the Mineral Code, the specific provisions of the Mineral Code will prevail. The court then looked to the Mineral Code's provision that controls the duration of a mineral lease. Mineral Code article 115(A) states that a lease cannot be maintained for a period in excess of ten years in the absence of drilling or mining operations or production. After juxtaposing the Mineral Code and Louisiana Civil Code articles, the court found a conflict did, in fact, exist between the articles. Accordingly, the ninety-nine year limitation on leases in the Louisiana Civil Code did not apply to a mineral lease that complied with Mineral Code article 115(A).

In *Guy v. Empress, L.L.C.*, the court was faced with the issue of whether a lease was divided as a result of an assignment of a geologic cross section of the lease.[81] The lease at issue provided that:

> [i]f Lessor or assignee of part or parts hereof shall fail to comply with any other provisions of the lease, such default shall not affect this lease insofar as it covers a part of said lands upon which Lessee or any assignee shall comply with the provisions of the lease.[82]

The original lessee in *Guy* executed an assignment that conveyed "all right title and interest" in the lease, excepting a shallow geologic formation underlying the lease surface acreage. Reaffirming its prior stance on this issue, the court cited *Hoover Tree Farm L.L.C. v. Goodrich Petroleum Co.*,[83] where the transaction was classified as "'an assignment of an undivided interest in … [an] incorporeal immovable….'", and found that the instant assignment of deep rights did not divide the lease.[84]

In *TDX Energy, LLC v. Chesapeake Operating, Inc.*, a number of disputes arose between an operator and non-operating working-interest owner included in a drilling and production unit established by the Commissioner of Conservation.[85] On one hand, the non-operating working-interest owner claimed that the operator was required to send reports to the non-operating working-interest owner pursuant to La. R.S. 103.1. On the other hand, the operator claimed that pursuant to La. R.S. 30:10, it had a right to recover a risk fee out of the non-operating working-interest owners' share of production from the unit well even though the risk-fee notice was sent after the unit well was completed. The court resolved both disputes in an exercise of statutory interpretation. As to the non-operating working-interest owner's claim, the court looked at the language of La. R.S. 103.2, which provides a remedy to those owners of unleased oil and gas interests. On its face, the statute was deemed to clearly and unambiguously refer only to those mineral interests that were unleased, not mineral interests that were unleased *by the operator*. Had the legislature intended the phrase to encompass such a broad meaning, it could have stated as much in the statute.

Next, the court in *TDX Energy* rendered an opinion on the operator's claim that it

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[79] LA. CIV. CODE ANN. art. 2679 (2016).
[80] 184 So. 3d 260 (La. Ct. App. 2016).
[81] 193 So. 3d 177 (La. Ct. App. 2016).
[82] *Id.* at 183-84.
[83] 3 So. 3d 159 (La. Ct. App. 2011), *writ denied*, 69 So. 3d 1161 (La. 2011).
[84] *Guy*, 193 So. 3d at 183-84.
[85] No. 13-1242, 2016 WL 1179206 (W.D. La. Mar. 24, 2016).

was entitled to recover a risk fee out of the non-operating working-interest owner's share of production when the risk-fee notice was sent after completion of the unit well. Importantly, the unit well was completed prior to the recordation of the non-operating working-interest owner's leases. The operator claimed that it was entitled to recover the risk fee because it sent a risk-fee notice within thirty days of being notified that the non-operating working-interest owner held a lease in the unit. Conversely, the non-operating working-interest owner argued that La. R.S. 30:10 mandates that the notice must be sent prior to completion of the well. The court agreed with the non-operating working-interest owner, finding that the plain language of the statute only contemplated transmission of the risk-fee notice prior to the completion of the unit well. Incidentally, as discussed above, this issue has now been reversed by the 2016 amendment to Louisiana's risk-fee statute.

Following *TDX Energy*, the issue of whether a non-operating working-interest owner had a claim against an operator for failure to comply with La. R.S. 30:103.1 et seq. came before the Third Circuit. In *XXI Oil & Gas, LLC v. Hilcorp Energy Co.*, the court reaffirmed its position on a prior exception of no cause of action that La. R.S. 30:103.1 et seq. apply in the context of a non-operating working-interest owner and an operator.[86] In addition, the Third Circuit was confronted with the scope of costs included within the forfeiture penalty outlined in La. R.S. 30:103.2.[87] The court looked to the language of the statute that delineates the penalty as a forfeiture of "the costs of the drilling operations of the well."[88] After a comparison to the historical language used in La. R.S. 30:103.1, the current language was deemed to include both drilling and operational costs. Under any other interpretation, the court contended, an operator would have no incentive to provide quarterly reports under the statute. Writs are currently pending before the Louisiana Supreme Court in this matter.

In *AIX Energy, Inc. v. Bennett Properties, LP*, an issue arose as to whether a servitude encompassed within a voluntary drilling and production unit had extinguished.[89] While there was no production from wells within the servitude boundary, there was production from a well included within a nearby voluntary drilling and production unit. However, the owner of the servitude never signed the unit agreement that was filed in the public records. Despite not signing the unit order, the servitude owner executed division orders, received production attributable to the voluntary unit, and signed a tax-related document certifying that he retained an economic interest in the conventional drilling and production unit. The issue presented was whether these acts of subsequent ratification were binding upon third parties when the unit order filed in the public records was not signed by the servitude owner. Relying upon Louisiana Civil Code article 3339, which states that "a tacit acceptance . . . [is] effective as to a third person although not evidenced of record", the court found that the unrecorded acts of ratification were binding on the third parties.[90] In addition, the court declared that because the voluntary unit agreement expressly provided for subsequent ratification by owners, a reasonable person or title examiner would be alerted to the possibility that the agreement was effective even in the absence of a recorded signature.

In *The Parish of Jefferson v. Atlantic Richfield Co.*,[91] one of many pending coastal zone lawsuits filed in Louisiana, the plaintiffs allege that the historic oil and gas operations along the Louisiana coast violated the State and Local Coastal Resources Management Act of 1978 (the SLCRMA), along with its associated regulations, rules, ordinances and orders. The decision rendered in the Twenty-Fourth Judicial District Court for Jefferson Parish

[86]No. 16-269, 2016 WL 5404650, *2 (La. Ct. App. Sept. 28, 2016).
[87]*Id.* at *3.
[88]*Id.* at *8.
[89]No. 13-cv-3304, 2016 WL 5395870, at *7 (W.D. La. Sept. 26, 2016).
[90]*Id.* at *4; LA. CIV. CODE ANN. art. 3339 (2016).
[91]No. 732-768, 2016 La. Dist. LEXIS 3237 (M.D. La. Aug. 8, 2016).

found that the statutory regime contemplated surveillance by the permitting authority and suspension of the permit if a violation occurred. After giving the permittee an opportunity to respond to the findings of the permitting authority, the permitting authority could reinstate, modify, or revoke the permit. Accordingly, judicial relief was only appropriate after a permittee's noncompliance under the aforementioned enforcement regime. In *Atlantic Richfield Co.*, the plaintiffs made no attempt to follow the existing administrative enforcement regime prior to filing suit, and thus, the suit was dismissed on the basis that the plaintiffs failed to exhaust the administrative remedies. In view of an affidavit from the Department of Natural Resources, however, the trial court reversed that decision on a motion for new trial finding it would be too difficult to prosecute the violations administratively. The defendants have a pending writ application.

In *Middleton v. EP Energy E & P Co., L.P.*, a lessee brought suit for cancellation of leases on the basis that a unit well failed to produce in paying quantities for a forty-one month period that pre-dated the suit by approximately twenty years.[92] At the trial court, the plaintiffs succeeded on a motion for summary judgment that the lease terminated at the end of the forty-one month period. On appeal, the defendants claimed that (1) consideration of a time period that was almost twenty years before filing of suit was improper, (2) the time period between the forty-one-month period and the filing of suit should be considered, and (3) the evidence reflected that a reasonably prudent operator would have continued production. The first two claims were rejected by the Second Circuit. However, after excising extraordinary, non-recurring expenses from the paying quantities calculation, the court found that the unit well yielded a slight profit over the forty-one-month period. Further, the court stated that the determination of whether a reasonably prudent operator would have continued production is inherently a fact-intensive inquiry. Accordingly, an issue of material fact existed and the order granting summary judgment was reversed.

Moore v. Denbury Onshore, LLC, was an oilfield legacy suit where the plaintiffs claimed oil and gas operations contaminated their property.[93] Pursuant to Act 312, defendant admitted liability and the matter was referred to the Louisiana Department for Natural Resources, Office of Conservation to determine the most feasible plan to remediate to statutorily-delineated standards. Following the Office of Conservation's adoption of the defendant's most feasible plan, the defendant filed a motion for summary judgment on the grounds that, based upon Act 312 as amended in 2014, its only obligation was to fund the most feasible remediation plan. The plaintiffs opposed, claiming that the defendants operated unreasonably and excessively on plaintiffs' property, and even in the absence of an express contractual provision, it was entitled to directly recover remediation damages in addition to the amounts used to fund the most feasible plan. In making an *Erie* guess, the court reviewed the legislative and judicial history of Act 312 and found that the plaintiff could not directly recover additional damages in the absence of an express contractual provision. However, the court did not go so far as to find that additional damages for unreasonable and excessive operations could not ever be recovered under the amended version of Act 312. Rather, the court found that the statute now required payment of the additional damages into the registry of the court.

VII. NEW MEXICO

A. Judicial Developments

In *T.H. Mcelvain Oil & Gas Limited Partnership v. Group I: Benson-Montin-Greer Drilling Corp., Inc.*,[94] the successors to the grantors of a warranty deed collaterally

[92] 188 So. 3d 263, 265 (La. Ct. App. 2016).
[93] 159 F. Supp. 3d 714, 715 (W.D. La. 2016).
[94] Nos. S-1-SC-34993, S-1-SC-34997, 2016 WL 6123936 (N.M. Oct. 20, 2016).

challenged a 1948 quiet title action that negated grantors' oil and gas reservation which was held in a joint tenancy. After the district court ruled for the successors to the grantees, the court of appeals reversed. To the consternation of title lawyers, the court held that the successor to the grantee that brought the 1948 quiet title action failed to exercise diligence and good faith to notify the surviving joint tenant, Mabel Wilson, violating her due process rights by depriving her of her property.[95] The New Mexico Supreme Court disagreed and reversed the court of appeals. As indicated on the face of the 1948 district court quiet title decision, that court had a verified complaint and sheriff's return indicated that plaintiffs' predecessors could not be located. Ms. Wilson's "address was not in any of the original deeds," she had changed her name and moved to San Diego, and had not exercised any rights to ownership.[96] Publication in a Farmington, New Mexico newspaper was therefore sufficient. The court stated, "[w]ithout evidence on the face of … [the] quiet title judgment that the district court lacked jurisdiction, that judgment must be accorded finality in accordance with the reliance interests created as a consequence of the quieting of the title in its owner."[97]

In *Conception and Rosario Acosta v. Shell Western Exploration and Production, Inc.*,[98] the plaintiff residents brought a toxic tort action against oil and gas companies alleging that toxic chemicals from crude oil that was released from an unlined pit caused autoimmune disorders. The trial court and the New Mexico Court of Appeals excluded the plaintiff's expert's causation testimony based on *General Electric Co. v Joiner*,[99] which refines *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[100] and allows exclusion of expert testimony where there is a large analytical gap between the data and the opinion proffered. The New Mexico Supreme Court reversed, stating that New Mexico has never adopted *Joiner* and places great value on allowing the jury to hear the evidence.[101] Because summary judgment was granted to Shell as a result of the exclusion of evidence, the court remanded for further proceedings.

In 2008, the New Mexico Oil Conservation Commission adopted a stringent new rule to regulate pits used in oil and gas production activities (the Pit Rule). Industry appealed the rule and the court of appeals stayed the proceedings. While the appeals were stayed, and after a change of administrations, the 2013 Commission adopted a revised version of the Pit Rule acting on a petition from industry associations that relaxed, simplified, and clarified certain requirements. The revised rule was appealed by environmental organizations by writ of certiorari because the Oil and Gas Act does not provide a statutory right to appeal rulemakings.[102] On appeal in *Earthworks' Oil & Gas Accountability Project v. New Mexico Oil Conservation Comm'n*,[103] the court held that the pending appeals regarding the 2008 Pit Rule did not prevent the Commission from adopting a new version of the rule. Although an appeal might divest a tribunal of jurisdiction where it is acting in an adjudicatory capacity, the 2013 Pit Rule was the result of a rulemaking, not adjudication. The doctrine of separation of powers prevents the judicial branch from acting to stop a rulemaking before the rule is final, regardless that a prior version of the rule has been appealed. To the extent of any difference between the 2008 Pit Rule and the

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[95]*See* T.H. McElvain Oil & Gas Ltd. P'ship v. Benson-Montin-Greer Drilling Corp., 340 P.3d 1277 (N.M. Ct. App. 2015).
[96]*Id.* at *34.
[97]*Id.* at *36-37.
[98]370 P.3d 761 (N.M. 2016).
[99]522 U.S. 136, 146 (1997).
[100]509 U.S. 579 (1993).
[101]*Conception & Rosario Acosta*, 370 P.3d at 767.
[102]*See* N.M. STAT. ANN. § 70-2-25 (2016).
[103]374 P.3d 710 (N.M. Ct. App. 2016).

2013 Pit Rule, the former rule has been repealed by implication.[104] The court also refused to take judicial notice of the record in the 2008 rulemaking proceeding because administrative appeals are limited to the record before the agency.[105] The fact that the 2013 Pit Rule is different than the 2008 rule does not automatically render the new rule arbitrary and capricious. The Commission had provided adequate reasoning to support the new rule and did not impermissibly apply economic considerations. "[T]he Oil and Gas Act allows the Commission to include economic considerations," and there was "no indication that [the] economic considerations were the primary" consideration for the new rule.[106]

In *Enduro Operating LLC v. Echo Production, Inc.*,[107] the court refined the test for what it means to "commence operations" under New Mexico law. The court had previously stated in *Johnson v. Yates Petroleum Corp.*[108] that "it appears that any activities in preparation for, or incidental to, drilling a well are sufficient."[109] In *Johnson*, the lessee had staked and surveyed the location, applied for and received a drilling permit, and conducted preliminary site work, including clearing brush and leveling the site. In *Enduro*, the operator had staked and surveyed the site, designed a closed loop system, contracted to build a drill pad, and entered into a drilling contract, but unlike in *Johnson*, had not actually obtained a drilling permit or conducted activity on the site other than staking and surveying. The *Enduro* court adopted the Texas rule that at least some meaningful onsite activity is required,[110] but also muddled the clear test from *Johnson*. After *Enduro*, "onsite activities ancillary to actual drilling can, under some circumstances, amount to commencement, but each case requires an individual analysis of the actions taken by the proposed driller."[111]

In *Diné Citizens Against Ruining Our Environment v. Jewell*,[112] the Tenth Circuit Court of Appeals affirmed the denial by the district court of a preliminary injunction sought by the plaintiffs to prevent the drilling of "oil and gas wells in the Mancos Shale formation of the San Juan Basin in New Mexico"[113] based on violations of the National Environmental Policy Act. In so doing, the court agreed with the district court that the Supreme Court in *Winter v. Natural Resources Defense Council*[114] impliedly overruled the use of a "sliding scale" test for a preliminary injunction. Under this alternative test, the plaintiff would not be required to show "substantial likelihood" of success on the merits (the normal standard) if the plaintiff could instead show that "'questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.'"[115] In concurrence, Judge Lucero disagreed that *Winter* had overruled the use of the sliding scale test, but the panel unanimously agreed that under any test the plaintiffs had failed to satisfy their burden that the district court abused its discretion in denying the injunction.

In *Anderson Living Trust v. WPX Energy Production, LLC*,[116] the court denied the plaintiffs' motion to reconsider class certification. The plaintiffs had previously alleged

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[104]*Id.* at 714-15.
[105]*Id.* at 717.
[106]*Id.* at 720-21.
[107]Nos. 34,581, 34,918, 2016 WL 6962108 (N.M. Ct. App. Nov. 21, 2016).
[108]981 P.2d 288 (N.M. Ct. App. 1999).
[109]*Id.* at 291.
[110]*See* Valence Operating Co. v. Anadarko Petroleum Corp., 303 S.W.3d 435 (Tex. App. 2010).
[111]*Enduro Operating LLC*, 2016 WL 6962108, at *6.
[112]839 F.3d 1276 (10th Cir. 2016).
[113]*Id.* at 1279.
[114]555 U.S. 7 (2008).
[115]*Diné Citizens Against Ruining Our Env't*, 839 F.3d at 1281-82 (quoting Davis v. Mineta, 302 F.3d 1104, 1111 (10th Cir. 2002)).
[116]312 F.R.D. 620 (D.N.M. 2015).

underpayment of royalties based on improper deductions of costs, and class certification had been denied for failure to satisfy the commonality and predominance elements because the court would have been required to examine too many different forms of leases to determine whether the cost deductions were appropriate.[117] In this case, the plaintiffs sought to re-characterize the common question as the failure of the lessee to obtain the highest obtainable price in violation of the implied duty to market, rather than a breach of the marketable condition rule. The court concluded that New Mexico would recognize a claim based on the failure to obtain the highest obtainable price, but that plaintiffs had not properly pled the duty to market claim, and changing his prior denial of class certification would be unfair to the defendants.[118] Note, however, that the court would allow the plaintiffs to file a new motion to consider class certification based on this new claim.[119] In the virtually identical case of *Anderson Living Trust v. ConocoPhillips Co.*,[120] the court allowed the plaintiffs to amend their complaint to add a cause of action under the implied duty to market for failure to secure the best price reasonably available applying the reasonably prudent operator standard. The court was careful, however, to disallow any new claims for violation of the duty to market based on cost deductions.[121]

In *Abraham v. WPX Production, LLC*,[122] the plaintiffs in a class action lawsuit alleged that the defendants underpaid royalties by substituting residue gas for more valuable NGLs in calculating royalty payments, breaching their contractual royalty obligations, the covenant of good faith and fair dealing, and their implied duty to market. The defendants argued that as overriding royalty owners (as opposed to lessors under an oil and gas lease), the named plaintiffs did not have standing to sue for breach of the implied covenant to market. The district court disagreed. Although the Supreme Court of New Mexico has not directly addressed standing of overriding royalty owners in implied covenant cases, and in an earlier case implied that implied covenants apply only in the lessor-lessee relationship,[123] in a more recent case, the New Mexico Supreme Court allowed the named class action plaintiffs to represent both royalty owners and overriding royalty owners.[124] The district court believed this implied that overriding royalty owners may sue for breach of the implied covenant to market.[125]

In a separate memorandum opinion and order issued later in the year in the same case, however, the court denied class certification to the plaintiffs.[126] "To be certified under Federal Rules of Civil Procedure 23(b)(3), a class must meet all four of Rule 23(a)'s requirements—numerosity, commonality, typicality, and adequacy[—]and both of rule 23(b)(3)'s requirements[—]predominance and superiority";[127] and the class must be identifiable. The court concluded that the class was not ascertainable because the plaintiffs defined the class to include only leases that produce gas that has been delivered to certain named processing plants "for extraction and marketing of natural gas liquids….", but plaintiffs conceded that gas from some of the leases "did not flow to those plants or was bypassed around the processing unit."[128] The plaintiffs also failed to satisfy the

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[117]*See* Anderson Living Trust v. WPX Energy Prod., LLC, 306 F.R.D. 312 (D.N.M. 2015).
[118]*Anderson Living Trust*, 312 F.R.D. at 662.
[119]*See* Anderson Living Trust v. WPX Energy Prod., LLC, No. CIV 12-0040 JB/KBM, 2016 WL 5376325, at *11 (D.N.M. Aug. 27, 2016).
[120]No. CIV 12–0039 JB/KBM, 2016 WL 1158341 (D.N.M. Mar. 1, 2016).
[121]*Id.* at *15.
[122]184 F. Supp. 3d 1150 (D.N.M. 2016).
[123]*See* Cont'l Potash, Inc. v. Freeport-McMoran, Inc., 858 P.2d 66, 83 (N.M. 2003).
[124]Davis v. Devon Energy Corp., 218 P.3d 75, 78 (N.M. 2009).
[125]*Abraham*, 184 F. Supp. 3d at 1195 (D.N.M. 2016).
[126]*See* Abraham v. WPX Prod. Prods., LLC, 317 F.R.D. 169 (D.N.M. 2016).
[127]*Id.* at 273.
[128]*Id.* at 257, 271.

commonality and predominance requirements. The answer to the common question central to the case, the underpayment of royalties, depended not just on the actual payment practices, which were common, but also on the lessors' entitlement to payment—which varied based on the various different royalty language used in the leases. Further, because the court would spend more time adjudicating individual issues, such as the lessors' entitlement to payment and which wells' gas has been delivered for processing of NGLs, individual issues were found to predominate over common issues.

In *Anderson Living Trust v. Energen Resources Corp.*,[129] the court granted summary judgment to the defendant on all claims asserted by the plaintiff royalty owners under New Mexico law. Specifically, this court, which had previously ruled that New Mexico does not recognize the marketable condition rule and refused to certify the question to the New Mexico Supreme Court, held that the defendant could deduct the New Mexico natural gas processors tax that was paid by the lessee as compensation to the gas processor and that the defendant owed no royalty on drip condensate retained by the processors as in-kind compensation or on gas used off the lease for post-production processing. Even though the free use clause only allowed the use of gas by the lessee "on said land for its operations thereon,"[130] the court adopted the reasoning of the North Dakota Supreme Court in *Bice v. Petro-Hunt, L.L.C.*[131] that such a clause allows the free use of gas in furtherance of lease operations either on or off the lease.

For the third time and by a third United States district court judge,[132] a motion to certify the question to the New Mexico Supreme Court as to whether the marketable condition rule is implied in an oil and gas lease under New Mexico law was denied in *Ulibarri v. Southland Royalty Co., LLC.*[133] Because the Tenth Circuit in *Elliot Industries Ltd. Partnership v. BP America Production Co.*[134] had already determined that the marketable condition rule is not supported by New Mexico law, the court held that the Tenth Circuit, and not the district court, is the proper judicial level to certify the question.[135]

In *XTO Energy, Inc. v. ATD, LLC*,[136] XTO Energy, as operator, contracted with Air Tech to provide well services. After two employees of Air Tech were harmed in a fire at the well site, the employees and their families sued XTO Energy in state court claiming that XTO Energy supervised the work. Notably, the employees did not sue their employer, Air Tech, because of the sole workers' compensation remedy. XTO Energy thereafter sued Air Tech in federal court for breach of Air Tech's indemnification and defense obligations under their Master Service Contract, and sued Zurich Insurance, the insurer of Air Tech, for breach of its obligations to XTO Energy as an additional insured. The court denied Zurich's and Air Tech's motion for summary judgment, finding that the savings clause that followed the indemnification provision, which provided that that "the provisions therein shall be read not to include indemnification for one's own negligence,"[137] saved the indemnity from the New Mexico Oilfield Anti-Indemnity Statute.[138] Without the savings clause, the broad indemnification of XTO Energy in the contract for any losses arising out of or connected to the work would have been void. The court later clarified in a separate

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[129]161 F. Supp. 3d 1055 (D.N.M. 2016).
[130]*Id.* at 1064-65.
[131]2009 ND 124, ¶ 22-27, 768 N.W.2d 496, 503-04 (N.D. 2009).
[132]*See* Anderson Living Trust v. ConocoPhillips Co., Nos. CIV 12-0039 JB/KBM et al., 2013 WL 11549178 (D.N.M. Sept. 18, 2013); *See* Anderson Living Trust v. Energen Res. Corp., No. 13-CV-00909 KBM-CG, 2014 WL 11515640 (D.N.M. Nov. 25, 2014).
[133]No. CIV 16-00215 RB/WPL, 2016 WL 3946800 (D.N.M. July 20, 2016).
[134]407 F.3d 1091 (10th Cir. 2005).
[135]*Ulibarri*, 2016 WL 3946800, at * 5.
[136]No. CIV 14-1021 JB/SCY, 2016 WL 1158073 (D.N.M. Mar. 11, 2016).
[137]*Id.* at *3.
[138]N.M. STAT. ANN. § 56-7-2(A) (2016).

opinion that the statute did not void the indemnity only to the extent it required indemnification for the vicarious liability of XTO Energy arising out of the negligence of Air Tech.[139]

B. Administrative Developments

The New Mexico Oil Conversation Commission amended rules 19.15.2, 19.15.35, and 19.15.36 of the New Mexico Administrative Code to revise the definition of "oil field waste"; to clarify that its waste disposal rules apply to oil and gas storage, transportation, treatment, refining, and oil field services (in addition to oil and gas development and production); and to significantly amend the permitting and financial assurance requirements applicable to surface waste management facilities. Notably, the Commission removed a $250,000 cap on financial assurance for commercial facilities permitted before the effective date of Rule 19.15.36, subject to a transition provision to allow such commercial facilities to participate in the development of closure and post closure cost estimates.[140]

VIII. NORTH DAKOTA

A. Judicial Development

In *Horob v. Zavanna, LLC*,[141] the court considered whether a lease terminated following a temporary cessation of production. Under the lease's cessation of production clause, the lease was to terminate following a cessation of production unless the lessee "began drilling or reworking operations within [sixty] days of the cessation."[142] The district court concluded that under the common law, the lessee had a *reasonable* time to conduct, maintain and restore production after each lapse in production. The Supreme Court of North Dakota disagreed and held that when parties agree on a specific period for a temporary cessation of oil or gas production, that clause controls over the common law doctrine of temporary cessation allowing a reasonable time for resumption of production. Although the lease would have terminated pursuant to its cessation of production clause because the lessee failed to begin drilling or reworking operations within sixty days of the cessation, it "remained in effect under … [the] communitization agreement with the United States."[143] The agreement stated that it would remain in force for two years and for so long as oil and gas are, or can be, produced from the communitized area. It further stated that production anywhere on the communitized area is considered production on all leases that may be wholly or partly in the communitized area. Finally, because there was "production," as defined in the communitization agreement from the communitized area, the entire lease remained in effect.

In *Vogel v. Marathon Oil Corp.*,[144] the court held that a royalty owner does not have a private right of action for damages for violations of the statute limiting the flaring of gas from an oil well. Although N.D.C.C. section 38-08-06.4 provides that a producer shall pay royalties to royalty owners upon the value of the gas flared in violation of the statute, it neither expressly nor implicitly provides a private right of action for damages. Rather, the statute contains a comprehensive regulatory scheme providing an

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[139]XTO Energy, Inc. v. ATD, LLC, 189 F. Supp. 3d 1174 (D.M.N. 2016).
[140]Order, No. R-14170 (N.M. Oil Conservation Comm'n May 19, 2016) (amending N.M. Admin. Code §§ 19.15.2, 19.15.35, 19.15.36).
[141]2016 ND 168, 883 N.W.2d 855 (N.D. 2016).
[142]2016 ND 168, ¶ 16, 883 N.W.2d at 861.
[143]2016 ND 168, ¶ 1, 883 N.W.2d at 857.
[144]2016 ND 104, 879 N.W.2d 471 (N.D. 2016).

administrative remedy for royalty owners to obtain payment for alleged violations of the statute.[145] The court also held that the royalty owner did not have a private right of action under the common-law doctrines of waste and conversion. The court held that there is no common law in any case in which the law is declared by statute. A royalty owner seeking the payment of royalties for gas flaring violations must exhaust administrative remedies before pursuing a claim in court.

In *Valentina Williston, LLC v. Gadeco, LLC*, the court held that when an oil and gas lease does not provide how the parties may modify its terms, the parties may alter the lease "by a contract in writing, or by an executed oral agreement[,] and not otherwise."[146] The lease in question "contained a 'continuing operations clause,' which enabled Gadeco, [an oil and gas company,] to extend the primary term of the lease 'if not more than ninety … days … elapse[d] between the completion or abandonment of one well and the beginning of operations for the drilling of a subsequent well.'"[147] In addition to the lease with Gadeco, the landowners also entered into a top lease with Valentia Williston, which would become effective if and when the existing lease with Gadeco expired or was terminated. A few months before the end of the Gadeco lease's primary effective term, Gadeco mailed the landowners a letter stating that the company would extend the primary term of certain sections of the land and would terminate others if no wells were spud by a certain date. Valentia brought suit arguing that Gadeco's lease had terminated as a matter of law due to Gadeco's letter. The court disagreed with Valentia and held that the letter did not indicate a surrender of the primary lease. The letter as written was not a written contract which modified the lease because it did not contain an offer and lacked consideration. The doctrine of promissory estoppel was also inapplicable because there was no promise or agreement between the parties.

In *Kittleson v. Grynberg Petroleum Co.*,[148] the lessor of oil and gas interests brought an action against successors to the lessee, alleging the wrongful deduction of certain costs from gas royalties. The royalty clause at issue prohibited the lessee from deducting from the value of any gas sold from the lease costs required processing, dehydration, compression, transportation, or other post-production costs required to make the gas marketable. The clause also required "lessor's royalty to be calculated on the basis of the gas's market value at the well."[149] "Under the 'at the well' rule, calculating market value using the work-back method [would] allow[] … [the] lessee to deduct post-production costs from the royalty."[150] However, the court held that the lessee was not allowed to deduct those costs from the lessor's royalty. When a specific provision and a general provision in a contract conflict, '"the specific provision ordinarily prevails over the general provision.'"[151] "The 'no deductions' language in the royalty clause … specifically [omit] prohibit[ed] deductions of post-production costs from the royalty."[152]

In *Desert Partners IV, L.P. v. Benson*, a "[p]urported purchaser of mineral interests

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[145]*See* N.D. CENT. CODE § 38-08-06.4(5) (2016) ("The industrial commission may enforce this section and, for each well operator found to be in violation of this statute, may determine the value of flared gas for purposes of payment of royalties...."); *see also* N.D. CENT. CODE § 38-08-11(4) (2016) (authorizing an interested person to petition the North Dakota Industrial Commission for a determination of royalties on gas flared in violation of the statute).

[146]2016 ND 84, ¶ 14, 878 N.W.2d 397, 402 (N.D. 2016).

[147]2016 ND 84, ¶ 2, 878 N.W.2d at 399.

[148]2016 ND 44, 876 N.W.2d 443 (N.D. 2016).

[149]2016 ND 44, ¶ 11, 876 N.W.2d at 446.

[150]2016 ND 44, ¶ 15, 876 N.W.2d at 447.

[151]2016 ND 44, ¶ 14, 876 N.W.2d at 447.

[152]2016 ND 44, ¶ 15, 876 N.W.2d at 447.

brought [an] action against [the] purported owners to quiet title."[153] A mineral interest owner deeded his interests to his five grandchildren. Two of the grandchildren conveyed their interest in 160 acres to an individual by quit claim deed; however, they failed to immediately record the deed. Twenty-two years later, the parties recorded the deed and a statement of claim. Following the recording, one of the grandchildren conveyed her interest in 1,720 acres, including the aforementioned 160 acres, to a corporation. The deed was recorded, and the corporation thereafter conveyed twenty-four of the 160 acres to a third party. The third party and the corporation brought suit to quiet title. The court reaffirmed the principal that an "unrecorded instrument is valid between the parties to the instrument and those with notice."[154] An unrecorded conveyance of land is "void … against any subsequent purchaser in good faith[] and for valuable consideration…."[155] However, the recording of any instrument affecting title to real property serves as constructive notice to all subsequent purchasers or encumbrancers of the real property.

In *Fredericks v. Fredericks*,[156] the plaintiff "brought an action against his brother, and purchasers of mineral interests, seeking to reform [a] mineral deed and to quiet title to [the] mineral interests...." The purchasers cross-claimed against the brother, arguing the brother breached the warranty of title. The court held that a "'party seeking reformation of a written instrument must establish by clear and convincing evidence that the document does not state the parties' intended agreement.'"[157] The court found that "clear and convincing evidence existed to support a finding that a mutual mistake was made sufficient to reform quit claim mineral deed, and to provide claimant with ownership of disputed mineral interests."[158]

In *EEE Minerals, LLC v. State of North Dakota*,[159] the court dismissed a putative class action based on the plaintiffs' failure to join the United States as a necessary party. The plaintiffs sought to quiet title on behalf of a class of mineral owners to the minerals under and adjacent to the Missouri River in twenty-seven townships in North Dakota. The parties agreed that the State owns the minerals in an under the bed of the Missouri River under the equal footing doctrine, but they disagreed about where the high water mark—the dividing line between the riverbed and riparian lands—was located. Before considering the merits of the underlying dispute or whether it could proceed as a class, Continental Resources, Inc. and other defendants moved to dismiss, arguing the plaintiffs failed to join the United Sates was a necessary party under Rule 19 of the Federal Rules of Civil Procedure. The court agreed and dismissed the complaint without prejudice.

In two separate cases, the scope of the lessee's implied right to make use of the surface of an oil and gas lease to explore for, produce, and market oil and gas was clarified. In *Continental Resources, Inc. v. Langved*,[160] the court confirmed that the lessee could use the surface of land covered by the lease at issue to drill several oil wells that produced from a force-pooled spacing unit even though that spacing unit contained only a small portion of the acreage covered by the lease. In *Continental Resources, Inc. v. Reems*,[161] the court confirmed the lessee's implied right to use the surface to provide power to its well site, even though the minerals had been severed from the surface, and the surface owners had not executed the applicable lease or any other document granting surface rights.

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[153]2016 ND 37, 875 N.W.2d 510 (N.D. 2016).
[154]2016 ND 37, ¶ 12, 875 N.W.2d at 514.
[155]*Id.*
[156]2016 ND 234, 888 N.W.2d 177 (N.D. 2016).
[157]2016 ND 234, ¶ 16, 888 N.W.2d 177 at 185.
[158]2016 ND 234, 888 N.W.2d at 177.
[159]No. 1:16-CV-115, 2016 WL 7209805 (D.N.D. Oct. 3, 2016).
[160]No. 4:15-CV-19, 2016 WL 3950744 (D.N.D. Apr. 12, 2016).
[161]No. 1-15-CV-76, 2016 WL 5376179 (D.N.D. Sept. 26, 2016).

A. Legislative Developments

On June 28, 2016, House Bill 390 was signed into law.[162] Among other matters, the bill clarified the status of pending applications for unit operations concerning mineral rights owned by the Ohio Department of Transportation. In particular, it required the chief of the Ohio Department of Natural Resources, Division of Oil and Gas Resources Management to issue unit orders with respect to such applications within forty-five days of the law's effective date (where some applications had been pending for nearly two years). It also provided that if such an order were approved, the applicant was not required to commence unit operations for a period of two years from the order's effective date.

B. Judicial Developments

In *State ex rel. Claugus Family Farm, L.P. v. Seventh District Court of Appeals,*[163] the court addressed the construction of a certain form of oil and gas lease that is prevalent across much of Ohio's Utica shale play. Each lease contained a habendum clause stating that it will continue for a primary term of a set number of years and "so much longer thereafter as oil and gas or their constituents are produced or are capable of being produced in paying quantities, in the judgment of the lessee, or as the premises shall be operated by the lessee in the search for oil or gas."[164] The leases also contained a delay rental clause providing for lease termination unless the lessee paid a specified delay rental. The delay rental clause did not, however, expressly state that it applied only during the lease's primary term. The landowners filed suit to terminate the leases, arguing that they were void as against public policy as "no-term" or "perpetual" leases because the combination of habendum clause and delay rental language allowed the producer to hold the leases indefinitely without production. The court rejected the landowners' interpretation of the lease. Delay rentals—the court found—could only be paid during the leases' primary term and not beyond. The court further found that the habendum clause in the leases was a two-tiered clause with a definite primary term and an indefinite secondary term that continued as long as certain conditions set forth in the leases were met (i.e., production in paying quantities). It was not, therefore, the open-ended or perpetual grant claimed by the landowners.

The court also issued a long-awaited series of ruling interpreting the 1989 version of the Ohio Dormant Mineral Act (DMA). In the lead case, *Corban v. Chesapeake Exploration, L.L.C.*, the court held that the 1989 version of the DMA was not self-executing (i.e. "did not automatically transfer ownership of dormant mineral rights" to the surface owner of the property by operation of law).[165] Rather, the surface owner must have filed a quiet title action seeking a decree "that the [dormant] mineral … [interest] had been abandoned in order to merge" the interests.[166] The court further held that the 2006 version of the DMA applies to claims to abandon dormant mineral interests asserted after the act's effective date on June 30, 2006.

Lastly, the court turned its attention to post-production costs. In *Lutz v. Chesapeake Appalachia, L.L.C.*,[167] the court declined to answer a certified question from a federal court regarding whether Ohio follows the "at the well" rule or the "marketable product" theory

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[162]H.B. 390, 131st Gen. Assemb., Reg. Sess. (Ohio 2016).
[163]145 Ohio St.3d 180, 2016-Ohio-178, 47 N.E.3d 836 (Ohio 2016).
[164]145 Ohio St.3d 180, 2016-Ohio-178, 47 N.E.3d 836, at ¶ 23.
[165]No. 2014-0804, 2016 WL 4887428, at *9 (Ohio Sept. 15, 2016).
[166]*Id.*
[167]No. 2015-0545, 2016 Ohio LEXIS 2700 (Ohio Jan. 5, 2016).

with respect to post-production costs, leaving it up to the federal court to interpret the parties' contracts under traditional cannons of contract construction.

In *Alford v. Collins-McGregor Operating Co.*,[168] the court found that the non-development of horizons below the "Gordon Sand" formation did not result in a forfeiture of those zones. The lessor claimed that the lessee had breached its implied covenants with respect to the horizons below the Gordon Sand because there had been no development of those deeper depths during the lifetime of the lease. While agreeing that production from a well may not necessarily hold all acres of a lease, and that forfeiture may be an appropriate remedy for a breach of an implied covenant, the court refused to find that "availability of [a] partial forfeiture as a remedy for horizontal, as opposed to vertical, property."[169]

In *Pottmeyer v. East Ohio Gas Co.*,[170] lessors under two oil and gas leases purchased the wells drilled under those leases to provide them with gas for household and personal use. Several decades later, the lessors sued to have the leases declared forfeited for failing to produce in paying quantities. The court agreed, finding that the lessors' use of gas for domestic purposes does not factor into the paying quantities calculation. The court also rejected the operator's argument that the lessors' operations on the property maintained the lease.

In *RHDK Oil & Gas LLC v. Dye*,[171] lessors claimed that three separate periods of non-production for no more than six months each caused their lease to terminate despite otherwise continuous production for three decades. Alternatively, the lessors argued that the lease terminated for failing to produce in paying quantities. The lessee responded by noting that the cessation of production was only temporary, and that the evidence provided below shows that the lease was producing in paying quantities. The court agreed with the lessee, finding that "absent a finding of unreasonableness, a six-month cessation period is temporary and does not terminate a lease."[172] After considering possible weather causes and well maintenance records, the court found that the lessee's actions to resume production following the gaps in non-production were reasonable.

Addressing the question of who bears the burden of proof in a lease expiration claim, the court in *Burkhart Family Trust v. Antero Resources Corp.*[173] placed the burden on the lessor, holding that the trial court had improperly shifted the burden to the lessees to establish production in paying quantities. "For instance, the trial court found that … [the shallow lessee] had presented 'no credible evidence to support his blanket assertion' that the well[] remain profitable."[174] This, according to the court, was one of many instances showing that the trial court believed that the lessees bore the burden of proof. However, "'[t]he burden of proof question is not controlled by substantive oil and gas law, but rather procedure'.…[t]he party who asserts a claim carries the burden of proof."[175]

Ohio courts also wrestled with the sufficiency of the evidence in a lease expiration suit. In *Mobberly v. Wade*,[176] the court held that the lessee's failure to file production reports was not evidence of a lack of production resulting in the underlying lease's termination: "[w]hether or not Appellee sent ODNR production reports is not a relevant issue in this matter. To prevail, Appellee need only produce evidence that oil was produced,

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[168]No. 16CA9, 2016 Ohio App. LEXIS 2887 (Ohio Ct. App. July 15, 2016).
[169]*Id.* at *9.
[170]2016-Ohio-1294, 62 N.E.3d 617 (Ohio Ct. App. 2016).
[171]No. 14-HA-0019, 2016 Ohio App. LEXIS 2486 (Ohio Ct. App. 2016).
[172]*Id.* at *11.
[173]Nos. 14-MO-0019 et al., 2016 Ohio App. LEXIS 3149 (Ohio Ct. App. June 28, 2016).
[174]*Id.* at *6.
[175]*Id.* at *7.
[176]2015-Ohio-5287, 44 N.E.3d 313 (Ohio Ct. App. 2015).

not that he filed the requisite production records to ODNR."[177] Adopting *Mobberly*, the *Burkhart Family Trust*[178] court also rejected the lessor's attempt to rely on a lessee's failure to report production to ODNR or the county auditor, and its showing of a loss generally on its tax returns, as evidence of a lack of production in paying quantities regarding the lease at issue.

But in *Holland v. Gas Enterprises Co.*,[179] the court reached a contrary result. There, the lessors claimed that the underlying lease expired of its own accord following several periods of non-production (i.e., during 2006-08 and 2012-13). The court agreed, noting first that "[an] oil and gas lease containing a habendum clause that states the lease shall remain in effect as long as oil or gas is produced in paying quantities automatically expires when no oil or gas is produced for two years or more" (while recognizing that Ohio follows the temporary cessation of production doctrine).[180] Moreover, the court found that the fact that the forms the lessee issued to ODNR and the county auditor affirmatively reported no production for those periods distinguished this case from *Mobberly* above.

In *Schultheiss v. Heinrich Enterprises, Inc.*, [181] the lessor sought to cancel a 1950 lease, in part, for lack of production alleged to have occurred over three decades earlier (from 1977 to 1981). The lessee argued that the lessor's claim was barred by the relevant statute of limitations and equitable doctrines such as laches. In rejecting that argument, the court first noted that under Ohio law, when the primary term of a lease expires, the conditions of the secondary term must be met or the lease automatically expires. "'In such a case, no affirmative action on the part of a lessor is required to formally terminate the lease; it expires on its own terms.'"[182] The court also cited to *Williams & Meyers* for the proposition that "when the lease has terminated by operation of law, any delay by the lessor in asserting termination of the lease cannot give life to the affirmative defenses of laches or the statute of limitations."[183]

In *Holland v. Gas Enterprises Co.*,[184] also discussed above, the lessee argued that the lessors' claim that the underlying lease expired for non-production was barred by a four-year statute of limitations. The court rejected that position, first because the four-year period applied to royalty claims and not lease expiration claims, and second because the last period of non-production ended in 2013, well within the applicable eight-year limitations period. But in *Ricketts v. Everflow Eastern, Inc.*,[185] another court of appeals, considering a claim that an oil and gas lease expired because of an improper pooling more than twenty years earlier, found that the action sounded in breach of contract and held that the related eight-year statute of limitations barred the plaintiffs' claims.

The disgorgement of a lease bonus was the subject of *Miller v. Cloud*.[186] There, the buyer of property established that it was entitled to a deed reformation indicating that it owned the underlying minerals (as opposed to the seller). As a consequence, in part, it asked the court to require the seller to disgorge the lease bonus that the seller had been paid by an oil and gas producer for entering into a lease of the minerals. The court determined that the seller was not a wrongdoer under disgorgement law because a person could have

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[177]2015-Ohio-5287, 44 N.E.3d 313, ¶ at 16.
[178]2016-Ohio-4817, 66 N.E.3d 142 (Ohio Ct. App. 2016).
[179]No. 15CA42, 2016 Ohio App. LEXIS 2593 (Ohio Ct. App. June 28, 2016).
[180]*Id.* at *12.
[181]2016-Ohio-121, 57 N.E.3d 361 (Ohio Ct. App. 2016), *application for reconsideration granted and denied in part*, 57 N.E.3d 361, 2016-Ohio-121 (Ohio Ct. App. 2016) *appeal accepted*, 146 Ohio St.3d 1494, 2016-Ohio-5585, 57 N.E.3d 1172 (Ohio 2016).
[182]2016-Ohio-121, 57 N.E.3d 361, at ¶ 23.
[183]2016-Ohio-121, 57 N.E.3d 361, at ¶ 24.
[184]No. 15CA42, 2016 Ohio App. LEXIS 2593 (Ohio Ct. App. June 28, 2016).
[185]2016-Ohio-4807, 66 N.E.3d 165 (Ohio Ct. App. 2016).
[186]No. 15-CO-0018, 2016 Ohio App. LEXIS 2852 (Ohio Ct. App. July 22, 2016).

reasonably inferred from the underlying documents that the seller owned the minerals at the time she entered into the lease. Furthermore, the court determined that the seller would be prejudiced in the event she was required to disgorge the lease bonus because most of it had already been spent.

In *Summitcrest, Inc. v. Eric Petroleum Corp.*,[187] a lessee obtained a lease of over 2,700 acres out of which a forty-acre unit had been formed and on which a well had been drilled and completed. After the lessee subsequently increased the size of the unit to 640 acres, the lessor filed suit alleging, in part, that the new unit was invalid because the lease did not permit the re-pooling and it violated the lessee's duty of good faith and fair dealing. The court rejected both arguments, finding that the terms of the pooling clause authorized the operator to increase the size of its unit, and that such an increase, being contemplated by the parties' agreement, did not breach the lessee's duty of good faith and fair dealing. But in *Filicky v. Am Energy – Utica, LLC*,[188] the court found the lessee's pooled unit unauthorized when the lessee reconfigured the size of its unit but failed to record a declaration of pooling as required by the terms of its lease. Finally, in *Eclipse Resources-Ohio v. Madzia*[189] the court rejected the lessor's claim that the lessee had breached its covenant of good faith and fair dealing by including only a small portion of the leased premises into a unit. The court found that this allegation failed to state a claim for relief because Ohio does not recognize a standalone claim of a breach of this implied covenant absent a valid breach of contract claim. Moreover, the court found that this covenant "cannot be breached by acting as allowed under a specific term of a contract."[190]

In *Kinder Morgan Cochin LLC v. Simonson*,[191] a pipeline operator sued for access to conduct surveys, inspections, and examinations allowed under state law pertaining, in part, to a company organized in part for the purpose of transporting petroleum. The landowner argued that the statutory term "petroleum" in R.C. 1723.01—which permits common carries to appropriate land—did not include natural gas liquids such as ethane and propane, and thus the pipeline operator was not entitled to access his property. The court disagreed, based on prior case law and related statutory definitions. It also concluded that the pipeline operator qualified as a common carrier under Ohio law in respect to the pipeline operations at issue.

Another appellate court reached the same conclusion in *Sunoco Pipeline L.P. v. Teter.*[192] There, the landowner contested the pipeline exercise of eminent domain on the basis that pure propane and pure butane (i.e., the liquids to be transported by the pipeline) were not "petroleum" for purposes of R.C. 1723.01. The court found that while R.C. 1723.01 did not define "petroleum," other Ohio statues and administrative code provisions indicated that pure propane and butane were considered petroleum, and that such a construction was supported by considering the technical or industry definition of "petroleum" as well as its historic meaning. Further, the court rejected the landowner's claim that the appropriation was not "necessary" or for a "public use."

C. Administrative Developments

On December 8, 2016, ODNR's Division of Oil and Gas Resources Management formally enacted new rules creating an emergency notification process for oil and gas related emergencies, such as an uncontrolled fire or the release of natural gas, oil, brine,

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[187]2016-Ohio-888, 60 N.E.3d 807 Ohio Ct. App. 2016).
[188]645 F. App'x 393 (6th Cir. 2016).
[189]No. 2:15-cv-1777, 2016 U.S. Dist. LEXIS 25993 (S.D. Ohio Mar. 2, 2016), *vacated in part on other grounds*, 2016 U.S. Dist. LEXIS 86762 (Jul. 5, 2016).
[190]*Id.* at *48.
[191]2016-Ohio-4647, 66 N.E.3d 1176 (Ohio Ct. App. 2016).
[192]2016-Ohio-7073, 63 N.E.3d 160 (Ohio Ct. App. 2016).

hazardous substances and other wastes at a production or processing facility.[193] Under the rules, such emergencies are to be reported to the Division who will then coordinate statewide notification and responses. The rules had already been instituted on an interim basis after Ohio governor Kasich's signed Executive Order 2016-04K on August 9, 2016.[194]

X. OKLAHOMA

A. Judicial Developments

The decision in *United States Energy Development Corp. v. Stephens Energy Group, LLC*,[195] involved the interpretation of a Participation Agreement (PA) between Slawson, United States Energy Development Corporation (USEDC), and Osage covering a field of oil and gas leases and wells. "A number of third party working interest owners held interests of varying sizes in those wells, but those other owners did not sign, and were not subject to the PA."[196] As between the three parties to the PA, the contract provided that Slawson would be the operator of all wells. Attached as an exhibit to the PA was an unsigned AAPL Model Form 610 – 1989 Operating Agreement. The PA provided that "'[w]here there is a conflict between the Operating Agreement and [the PA, the PA] will control.'"[197] The PA also recognized the right of each of the parties to assign their rights, duties, and obligations under the PSA. Slawson later sold and assigned "[most] of its rights, titles and interests in the project area to Stephens."[198]

> Relying on the provisions of the Operating Agreement exhibit to the PA, rather than the above-referenced assignability clause of the PA, Osage asserted that Slawson … [had] resigned as operator under the PA and had also ceased to be operator under the PA by virtue of assigning all of its working interest rights in the lands covered by the PA to Stephens.[199]

Stephens asserted the express wording in the PA allowed Slawson to assign its contractual right to be operator under the PA to Stephens, and controlled over the conflicting provisions of the Operating Agreement exhibit cited by Osage. "The [d]istrict [c]ourt found that the operator election and succession provisions of the" attached Operating Agreement controlled and that Osage was the valid successor operator under the PA.[200] On appeal, the Tenth Circuit reversed and held that Slawson had the right to assign its contractual right to be operator under the PA.

"In *A. B. Still Wel-Service, Inc. v. Antinum Midcon I, LLC*, the operator of a vertical well sued the operator and non-operators of the nearby Eggers horizontal well...." alleging that "the frac job conducted on the Eggers well caused damage to" its vertical well.[201] "The plaintiff asserted claims for alleged negligence, trespass, nuisance, conversion of hydrocarbons and unjust enrichment."[202]

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[193]OHIO ADMIN. CODE §§ 1509:9-8-01-1509:9-8-02 (2016).
[194]Exec. Order No. 2016-04K, OHIO ADMIN. CODE §§ 1509:9-8-01 to 1509:9-8-02 (2016).
[195]662 F. App'x 556, 558 (10th Cir. 2016).
[196]Mark D. Christiansen, *Energy Litigation Update 2016*, 2 OIL & GAS, NAT. RES. & ENERGY J. 425, 426 (Jan. 2017).
[197]*Id.*; *USEDC*, 662 F. App'x at 558.
[198]Christiansen, *supra* note 196, at 427.
[199]*Id.*
[200]*Id.*
[201]*Id.* at 428.
[202]*Id.*

> The lawsuit was filed in the county where the plaintiff corporation was located. The trial granted the defendants' motion to dismiss due to improper venue, finding that this suit was an action for 'damages to land, crops or improvements thereon' within the meaning of 12 O.S. [section] 131(2), and that the lawsuit must instead be filed in the county where the plaintiff's land and well were located.[203]

On appeal, that decision was affirmed by the Oklahoma Court of Appeals.

> In the early years following BP-Amoco's success in defeating class certification in the case of *Watts v. Amoco Production Company*, different plaintiff counsel, representing a different plaintiff, sought certification of a royalty owner class against BP in a different Oklahoma county district court in spite of the earlier court's denial of class certification in...*Watts*....[204]

In *Rees v. BP America Production Co.*, the court held that the new attempt in *Rees* to obtain class certification (*i.e.*, a second bite at the apple) "was precluded by the denial of class certification in the earlier *Watts* case." [205] "Unit Petroleum encountered a like scenario after defeating class certification in the earlier case of *Panola Independent School District No. 4 v. Unit Petroleum Co.*"[206] "A different plaintiff lawyer, representing a different plaintiff, sought certification of a royalty owner class against Unit in a different court in *Consul Properties, LLC v. Unit Petroleum Co*."[207] However, the court in "*Consul*, citing and discussing the above-referenced *Rees* decision from 2008, dismissed the portion of the *Consul* case that requested class certification (apparently leaving the case pending only as to the individual claims of the named plaintiffs)."[208] "Oklahoma as a matter of state law has clearly recognized [*e.g.*, *Rees v. BP America Production Co.*] non-mutual defensive collateral estoppel or issue preclusion to apply in the circumstances of this case."[209]

"The case of *Concorde Resources Corp. v. Williams Production Mid-Continent Co.*, involved an oil and gas lease termination lawsuit." [210] No production was marketed from the well for over seventeen years due to there being no pipeline in the vicinity of the well. Under Oklahoma law, "[t]he question in th[e] case … [was] whether the well *had the ability* to produce in paying quantities when the impediment (no pipeline) to marketing was removed."[211] The plaintiff contended that the well required repair and additional equipment before it could be turned on and begin flowing gas. The court found that "[t]he determination of whether a well is '*capable* of producing in paying quantities' involves

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[203]Christiansen, *supra* note 196, at 428.
[204]Watts v. Amoco Prod. Co., 75 O.B.J. 2459 (Okla. App. 2004); Christiansen, *supra* note 196, at 455.
[205]2009 OK CIV APP 37, 211 P.3d 910 (Okla. Civ. App. 2008); Christiansen, *supra* note 196 at 455.
[206]2012 OK CIV APP 94, 287 P.3d 1033 (Okla. Civ. App. 2012); Christiansen, *supra* note 196, at 455.
[207]Order, No. CIV-15-840-R (W.D. Okla. Feb. 2, 2016); Christiansen, *supra* note 196, at 455.
[208]Christiansen, *supra* note 196, at 455.
[209]*Id.* at 456.
[210]*Id.* at 460; Concorde Res. Corp. v. Williams Prod. Mid-Continent Co., 2016 OK CIV APP 37, 379 P.3d 1157 (Okla. Civ. App. 2016).
[211]Christiansen, *supra* note 196 at 462 (emphasis added).

equitable considerations reviewed on a case-by-case basis."[212] Here, it was clear to the appellate court that the trial court expressly or implicitly examined the facts pertinent to the well and concluded that it was capable of producing in paying quantities, and that its conclusion was not against the clear weight of the evidence or contrary to law.

"The landowner plaintiffs in *Lee v. ConocoPhillips Co.* sued ConocoPhillips (Conoco) to enforce their interpretation of the free gas clauses contained in the underlying oil and gas leases." [213] Based on a series of safety and other concerns, Conoco urged the landowners to find alternate sources for natural gas, and offered a financial payout. "When those communications failed to lead the landowners to end their use of the free gas option, Conoco notified certain of the plaintiff landowners that it was going to disconnect their farm taps by a specified date…."[214] The landowners "filed suit in the state district court of Texas County, Oklahoma and sought injunctive relief…." with respect to seeking a declaratory judgment that Conoco was required to comply with its contractual obligation to make natural gas available to landowners.[215] Conoco "sought declaratory relief that, *inter alia*, it was not obligated to continue providing natural gas under the leases, due to stated concerns, and that it could turn off, disconnect and disable the farm taps…."[216] The landowners' moved "for a preliminary injunction prohibiting Conoco from terminating the supply of natural gas via the farm taps during the pendency of the lawsuit."[217] The court concluded that the landowners failed to make an adequate showing of irreparable harm and denied the plaintiffs' request. The court did, however, '"direct[ed] Conoco to reasonably assist [the] [l]andowners in locating and connecting an alternative source of energy, and to temporarily refrain from shutting off the farm taps for a reasonable time in order to allow such alternative sources to be put in place."'[218]

In *American Natural Resources, LLC v. Eagle Rock Energy Partners, L.P.*,[219] in which the Oklahoma Supreme Court affirmed the district court's dismissal of the case based upon the rule against perpetuities, the court found that the option at issue in this case did not expire when an existing lease expired, "but instead continue[d] when new leases are executed with new wells to be drilled on those leases."[220] "The AMI agreement in this case was found to be a stand-alone document" that provided by its terms that ANR could participate in wells *infinitum*.[221]

> Additionally, the court found that ANR, as a [l]imited [l]iability [c]ompany, could not be a life in being under the Rule. It further stated that, when there is no measureable life in being (such as … [in the instance of] a corporation or an LLC), 'the only definite period permitted by the rule against perpetuities is a term not exceeding 21 years.'[222]

The option provision violated the rule against perpetuities.

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[212]*Id.* (emphasis added).
[213]No. CIV-14-1391-D, 2016 WL 67803 (W.D. Okla. Jan. 5, 2016); Christiansen, *supra* note 196, at 463.
[214]Christiansen, *supra* note 196, at 463.
[215]*Id.* at 464.
[216]*Id.*
[217]*Id.*
[218]*Id.* at 465-66.
[219]2016 OK 67, 374 P.3d 766 (Okla. 2016).
[220]Christiansen, *supra* note 196, at 467.
[221]*Id.* at 467-68.
[222]*Id.* at 468.

> The decision in *Natural Gas Anadarko Co. v. Venable,* involved the appeal of the district court's judgment awarding costs and attorney fees to the Venable defendants after they prevailed on the merits in the quiet title action described in the preceding case summary of this paper. [223]

"Anadarko's appeal . . . challenged the Venable defendants' statutory entitlement to costs and attorney fees under the Nonjudicial Marketable Title Procedures Act (NMTPA)."[224]

> Anadarko contended that the attorney fee portion of the Act [did] not apply. Anadarko argued that attorney fees are authorized only if a party prevails on its entire claim. Anadarko noted that although it did not obtain the relief it sought, it did obtain some relief—*i.e.*, the validity of its leases as to the two producing formations was confirmed. [225]

"In affirming the district court's award of attorney fees and costs to the Venable defendants under the NMTPA, the court found" that what Anadarko sought before the trial court was clear and uncontested title to the nonproducing formation.[226] On that issue, the Venable defendants prevailed. The NMTPA authorizes recovery of attorney fees by a quiet title defendant who correctly "failed or refused" to take the corrective action demanded by the plaintiff in its pre-lawsuit request.[227] The district court's award of attorney fees, costs and expenses to the Venable defendants was affirmed.

> The case of *Stinson Farm and Ranch, L.L.C. v. Overflow Energy, L.L.C.*, involved a suit by the plaintiff-seller of land to obtain rescission of the sale and transfer documents based on the defendant-buyer's alleged misrepresentation that it was buying the property for use as an equipment yard. [228]
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> Less than a year after the sale, the seller learned that the defendant had applied for a commercial disposal well permit several weeks after the closing of the sale. In rejecting the request for rescission based upon alleged fraud, the court ruled that the seller could not simply inquire in discussions with the buyer about the intended usage, even on more than one occasion, and then seek to rely on the buyer's response without seeking to protect the seller by affirmatively stating in the sale documents that the property would not be used for certain specified offensive purposes. [229]
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> [In] *Buckles v. Triad Energy, Inc.*,[230] involv[ing] the construction by OG&E (an electric utility) of an electrical highline to supply electricity to a well operated by Triad. The plaintiff landowners objected to the fact that the electrical supply line ran across public right-of-way including their lands in Section 28 in order to supply electricity to a well in Section 22. The

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[223]*Id.* at 469; Nat. Gas Anadarko Co. v. Venable, 368 P.3d 3 (Okla. Civ. App. 2015).
[224]OKLA. STAT. ANN. tit. 12 §§ 1141.1-.5 (2016).
[225]Christiansen, *supra* note 196, at 469.
[226]*Id.*
[227]OKLA. STAT. ANN. tit. 12 § 1141.5(B) (2016).
[228]No. CIV-14-1400-R, 2015 WL 4925921 (W.D. Okla. Aug. 18, 2015); Christiansen *supra* note 196, at 487.
[229]Christiansen, *supra* note 196, at 487.
[230]2015 OK CIV APP 101, 364 P.3d 665 (Okla. Civ. App. 2015).

> landowners did not sue the utility, OG&E. Instead, they sued the operator Triad as an alleged aider and abetter of trespass in the construction of the line. Triad responded that it did not own, operate or maintain the supply line and did not construct it. Rather, Triad was merely a customer of OG&E …[—a utility that] had the right to use the right-of-way….[231]
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> The court
>
> found that the legal authority relied upon by the landowner 'provides no support for the proposition a customer of a public utility is liable as an aider and abettor simply by requesting the provision of electrical service by a public utility.' The court further rejected the landowner's assertion that this case involved a 'private use' for a single oil and gas well of a public right-of-way…. [232]

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 and Gas Conservation Rules, were addressed in Cause RM No. 201600001.[233] Following is a brief summary of certain of the amendments which became effective on August 25, 2016:

> OAC 165:10-1-4 [was] amended to update the list of effective dates for OAC 165:10 rulemakings; OAC 165:10-1-7 [was amended] to update the list of [Oil and Gas Conservation Division] prescribed forms and to eliminate requirements for the submission of multiple copies of forms to the Commission; OAC 165:10-1-15 regarding transfer of operatorship of oil and gas wells; OAC 165:10-3-1 [was amended] concerning permits to drill for horizontal wells; OAC 165:10-3-15 [was amended] regarding the venting and flaring of gas from wells; OAC 165:10-3-16 with respect to operations in hydrogen sulfide areas; OAC 165:10-5-7 [was amended] to add a provision concerning requested monitoring and reporting within areas of interest regarding seismicity and to address administrative shutdown of underground injection wells; OAC 165:10-5-9 [was amended] with respect to duration of underground injection well orders or permits, and OAC 165:10-5-10 [was] amended regarding transfer of authority to inject concerning underground injection wells.[234]
>
> OAC 165:10-5-13 [was] amended to eliminate surface casing injection of reserve pit fluids; OAC 165:10-7-16 [was amending] regarding liner requirements for flow back water pits in hydrologically sensitive areas, sampling of monitor wells and leachate collection systems, and the use of flow back water pits by other operators; OAC 165:10-7-20 [was amended]

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[231]Christiansen, *supra* note 196, at 488-89.
[232]*Id.* at 489 (citing *Buckles*, 2015 OK CIV APP 101, 364 P.3d at 672).
[233]Notice of Proposed Rulemaking, In the Matter of a Permanent Rulemaking of the Oklahoma Corporation Commission Amending OAC 165:10, Oil and Gas Conservation, RM No. 201600001 (Okla. Corp. Comm'n Jan. 19, 2016) (to be codified at OKLA. ADMIN. CODE § 165 (2016)).
[234]*Id.*

> to eliminate a requirement that applications to permit noncommercial disposal or enhanced recovery well pits used for temporary storage of saltwater be submitted in duplicate to the Commission and regarding sampling of monitor wells and leachate collection systems pertaining to such pits; OAC 165:10-7-33 [was amended] regarding sampling of monitor wells and leachate collection systems with respect to truck wash pits; OAC 165:10-9-1 [was amended] regarding monitoring by engineers during construction of commercial pits, geomembrane liners installed in such pits and sampling of monitor wells pertaining to such pits; OAC 165:10-9-2 [was amended] with respect to sampling of monitor wells concerning commercial soil farming[.][235]

In addition, "OAC 165:10-10-1 [was] amended concerning the purpose, authority and applicability of the Brownfield program; OAC 165:10-10-2 [was amended] regarding Brownfield sites; OAC 165:10-10-3 [was amended] concerning administration and enforcement of rules pertaining to Brownfield sites."[236]

Further,

> OAC 165:10-12-3 [was] amended to change the reference to the statute authorizing the Commission to promulgate and enforce rules and issue and enforce orders relating to seeping natural gas[;] OAC 165:10-12-6 [was amended] regarding notice requirements for seeping natural gas occurrences[;] OAC 165:10-12-8 concerning procedures for the Rapid Action Assessment Team pertaining to gas surface seeps[, and] OAC 165:10-12-9 [was amended] regarding assistance to an owner of property which has a seeping natural gas occurrence and in accordance with 17 O.S. § 180.10 and amendments thereto in Enrolled House Bill No. 2234 (2015).[237]

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. 201600002. Following is a brief summary of certain of the amendments which became effective on August 25, 2016: "OAC 165:5-1-6 [was] amended regarding computation of time periods; OAC 165:5-1-25 … to strike the phrase 'hazardous substance' with respect to storage tanks from the definition of 'site specific' concerning responses to citizen environmental complaints[; and] OAC 165:5-17-1 [was] amended regarding motions filed after an order of the Commission is entered."[238]

XI. PENNSYLVANIA

A. Legislative 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

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[235]*Id.*
[236]*Id.*
[237]*Id.*
[238]Notice of Proposed Rulemaking, In the Matter of a Permanent Rulemaking of the Oklahoma Corporation Commission Amending OAC 165:5, Rules of Practice, No. RM 201600002 (Okla. Corp. Comm'n Jan. 21, 2016).

Chapter 78a (relating to unconventional wells).[239] The rules "add[] additional controls to the surface activities associated with the development of unconventional well sites."[240] The rules also implement more stringent requirements for the storing of fracking wastewater at impoundments, and in large part prohibit any disposal of drill cuttings at well sites.

B. Judicial Developments

In *Loughman v. Equitable Gas Co.*, the court held that a lease granted the lessees the right to produce gas or store gas, and that the lease was not severable.[241] The relevant lease language provided, in part, that it remained in effect as long as the property was

> operated for the exploration or production of gas or oil, or as gas or oil is found in paying quantities thereon, or stored thereunder or as long as said land is used for the storage of gas or the protection of gas storage on lands in the general vicinity of said land, [and that the lease was properly held by storage alone].[242]

The court held that the durational provisions of the lease were unambiguously written in the disjunctive, providing that the lease would continue during either production *or* storage. The court disagreed with the plaintiffs' interpretation of the effect of the sublease of production rights, noting that the language of the sublease explicitly stated the parties did not intend to sever the lease. The court held that the language of the lease, and in particular, the use of the disjunctive "or," indicated that the production and storage rights were not severable, and the lease was held by the use of the property for the storage of gas.

In response to the Public Utility Commission's (PUC's) appeal of the Pennsylvania Commonwealth Court's ruling on remand in *Robinson Township v. Commonwealth*,[243] the Pennsylvania Supreme Court issued an opinion striking down various provisions of Act 13.[244] The court held that the PUC is no longer authorized to review local ordinances to ensure compliance with Act 13. The court also struck down the restrictions and obligations placed on doctors related to confidentiality of fracturing fluid trade secrets, and concluded that the oil and gas industry was receiving "special treatment not afforded to any other class of industry"[245] and that there was no justifiable reason to provide the special treatment. The court struck down Section 3218.1 of the Act, which required the DEP "to notify only public drinking water facilities that could be affected"[246] by a spill, and not private drinking water facilities. The court held that this provision was a *special law* because Act 13 was enacted to secure the health, safety, and property rights for all Pennsylvania residents during the oil and gas extraction process, without exception.[247] As to this part of its holding, the court issued a stay of its decision for 180 days to allow the legislature an opportunity to reach a solution, otherwise, the entire provision will be stricken. Finally, the court struck down the provision of the Act that granted private companies the power of eminent domain for gas storage, finding that it violated the United States and Pennsylvania Constitutions because the power was not limited to public utilities.

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[239] 25 PA. CODE § 78.1-78.906, 78a.1-78a.301 (2016); *see also* 46 Pa. Bull. 6431 (Oct. 8, 2016).
[240] 46 Pa. Bull. at 6432.
[241] 134 A.3d 470 (Pa. Super. Ct. 2016).
[242] *Id.* at 473.
[243] Robinson Twp. v. Commonwealth, 96 A.3d 1104 (Pa. Commw. Ct. 2014).
[244] Robinson Twp. v. Commonwealth, 147 A.3d 536, 556 (Pa. 2016).
[245] *Id.* at 575.
[246] *Id.* at 576.
[247] *Id.* at 581.

In *Pennsylvania Environmental Defense Foundation v. Commonwealth*, the Pennsylvania Environmental Defense Foundation (PEDF) sought declaratory relief against the Commonwealth challenging budget-related decisions from 2009 to 2015 related to leasing state lands for oil and gas development and the use of the monies in the Oil and Gas Lease Fund (Lease Fund). [248] PEDF argued that the actions by the Commonwealth violated the Environmental Rights Amendment of the Pennsylvania Constitution. The court held that the General Assembly could "vest in itself the power to appropriate certain monies in the Lease Fund," and the decision to do so did not reflect a failure by the General Assembly to uphold its trustee obligations under the Environmental Rights Amendment.[249] Second, the court held that the legislature did not violate the Environmental Rights Amendment by passing legislation, including Act 13, which appropriates monies from the Lease Fund. The court noted that the Environmental Rights Amendment merely required that monies be used for the benefit of all the people, and the General Assembly appropriated the Lease Fund monies for the benefit of all people of the Commonwealth. The Commonwealth Court ruled that the Environmental Rights Amendment did not require revenue from oil and gas drilling to go towards environmental goals. Finally, it held that the Pennsylvania Department of Conservation and Natural Resources was best positioned to act consistent with its constitutional duties related to further leasing of state lands for oil and gas development. The PEDF appealed the Commonwealth Court's decision, and the Pennsylvania Supreme Court heard oral argument on March 9, 2016. The issues on appeal include the proper standards for judicial review of government regulations and legislation challenged under the Environmental Rights Amendment and the constitutionality of the challenged provisions in the Fiscal Code. The Pennsylvania Supreme Court has not yet rendered its decision.

The Pennsylvania Commonwealth Court upheld a condemnation by a pipeline company to construct a pipeline to deliver natural gas from Pennsylvania, West Virginia, and Ohio to a refinery in eastern Pennsylvania.[250] The landowners had argued in the lower court that the pipeline company lacked the power to condemn property because (1) it is not a public utility regulated by the Pennsylvania PUC, and (2) the pipeline is not an intrastate pipeline subject to regulation by the PUC. The Commonwealth Court held that the pipeline had been reconfigured as both an interstate pipeline and an intrastate pipeline subject to PUC regulation. Accordingly, the pipeline company had the power to condemn property in the Commonwealth.

In another case, a district court granted Cabot's motion for summary judgment in a memorandum, finding that Cabot had not breached its duty to warn or remedy dangers on the site where a drilling operator was injured by a dust cloud.[251] In its motion for summary judgment, Cabot argued that 1) it owed no duty to the plaintiff; 2) even if it did owe a duty to the plaintiff, it did not breach that duty; and 3) the plaintiff failed to establish causation. The district court agreed with Cabot and granted its motion for summary judgment. Of particular relevance to oil and gas drilling companies, the district court held that "dumping of large quantities of cement to solidify drill cuttings is a usual and ordinary risk associated with pit abatement",[252] and the "peculiar risk" exception did not apply. This exception provides that persons owe a duty "where 1) 'the risk is foreseeable to the owner at the time the contract is executed'[;] and 2) 'the risk is different from the usual and ordinary risk associated with the type or work done.'"[253]

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[248]Pa. Envtl. Def. Found. v. Commonwealth, 108 A.3d 140 (Pa. Commw. Ct. 2015).
[249]*Id.* at 161.
[250]*In Re*: Condemnation by Sunoco Pipeline, L.P. of Permanent and Temp. Right of Way, 143 A.3d 1000 (Pa. Commw. Ct. 2016).
[251]Maghakian v. Cabot Oil & Gas Corp., 171 F. Supp. 3d 353 (M.D. Pa. 2016).
[252]*Id.* at 362.
[253]*Id*. at 361-62.

A court recently denied a lessee's motion for summary judgment on private nuisance and negligence claims in a memorandum opinion.[254] In this case, the lessor entered into an oil and gas lease with the lessee which conveyed the right to the lessee to explore, develop, produce, and market oil and gas from the unit of which her property was a part. There is no language in the lease regarding the location of drilling activity, but the lessor alleges that she was assured that no drilling would occur within miles of her property because of a nearby water source. The lessee engaged in drilling activities less than a quarter of a mile from the lessor's home. The lessor filed suit, alleging that the lessee is liable for private nuisance and negligence, but the lessor subsequently abandoned her negligence claim, leaving only a claim for private nuisance. The lessee filed a motion for summary judgment. The court held that the county ordinances were not a proper standard because "conduct could comply with [c]ounty ordinances and … [still] be found to constitute a private nuisance under the community standard"[255] that is applied for private nuisances. Second, the court found that the "[p]laintiff's deposition testimony … establish[ed] sufficient evidence from which a reasonable juror could deduce…."[256] that the lessee's conduct was the legal cause of the alleged invasion. Finally, the court concluded that the lessor "ha[d] [p]roduced [s]ufficient [e]vidence for a [r]easonable [j]uror to [c]onclude [d]efendant [a]cted [i]ntentionally."[257]

In *Hall v. CNX Gas Co.*, the plaintiffs contended that CNX Gas Company, LLC (CNX) improperly allocated volumes of gas to multiple wells behind a single sales meter, thus depriving plaintiffs of royalties on gas lost or used between the wells and the point of sale. The trial court granted summary judgment to CNX on the allocation issue, holding that because the leases were silent as to how to allocate volumes, the court should supply the missing term so as to meet "community standards of fairness and policy."[258] The trial court found that CNX Gas's practice of allocating volumes pro rata met that standard. The plaintiffs appealed, arguing that the Pennsylvania Supreme Court's decision in *Pomposini v. T.W. Phillips Gas & Oil Co.*, 580 A.2d 776 (Pa. Super. Ct. 1990), meant that if allocation of volumes was not addressed in the lease, the lessee could not allocate and was required to pay on volumes measured at each well. The Pennsylvania Superior Court affirmed, agreeing with CNX that there was no allocation of lost and used gas because such volumes are simply not part of the royalty calculation – "[g]as lost or used on the way to the point of sale is simply not part of the royalty computation. It necessarily follows that lost and used gas is not allocated when the royalty is allocated among the various lessors."[259] The Court noted that "CNX bears seven-eighths of any lost revenue attributable to lost and used gas; the lessors bear one-eighth of the lost revenue."[260] That allocation is dictated by the provision in the lease that the one-eighth royalty is "based on the net amount realized at the point of sale."[261] Plaintiffs requested review by the Pennsylvania Supreme Court, which the Pennsylvania Supreme Court denied on November 2, 2016.[262]

The Third Circuit refused to overturn a jury award in favor of a class of plaintiff-lessors against Defendant Energy Corporation of America (ECA), on claims that ECA had improperly deducted from royalties interstate pipeline costs and marketing expenses

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[254]Tiongco v. Sw. Energy Prod. Co., No. 3:14-CV-1405, 2016 WL 6039130 (M.D. Pa. Oct. 14, 2016).
[255]*Id.* at *4.
[256]*Id.* at *6.
[257]*Id.*
[258]Hall v. CNX Gas Co., No. GD 10-21633, 2014 WL 11430738 (Pa. Com. Pl. Oct. 7, 2014).
[259]Hall v. CNX Gas Co., 137 A.3d 597, 604 (Pa. Super. Ct. 2016).
[260]*Id.* at 605 n.9.
[261]*Id.* at 604.
[262]Hall v. CNX Gas Co., No. 188 WAL 2016, 2016 WL 6508939 (Pa. Nov. 2. 2016).

incurred after title passed to ECA's buyer, its affiliate marketing company.[263] Prior to the jury award in March 2015, the district court had granted summary judgment in favor of ECA on the rest of plaintiffs' claims, holding that plaintiffs were not entitled to royalties on gas that was lost before the point of sale, that ECA was entitled to deduct post-production costs for transportation, processing and marketing, that ECA's method of allocating these costs among multiple wells behind the sales meters was proper, and that plaintiffs were not entitled to royalties on ECA's hedging of gas. On appeal, in a non-precedential opinion, the Third Circuit denied ECA's motion for judgment as a matter of law, or, alternatively, for a new trial, finding that a jury could reasonably conclude that transportation costs had been improperly deducted and that there was sufficient evidence to support the jury's conclusion that marketing costs were improperly deducted from the royalties.

In *Shedden v. Anadarko E. & P. Co.*, the court affirmed a decision holding that estoppel by deed applies to oil and gas leases.[264] Here, the landowners alleged that at the time they purchased sixty-two acres, they were unaware that their predecessors in interest had reserved a one-half interest of the oil and gas rights in a recorded deed in 1894. The landowners leased their oil and gas rights to Anadarko in May 2006. However, prior to making payment, Anadarko discovered the prior reservation and revised the order of payment so that it was only paying for half of the acreage leased, or thirty-one acres, which the landowners accepted. The landowners subsequently quieted title on the reserved one-half interest. In 2011, Anadarko invoked an extension clause in the lease by sending the landowners an extension payment of $70 per acre for sixty-two acres. The landowners filed a lawsuit seeking a declaration that the lease with Anadarko was only for a one-half interest. The superior court held that estoppel by deed barred the landowners from arguing that the lease only covered a one-half interest. The Pennsylvania Supreme Court agreed, and held that the lease was not modified by the initial payment for one-half of the acreage because the express language in the lease provided that the landowners were only entitled to payment for the oil and gas rights they actually owned. Further, the Court rejected the landowners' argument that estoppel by deed required a showing of equitable reliance, finding that the landowners were attempting to conflate two separate concepts: equitable estoppel and estoppel by deed.

The Third Circuit, in a non-precedential decision, decided a Pennsylvania oil and gas lease dispute on appeal from the Western District of Pennsylvania that concerned the interpretation of an oil and gas lease.[265] In *McWreath v. Range Resources-Appalachia, LLC*, the lessors, who only owned partial mineral rights in the property, argued the oil and gas lease they entered into with the lessee did not apply to oil and gas produced from the two wells the lessee drilled, and claimed they were cotenants in the oil and gas estate entitled to an accounting of the oil and gas produced from these wells. In support, the lessors argued that the lease only contemplated drilling operations on the surface of property adjacent to the lessors' mineral interests, and not on property directly above the oil and gas interests. The lessee had entered into agreements with the surface owner to conduct drilling operations on the surface and also had leases with the other partial mineral owners in the property.

The Third Circuit rejected the lessors' interpretation of the oil and gas lease and agreed with the district court that the granting clause in the oil and gas lease gave the lessee the "exclusive ability to explore for and produce oil and gas" and authorized the lessee "to use any methods or techniques required to do so".[266] The Third Circuit also rejected the

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[263]Pollock v. Energy Corp. of Am., Nos. 15-2648, 15-2649, 2016 WL 6156313 (3d Cir. Oct. 24, 2016).

[264]Shedden v. Anadarko E. & P. Co., 136 A.3d 485 (Pa. 2016).

[265]McWreath v. Range Res.-Appalachia, LLC, 645 F. App'x 190 (3d Cir. 2016).

[266]*Id.* at 193.

lessors' reliance on a provision in the lease providing that the lessee could not drill a well on the surface of the property. The Third Circuit noted that under Pennsylvania law, the subsurface owner has an implied right to access and use of the surface estate, and here, the lessors conveyed all rights in the subsurface to the lessee. Because the lessors did not own the surface estate and lessee had acquired the right to drill from the surface owner, the lessors could not rely on the lease's restriction of drilling on the surface.

A district court granted a lessee's motion for summary judgment, finding that the lessee did not breach a right-of-way agreement by using a pipeline to transport gas from other properties.[267] Here, the parties entered into a right-of-way agreement in 2010 that said nothing about the source of the gas to be transported (the 2010 Agreement). The district court held that the 2008 oil and gas lease was a separate agreement, and that the provision in the parties' 2008 Lease barring gas from other properties was not incorporated into the 2010 Agreement. The district court noted that a provision in the 2010 Agreement stated that the 2008 Lease was only incorporated where the provisions conflicted with or were inconsistent with the 2010 Agreement – here, the 2010 Agreement contained no provision addressing the source of the gas, thus the lessee did not breach the 2008 Lease by transporting gas from other properties.

Another court issued a memorandum opinion granting Chesapeake Appalachia, LLC's motion for summary judgment that the court, and not an arbitrator, must decide whether class action arbitration is available based on the language of the leases at issue.[268] The district court relied upon another case involving Chesapeake and concerning arbitrability issues, *Chesapeake Appalachia, LLC v. Scout Petroleum LLC*,[269] where the Third Circuit held that courts, and not arbitrators, decide questions of class arbitrability absent clear and unmistakable evidence otherwise. Most recently, a district court granted a motion for summary judgment filed by Chesapeake Appalachia 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.[270]

XII. TEXAS

As usual, Texas courts dealt with a variety of energy related cases in 2016. The large volume addressed numerous areas of interest to an energy practitioner ranging from basic deed construction to ongoing liability after the sale of oil and gas properties. The following cases provide a highlight of recent decisions we found worthy of note.

The certainty of sweep language was called to issue in *Mueller v. Davis*,[271] where mineral and royalty deeds did not contain a metes and bounds description, but rather each stated that the grantor conveyed "[a]ll of those certain tracts or parcels of land out of the following surveys in Harrison County, Texas, described as follows", and went on to list certain parcels of land containing oil and gas production units.[272] The deeds also contained language purporting to convey all of the mineral, royalty, and overriding royalty interest owned by the grantors in Harrison County "whether or not [the] same is herein above correctly described."[273] The court held that the property descriptions in the deed were insufficient to identify the property conveyed and that the deeds were ambiguous, but noted

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[267]Camp Ne'er Too Late, LP v. SWEPI, LP, 185 F. Supp. 3d 517 (M.D. Pa. 2016).
[268]Chesapeake Appalachia, LLC v. Brown, No. 3:14-0833, 2016 WL 815571 (M.D. Pa. Mar. 2, 2016).
[269]809 F.3d 746 (3d Cir. 2016).
[270]Chesapeake Appalachia, LLC v. Ostroski, No. 4:16-cv-50, 2016 WL 4179583 (M.D. Pa. Aug. 8, 2016).
[271]485 S.W.3d 622 (Tex. App. 2016).
[272]*Id.* at 625.
[273]*Id.* at 629.

that "a deed should not be declared void for uncertainty if it is possible…to ascertain from the description, aided by extrinsic evidence, what property the parties intended to convey."[274] Accordingly, the court remanded the dispute for trial to determine what interests, if any, were conveyed by the deeds.

Highlighting the importance of attention to details on deed construction, *Combest v. Mustang Minerals, LLC*,[275] the court ruled that a deed's reservation clause reserved 1/2 of the minerals (being all of the grantor's interest), not 1/2 of grantor's mineral interest. The court concluded that a deed making a reservation of minerals "from the land described" reserves minerals under the entire tract. In other words, because the reservation "excepts from *this conveyance*" (*i.e.*, the "land described") and not from the land "conveyed," the reservation is made with respect to the entire physical tract.

Aery v. Hoskins, Inc.,[276] involved an agreement entered into by three siblings to pool the royalty interests in their respective individually-owned tracts, and gave each sibling a right to a share of the royalties from the tracts owned by the other two siblings. A third party acquired one sibling's tract by a general warranty deed that conveyed all of such sibling's interest and all "appurtenant" interest therein. The issue before the court was whether the conveying sibling's share of the royalty interests from the other two siblings' tracts was also conveyed via the general warranty. The court held that the conveying sibling did not convey his share of royalties from his siblings' tracts, because the shares in question were literally not "appurtenant" to his tract, and his interest in his siblings' royalties was not necessary for the enjoyment of his tract. Further, the court stated that the general warranty deed did not specifically convey the conveying sibling's share of royalties from his siblings' tracts.

In *Dragon v. Harrell*,[277] the court analyzed the language of a conveyance. The grantors owned 15/16 of the minerals subject to a life estate in 1/4 of the royalty, and the reversionary interest in the life estate. They conveyed all of their interest to grantee, while reserving

> [A] free non-participating interest in and to the royalty on oil, gas and other mineral in and under the hereinabove described property consisting of ONE-HALF (1/2) of the interest now owned by Grantors together with ONE-HALF (1/2) of the reversionary rights in and to the presently outstanding royalty in on and under said property.[278]

The issue for the court to decide was whether the reserved interest was a ½ royalty or ½ of royalty. The court held that the phrase "the interest now owned by Grantors" referred to the royalty interest owned by the grantors at the time the deed was executed. The court reasoned that the use of the phrase indicated that the grantors "recognize[d] that the royalty interest being reserved was reduced by the prior reservations."[279]

In *Alford v. McKeithen*,[280] the court highlighted the pitfalls created when a deed incorporates documents by reference. The deed in question conveyed to the Alfords three tracts of land, citing the "metes and bounds" description provided in an attached exhibit, which such metes and bounds description also contained a reservation of ½ of the mineral

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[274]*Id.* at 628.
[275]No. 04-15-00617-CV, 2016 WL 4124066 (Tex. App. Aug. 3, 2016).
[276]493 S.W.3d 684 (Tex. App. 2016).
[277]No. 04-14-00711-CV, 2016 WL 1238165 (Tex. App. Mar. 30, 2016), *rev. denied* (July 22, 2016).
[278]*Id.* at *2.
[279]*Id.* at *4.
[280]No. 12-14-00262-CV, 2016 WL 1253902 (Tex. App. Mar. 31, 2016) (no petition).

rights. Accordingly, the court found the deed ambiguous and affirmed the trial court's decision to submit the issue to the jury.

In *Hysaw v. Dawkins*, the court emphasized that, in the context of contract and deed interpretation the intent of the parties is to be determined through "a careful and detailed examination of the document in its entirety, rather than by application of mechanical rules of construction that offer certainty at the expense of effectuating intent."[281] In *Hysaw*, a will provided that fee title to certain tracts would be conveyed to each of three children, but with respect to the minerals beneath all such tracts, "each of [the testatrix's] children shall have and hold an undivided one-third (1/3) of an undivided one-eighth (1/8) of all oil, gas[,] or other minerals in or under or that may be produced from any of said lands...."[282] When a lease covering the lands was executed which provided for a one-fifth royalty, a dispute arose as to whether each of the children should be entitled to (i) a "floating" one-third of one-fifth of the royalties due under the lease, or (ii) a fixed one-third of one-eighth royalty, which the owner of the surface agreement being entitled to the benefit of any royalty in the lease in excess of one eighth. After noting the "dilemma" posed by double-fraction conveyances and the shift away from the "near ubiquit[y]" of the 1/8 royalty, the court held that "all the other language in the document must be considered to deduce intent" before any particular meaning can be ascribed to double-fraction language.[283] In doing so, the court held that the will intended to devise a floating one third royalty that would result in each of the three children equally sharing future royalties across all three tracts of land and were entitled to a one-third (1/3) or one-fifth (1/5) royalty.

In *Prochaska v. Barnes*,[284] the court recognized that defendants, managers of drilling partnerships with oil and gas wells and leases in Texas, were not subject to personal jurisdiction in Texas because the management took place outside Texas and the leases managed were property of the drilling partnerships, and not the individual partners who were defendants. Accordingly, the court held that the defendants did not directly receive revenue from Texas wells as it first flowed through the partnerships.

The court re-affirmed in *Goss v. Addax Minerals Fund, LP*[285] the limited role of the "discovery rule" in cases where a deed contains obvious errors or omissions. Goss aligned as the successor-in-interest to the grantee of a 1994 deed. The relevant sales contract from 1994 stated that Goss would receive all of the minerals. However, the 1994 deed left title to the minerals in the Grantor. In 2005, Goss secured and recorded an affidavit from the title company that prepared the 1994 deed. The affidavit described the mistake as a scrivener's error. Goss waited until 2013 (one year after the successor-in-interest to the original grantor leased the minerals to Addax) to file suit to quiet title to the mineral estate. The court rejected Goss's attempt to reform the 1994 deed, noting that the document unambiguously reserved the mineral estate to the original Grantor. Because the 1994 deed plainly left title to the minerals in the original Grantor, the discovery rule was inapplicable.

The central holding in *Garcia v. Genesis Crude Oil, L.P.*[286] was that payment of suspended royalties, plus interest before judgment will defeat a claim for attorney's fees and statutory minimum damages. In *Garcia*, a lessee paid a lessor all unpaid royalties and statutory interest allegedly owed to lessor. As such, the lessee was granted a take nothing judgment on Lessee's motion for summary judgment. The court held that for a plaintiff to seek attorney's fees or minimum damages under Section 91.406 of the Texas Natural

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[281] 483 S.W.3d 1, 16 (Tex. 2016).
[282] *Id.* at 5.
[283] *Id.* at 14.
[284] No. 01-15-01044-CV, 2016 WL 4055642 (Tex. App. July 28, 2016) (no petition).
[285] No. 07-14-00167-CV, 2016 WL 1612918 (Tex. App. Apr. 21, 2016), *rev. denied* (July 22, 2016).
[286] No. 13-14-00727-CV, 2016 WL 1732436 (Tex. App. Apr. 28, 2016) (no petition). (Payment satisfies Division Order Statute).

Resources Code, "it must first prevail on a cause of action brought under [C]hapter 91."[287] Because the lessee tendered full payment of proceeds and interest to the lessor, the lessor's cause of action against Lessee failed as a matter of law.

In *Fort Apache Energy, Inc. v. Resaca Resources, LLC*,[288] the court held that an unrecorded power of attorney is not synonymous with an unrecorded instrument that could bind a subsequent purchaser. The court reasoned that section 13.001(b) of the Property Code, which binds a subsequent purchaser who has knowledge of an unrecorded instrument, only contemplates an unrecorded conveyance or interest in property, not an unrecorded power of attorney, which is governed by section 489 of the Texas Probate Code. Therefore, although Fort Apache had knowledge of the unrecorded power of attorney when it entered into the lease at issue, Fort Apache was not bound by knowledge of the unrecorded power of attorney held by Resaca's, predecessor's lessor, who did not own or control the minerals and thus had no authority to enter into the lease at the time of the lease, because the unrecorded power of attorney did not describe or purport to convey any interest in real property.

In *Chesapeake Exploration L.L.C. v. Hyder*,[289] the Supreme Court of Texas held that parties to an oil and gas lease may modify the general rule that an overriding royalty interest is free from costs of production but not post-production expenses. Specifically, the court held that using the term "cost-free" to describe an overriding royalty that could either be paid in cash or in-kind, at the royalty owner's choice, created a royalty that was free from post-production costs.

Apache Deepwater, LLC v. McDaniel Partners, Ltd.,[290] confirms that production payments exist only as long as the burdened lease exists. The production payment interest in this case was created by the assignment of multiple leases, described as a fraction of total production from two surveys covered by the leases, until a dollar cap was reached. After some of these leases expired, Apache proportionately reduced payment, but the court of appeals held that Apache could not adjust the production payment equation downward, because the assignment contained no express language allowing for such a reduction. The Texas Supreme Court reversed, reasoning that the calculations behind the fraction of production payment was tied to production from each respective lease, as opposed to production from the covered lands, and ruled that Apache owed no duty to make production payments to McDaniel on expired leases.

The determination of drainage under off-set lease provisions was the issue in *Adams v. Murphy Exploration & Production Co.*[291] The court was asked to consider a summary judgment based on the meaning of "off-set well" as used in an oil and gas lease. Although the lessee timely drilled a horizontal well parallel to and approximately 2,100 feet from the draining well through the same producing, the lessors claimed this well was not an offset well under the lease and sued the lessee for unpaid in-lieu royalties. The lessee argued at trial that that the conventional understanding of drainage is inapplicable to geological structures in the Eagle Ford and any well drilled in the same formation on the drained property, regardless of location, is an "offset well." The appeals panel reversed summary judgment in favor of lessee, finding that the lessee's evidence lacked the specificity necessary to prove as a matter of law that its well met the lease definition of "off-set well" (*i.e.*, that it protects the leased premises from the draining well).

In *TEPCO, L.L.C. v. Reef Exploration, L.P.*,[292] the court held that the wellbore charges for reworking a well for completion in a more shallow area were subject to a

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[287] *Id.* at *4.

[288] No. 09-14-00325-CV, 2016 WL 637985 (Tex. App. Feb. 18, 2016) (no petition).

[289] 483 S.W.3d 870 (Tex. 2016).

[290] 485 S.W.3d 900 (Tex. 2016).

[291] 497 S.W.3d 510 (Tex. App. 2016), *petition for review filed* (Aug. 31, 2016).

[292] 485 S.W.3d 557 (Tex. App. 2016) (no petition).

recoupment calculation for non-participating parties. The JOA in question concerned the drilling operation under the deeper zones of a tract that already had a JOA with respect to shallower zones. The JOA for the deeper zones had a Subsequent Operations clause which provided for reimbursement of drilling costs by the participants in the shallow completion if the wellbore was taken over to be used in the shallow completion. The attempted deep well resulted in a dry hole, but it was used to complete a successful shallow well. The issue was whether the wellbore charge was a drilling cost under the terms of the agreement. The court construed Subsequent Operation to include reworking a well for completion in a more shallow zone. Because the parties agreed that the operation was not the "drilling" of a well, the court reasoned that if doing something to an existing wellbore was not "drilling" it must then be characterized as "reworking" the well.

The risk of ongoing liability after a sale was heightened in 2016. In the *ATP Oil & Gas Corp.*[293] bankruptcy case, the impact of the costs of plugging and abandoning wells resulted in a $100 million liability for the predecessor-in-title from a decade prior, Anadarko, because the debtor could not pay the $100 million P&A liability.[294] The court determined that Anadarko's co-lessee P&A obligation arose pre-petition and treated it as an unsecured administrative expense claim.

In *Crosstex North Texas Pipeline, L.P. v. Gardiner*,[295] the court clarified the law regarding the legal doctrine of "nuisance." The court held "the term 'nuisance' refers not to a defendant's conduct or to legal claim or cause of action but to a type of legal injury involving interference with the use and enjoyment of real property."[296] The court noted that a nuisance action required a "substantial" interference and "unreasonable" discomfort and, the plaintiff must prove an unreasonable effect, not unreasonable conduct by the defendant. Further, the court held that defendants can be liable for nuisance if their conduct is intentional, negligent, or by engaging in dangerous or ultra-hazardous activities.

Phillips v. Carlton Energy Group, LLC,[297] clarified the calculation of lost profits. The court held that when market value of a prospect is measured by lost profits, lost profits must be proved with reasonable certainty in order to prevent recovery based on speculation. Applying this rule to the case, the court found that prices fixed by investors can contain evidence to support the verdict. The court found support for the damage model in defendant's agreement to pay plaintiff an amount in exchange for an interest in the project.

Railroad Commission of Texas v. Gulf Energy Exploration[298] involved a well that was mistakenly plugged by the Railroad Commission after an agreement was reached with the lessee to postpone the plugging. The lessee obtained legislative consent to sue the Commission and obtained a favorable verdict on negligence and breach of contract claims, which verdict was affirmed by the court of appeals. The Texas Supreme Court held that (i) the legislative consent obtained by the lessee did not preclude the Commission from invoking the protections afforded by Section 89.045 of the Texas Natural Resources Code, which provides for an exculpation from liability for the Commission related to acts done in good faith, and (ii) the good faith defense applied to claims related to the Commission's mistaken plugging of the well in question. However, the court cited a series of "red flags" in the conduct of the Commission that meant that it could not say based on the facts that "as a matter of law that the Commission acted in good faith."[299] Accordingly, the court reversed the judgment of the court of appeals and remanded the matter for a new trial.

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[293] 540 B.R. 294 (Bankr. S.D. Tex. 2015).
[294] *In re ATP Oil & Gas Corp.*, No. 12-36187, 2013 WL 3157567 (Bankr. S.D. Tex. June 19, 2013).
[295] 505 S.W.3d 580 (Tex. 2016).
[296] *Id.* at 588.
[297] 475 S.W.3d 265 (Tex. 2015).
[298] 482 S.W.3d 559 (Tex. 2016).
[299] *Id.* at 570.

The court held in *Southwest Royalties, Inc. v. Hegar*,[300] that downhole equipment such as casing and tubing was not exempt from state sales taxes. In *Hegar*, a driller sought a refund for sales taxes paid on the casing, tubing, and pumps used by its oil and gas exploration division citing Section 151.318 of the Texas Tax Code. The section provides a tax exemption for equipment "used or consumed" in "the actual manufacturing, processing, or fabrication of tangible personal property for ultimate sale…."[301] The court concluded that "processing" included any equipment used to "modify or change the characteristics of tangible personal property," including hydrocarbons.[302] The key question was whether the casing, tubing, and pumps used by the driller caused any physical or chemical change to minerals after they were extracted. While minerals undergo various phase changes during extraction, the court concluded that these phase changes were the result of natural shifts in pressure and temperature that occurred during the extraction process. Although equipment plays a vital role in transporting hydrocarbons to the surface, it is only a "conduit" by which the minerals moved from the reservoir and therefore does not qualify as processing under the exemption.[303] This case is important because if the court determined the meaning of "processing" differently, Texas would have had to refund taxpayers a lot of money. However, the court left the door open for future tax disputes involving more advanced extraction equipment which may offer opportunities for exploration, production, and processing companies seeking tax benefits under Texas law.

XIII. WEST VIRGINIA

A. Legislative Developments

The West Virginia Legislature passed H.B. 4323 establishing a fifteen-minute accident reporting requirement for accidents with serious injuries or explosions.[304] The reports must be made to Homeland Security. The bill applies to both well operators and pipelines. The bill added new West Virginia Code sections 15-5C-1 through 2.

H.B. 4218 expands the definition of "underground facility" in the One-Call System Act "to include underground pipelines for gas, oil, or any hazardous substances…." within a normal inside diameter in excess of four inches and that "are not otherwise subject to one-call reporting requirements under federal … [and] state law."[305] The bill amended and reenacted West Virginia Code section 24C-1-2.

S.B. 419 removed the "excess" severance tax of 4.7 cents per thousand cubic feet of natural gas that companies have paid since 2005 and which was first implemented to pay off the state's old workers' compensation debts.[306] The bill amended and reenacted West Virginia Code section 11-13V-4.

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[300]500 S.W.3d 400 (Tex. 2016). The Texas Supreme Court issued a revised opinion on October 21, 2016, clarifying that in most cases "artificial means" are needed to move oil & gas from its reservoir into the wellbore.

[301]TEX. TAX CODE ANN. § 151.318(a)(2), (5), (10) (West 2016).

[302]*Sw. Royalties*, 500 S.W.3d at 406–09.

[303]*Id*. at 408-09 ("There is no evidence that the equipment was applied to cause changes in their characteristics as the hydrocarbons moved from the reservoir to the surface.").

[304]H.B. 4323, 2016 Leg., 83d Sess. (W. Va. 2016).

[305]H.B. 4218, 2016 Leg., 83d Sess. (W. Va. 2016).

[306]S.B. 419, 2016 Leg., 83d Sess. (W. Va. 2016).

Mountain Valley Pipeline, LLC v. McCurdy[307] involved the application of West Virginia's eminent domain statute. MVP was a pipeline company in the process of seeking a certificate of public convenience and necessity from FERC. The landowners sought and obtained an order from the circuit court granting preliminary and permanent injunction against MVP, precluding it from conducting surveys as part of the FERC application process. The circuit court found that MVP was not authorized under the eminent domain statute to enter the property because the pipeline at issue was not for "public use." The Supreme Court of Appeals of West Virginia affirmed. First, the court agreed that under the eminent domain statute, MVP only had the right to enter the property if it could demonstrate the pipeline was for a "public use." Second, the court found that the subject pipeline did not equate to a public use based upon the following facts: (1) the defendant "is not regulated as a utility by any West Virginia agency" (2) the primary purpose of the pipeline was to deliver gas to a distributor located in Virginia; (3) up to ninety-five percent of the gas shipped through the pipeline will be owned and produced by the defendant's affiliated companies, none of which are West Virginia companies and (4) "there is only a possibility … [or] potential that some of the gas would reach West Virginia consumers."[308]

Leggett v. EQT Production Co.[309] involved a dispute over the deduction of post-production costs from royalty payments issued to successor-in-interest lessors of a 1906 flat-rate royalty lease. In 1982, West Virginia enacted a statute, West Virginia Code section 22-6-8, that found flat-rate royalty leases violated public policy[310] and precluded the issuance of a permit for any new drilling or reworking of existing wells under such leases, unless the operator provides an affidavit certifying that it would pay a royalty of "*not less than one eighth of the total amount paid to or received by or allowed to the owner of the working interest at the wellhead . . . .*"[311]

There were nine wells drilled on the subject property, some which pre-dated the statute, but the majority of wells were drilled after the statute went into effect. The case was removed to the Northern District of West Virginia, which entered judgment against the lessors on all but the breach of contract claim and then certified two questions to the Supreme Court of Appeals of West Virginia—the first of which related to whether the *Tawney*[312] decision has "any effect upon … whether a lessee of a flat-rate lease, converted [under the statute], may deduct post-production expenses from his lessor's royalty, particularly with respect to the language of '1/8 at the wellhead' found in West Virginia Code [section] 22-6-8(e)?"[313] Noting its ambiguity finding in *Tawney* as to the "at the wellhead" language and the fact that the statute was enacted to "right past wrongs" inflicted upon lessors, the court reformulated the question as follows:

> Whenever the lessee-owner of a working interest in an oil or gas well must comply with … [West Virginia Code [section] 22-6-8(e)] by tendering to the lessor-owner of the oil or gas in place a royalty not less than one-eighth of the total amount paid to or received by or allowed to the lessee, *[does] the statute require[] in addition that the lessee not deduct from that amount any expenses that have been incurred in gathering, transporting, or treating the oil or gas after it has been initially extracted, any sums attributable to*

[307]793 S.E.2d 850 (W. Va. 2016).
[308]*Id.* at 861.
[309]No. 16-0136, 2016 WL 6833119 (W. Va. Nov. 15, 2016).
[310]W. VA. CODE ANN. § 22-6-8(b) (West 2016).
[311]W. VA. CODE ANN. § 22-6-8(e) (2016) (emphasis added).
[312]Tawney v. Columbia Nat. Res., L.L.C., 633 S.E.2d 22 (W. Va. 2006).
[313]*Leggett*, 2016 WL 6833119, at *3.

> *a loss or beneficial use of volume beyond that initially measured, or any other costs that may be characterized as post-production*[?][314]

The court ultimately answered the re-formulated question in the affirmative and declined to address the second certified question.

In *Poulos v. LBR Holdings, LLC*, the court determined whether a reservation of '"an undivided one-half interest in the oil and gas' under … [said] property" in a 1938 deed also reserved the coalbed methane.[315] The defendants sought a bright-line rule which interpreted any reservation of gas to include coalbed methane. The Court refused to establish such a bright-line rule, but instead, reiterated its position that "'in the absence of specific language to the contrary or other indicia of the parties' intent, an oil and gas lease does not give the oil and gas lessee the right to drill into the lessor's coal seams to produce coalbed methane gas….'"[316] The court further stated that this case by case rule requiring a clear intent to treat coalbed methane the same as "gas" is supported by the historical fact that coalbed methane was not a valuable resource, and was in fact considered a dangerous nuisance, until the 1990s, as this created a disincentive to expressly reserve it and thus presumably parties did not intend to do so. Furthermore, the court also relied on West Virginia's Coalbed Methane and Units statute in refusing to establish a bright line rule regarding coalbed methane ownership, finding it "worthy of note" that this comprehensive statute "'completely avoids and eschews any attempt at deciding ownership of coalbed methane.'"[317]

In *American Energy – Marcellus, LLC v. Poling*, the defendant oil and gas operators moved for summary judgment on a declaratory judgment claim that it had an implied right to pool leases to form a drilling unit, when "[t]here were numerous unknown and missing heirs and a few current mineral owners who refused to sign pooling amendments" to preexisting leases.[318] The court granted the defendants' motion for summary judgment on declaratory judgment finding that there is an implied right to pool oil and gas leases. The court found that, while the leases were silent as to pooling, the purpose of the oil and gas lease is the "production of oil and gas and [the] payment of royalties," and the ability to pool was necessary to economically develop the shale formations.[319]

In *Dytko v. Chesapeake Appalachia, LLC*, a lessor/surface owner, his wife, and two minor children filed suit claiming damages for: (1) "fraudulent inducement; (2) breach of contract; (3) negligence/intentional tort; and (4) private nuisance" in relation to the drilling of multiple wells from the subject property.[320] The defendant successfully compelled the lessor/surface owner's claims to arbitration, with the remaining plaintiffs' claims stayed pending the outcome of the arbitration. The arbitration was completed and all of the lessor/surface owner's claims were denied. The stay of the remaining plaintiffs' claims was then lifted and the district court dismissed all of their claims with the exception of the private nuisance claim.[321] Defendant sought summary judgment, arguing res judicata should prevent the remaining plaintiffs from relitigating that the operations contractually

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[314]*Id.* at *8 (emphasis added).
[315]792 S.E.2d 588, 591 (W. Va. 2016).
[316]*Id.* at 593.
[317]*Id.* at 603.
[318]*There is an Implied Right to Pool an Oil and Gas Lease*, JACKSON KELLY PLLC (last visited Mar. 14, 2017).
[319]*Id.*
[320]No. 5:13CV150, 2016 WL 3983657, at *1 (N.D.W. Va. July 25, 2016).
[321]The fraudulent inducement and breach of contract claims were dismissed as none of the remaining plaintiffs were signatories to the lease or other contracts at issue. Similarly, the court dismissed the negligence/intentional tort claims finding no allegations of injuries were made by the remaining plaintiffs.

agreed to by the lessor/surface owner were a private nuisance. Noting privity is typically required to impose res judicata on a non-party, the court found that it may still be imposed "where the [non-parties'] interests were adequately represented by" another vested with the authority of representation.[322] Ultimately, the court granted summary judgment, finding res judicata applied.

C. Administrative Developments

The WVDEP issued General Permit G35-C in an effort to prevent and control regulated air pollutants from eligible natural gas compressor and/or dehydration facilities. "Natural gas compressor station activities are reciprocating internal combustion engine driven compressor(s) or combination of equipment . . . that supplies energy to move natural gas at increased pressure from gathering systems, in transmission pipelines or into storage."[323] The terms of General Permit G35-C are applicable to "all natural gas compressor and/or dehydration facilities designed and operated for the purpose of gathering, transmitting, or compressing natural gas" except for a limited number of exceptions.[324] The "General Permit G35-C allows registrants to install and operate specified equipment, air pollution control devices and/or emissions reduction devices to control emissions of regulated pollutants into the air."[325] The West Virginia Oil & Natural Gas Association appealed General Permit G35-C to the West Virginia Air Quality Board.[326] Among other objections, the appeal asserts that the general permit inappropriately prohibits unreasonable noise and light; develops an LDAR program without establishing parameters of such a program through rulemaking; and will contain sections conflicting with EPA's proposed adoption of 40 C.F.R. 60 Subpart OOOOa. The appeal is ongoing.

The WVDEP issued General Permit G70-D in an effort to prevent and control regulated air pollutants from eligible natural gas production facilities located at well sites. The terms of General Permit G70-D are applicable to all facilities engaged in natural gas production activities.[327] General Permits G70-A, G70-B, and G70-C "will continue to exist, however, there will be no future registrations, modifications, or administrative updates allowed to registrations issued under those permits."[328] The "General Permit G70-D establishes an emission cap on . . . regulated and hazardous pollutants[.] The fugitive emissions of a stationary source shall not be considered in determining whether it is a major stationary source for the purposes of…." acquiring operating permits pursuant to West Virginia Code Regulation 45-30-2 or for eligibility for the General Permit G70-D.[329]

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[322] *Dytko*, 2016 WL 3983657, at *6.

[323] W. VA. DEP'T OF ENVTL. PROT., GENERAL PERMIT G35-C: ENGINEERING EVALUATION/FACT SHEET 2 (2016).

[324] *Id.* at 4.

[325] *Id.* at 2.

[326] Notice of Appeal, W.Va. Oil & Nat. Gas Ass'n v. W.Va. Dep't of Envtl. Prot., No. 16-02-AQG (W. Va. Air. Quality Bd. Jan. 15, 2016).

[327] W. VA. DEP'T OF ENV'T PROT., CLASS II GENERAL PERMIT G70-D (2016).

[328] W. VA. DEP'T OF ENV'T PROT., *supra* note 323, at 2.

[329] W. VA. DEP'T OF ENV'T PROT., GENERAL PERMIT G70-D, ENGINEERING EVALUATION/FACT SHEET 3 (2016).

A. Legislative Developments

Wyoming's Legislature convened its twenty-day Budget Session on February 8, 2016. During the session, the Legislature addressed two important oil and gas issues, one related to carbon sequestration and the other addressing taxation.

The Legislature amended Wyoming's carbon sequestration statute to allow the State Oil and Gas Supervisor to convert a carbon dioxide (CO_2) injection permit for enhanced oil and gas purposes to a geological sequestration permit.[330] Before conversion, the new statute requires the Supervisor to determine that the permit is being used to inject CO_2 for the primary purpose of long-term storage and the Supervisor must determine the permit does not create a risk of interference with underground sources of drinking water. After conversion to a geological sequestration permit, jurisdiction over the permit transfers from the Wyoming Oil and Gas Conservation Commission (WOGCC) to the Wyoming Department of Environmental Quality.[331]

The 2016 Legislature enacted legislation to remove archaic and obsolete provisions from Wyoming's mineral taxation statutes.[332] These amendments made no substantive change to the tax statutes. The Legislature also passed a bill allowing taxpayers or taxing entities to request electronic transmission of certain mineral tax assessment information.[333]

B. Judicial Developments

The federal district court issued an Order on Petitions for Review of Final Agency Action, striking down the Bureau of Land Management's (BLM's) hydraulic fracturing rule.[334]

After years of work, the BLM issued its "Fracking Rule" applicable to oil and gas activities on federal and Indian lands.[335] The Fracking Rule was scheduled to become effective on June 24, 2015, but the federal court issued a preliminary injunction preventing the BLM from implementing the rule. Ultimately, the court overturned the rule on the grounds that BLM has no jurisdiction over fracking. The court determined that Congress never delegated authority to the Department of Interior and BLM to regulate fracking.

BLM argued it had authority to regulate fracking under the Mineral Leasing Act of 1920 (MLA) and the Federal Land Policy, the Management Act of 1976 (FLPMA), and several other federal leasing statutes, which grant BLM authority to regulate oil and gas leasing and development activities on federal lands.[336]

For decades after enactment of the Safe Drinking Water Act (SDWA) in 1974, the Environmental Protection Agency (EPA) asserted that it had jurisdiction over fracking activities. Because of EPA's exercise of jurisdiction, BLM did not attempt to regulate fracking. However, when Congress enacted the Energy Policy Act of 2005 (EP Act), it

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[330] WYO. STAT. ANN. § 35-11-313(c) (2016); S.F. 0028, 63d Leg., 2016 Budget Sess. (Wyo. 2016).
[331] § 35-11-313(c).
[332] WYO. STAT. ANN. §§ 39-14-204(a)(iii)-(iv), 39-14-208(b)(iii); S.F. 0021, 63d Leg., 2016 Budget Sess. (Wyo. 2016).
[333] WYO. STAT. ANN. §§ 39-13-102(n), 39-13-103(b); H.B. 0077, 63d Leg., 2016 Budget Sess. (Wyo. 2016).
[334] Wyoming. v. U.S. Dep't of Interior, Nos. 2:15-CV-043-SWS, 2:15-CV-041-SWS, 2016 WL 3509415 (D. Wyo. 2016), *appeal docketed*, No. 16-8069 (10th Cir. June 29, 2016).
[335] *Id.* at *1 (citing 80 Fed. Reg. 16,128-16,222 (Mar. 26, 2015) (subsequently codified at 43 C.F.R. § 3160)).
[336] *Id.* at *4-5, *7-8, *10.

"expedite[d] oil and gas development within the United States" and specifically removed hydraulic fracturing operations from the EPA's jurisdiction under the SDWA.[337] Through its 2016 Fracking Rule, the BLM attempted to assert jurisdiction over fracking.[338]

In its 2016 order, the federal court found that the EP Act's removal of EPA's jurisdiction over fracking did not vest BLM with jurisdiction over fracking. The court held: "Given Congress' enactment of the EP Act of 2005, to nonetheless conclude that Congress implicitly delegated BLM authority to regulate hydraulic fracturing lacks common sense."[339] The court, therefore, held that the Fracking Rule was unlawful.[340] The district court's opinion has been appealed.

In *Pennaco Energy, Inc. v. Sorenson*, the Wyoming Supreme Court issued an opinion reaffirming its prior decision that a producer remains liable for duties to a landowner under a Surface Use Agreement (SUA) after assignment of the SUA to a third party.[341] In the 1990s, the producer/operator acquired lease interests and entered into an SUA with a landowner covering coalbed methane drilling and production operations. Under the SUA, the operator was required to pay the landowner an annual fee and to ensure lands subject to development would be reclaimed once mineral production ended. In July 2010, the operator sold its lease interests and SUA interests to a third party, which then assigned all of the interests to a fourth party. Following the assignment, the operator made no further annual payments and did not reclaim any of the lands. The landowner sued the operator, as well as the subsequent interest owners, to collect unpaid annual fees and to enforce the SUA's reclamation requirements. The subsequent interest owners never responded to the lawsuit and the trial court entered default judgments in favor of the landowner against those parties.

The operator responded to the landowner's complaint and contended that, following the assignment, "it was no longer required to perform … [any] obligations [under the SUA]."[342] The operator "argued that … [an] exculpatory clause included in the mineral lease[s] was incorporated by reference into the [SUA]…." and, as a result, relieved the operator of liability.[343] In the alternative, the operator argued its obligations under the SUA "constitute[d] covenants running with the ownership of the mineral estate…." and, as a consequence, the transfer and assignment to the third party released the operator from liability under the SUA.[344]

The trial court ruled for the landowner and the operator appealed. The Wyoming Supreme Court affirmed the trial court's ruling. In its opinion, the court held that because the SUA did not contain language specifically releasing the operator from its obligations following assignment, the operator remained liable for payments and reclamation.[345]

In *Merit Energy Co. v. Horr*, the court addressed an oil and gas operator's liability for injuries sustained by an independent contractor's employee.[346] The operator in the case employed an operations manager and field foremen who managed operations conducted by an independent contractor. The contractor conducted various operations in the field, including the clearing of clogged high pressure wells. One of the contractor's employees was injured during the work. The employee filed suit against the operator and a jury

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[337] *Id.* at *10.
[338] *Id.* at *9-10.
[339] *Id.* at *12.
[340] *Wyoming*, 2016 WL 3509415, at *12.
[341] 2016 WY 34, 371 P.3d 120 (Wyo. 2016) (citing Pennaco Energy, Inc. v. KD Co. LLC, 2015 WY 152, 363 P.3d 18 (Wyo. 2015).
[342] 2016 WY 34, ¶ 15, 371 P.3d at 124.
[343] *Id.*
[344] *Id.*
[345] 2016 WY 34, ¶ 45, 371 P.3d at 130-31.
[346] 2016 WY 3, 366 P.3d 489 (Wyo. 2016).

eventually found the operator 45% at fault for the employee's injuries. The Wyoming Supreme Court affirmed. It held there was sufficient evidence to support a finding that the operator, through its foremen, retained control over a portion of the independent contractor's work. The court relied upon evidence that the foremen approved equipment used by the independent contractor and the foremen did not inspect the well pressure during the work.

C. Administrative Developments

Effective April 1, 2016, the WOGCC amended its rules governing the flaring and venting of natural gas.[347] The new rule reduced the maximum venting of natural gas from 60,000 cubic feet per day (MCF/D) to 20 MCF/D, unless the WOGCC issues a special order for increased venting. Following the rule change, operators must report the following to the WOGCC on a monthly basis: flaring volumes, venting volumes, the number of days flaring and/or venting has occurred, the measurement method used to determine the flared or vented volumes, and all circumstances that involved flaring or venting.

The WOGCC also amended its well bonding and permitting rules. Effective February 1, 2016, the WOGCC increased its blanket bond requirement to $100,000.00, and set individual well bonds at $10 per foot per well. The WOGCC also set its split estate bonding rate at $10,000.00 per well site. The new fee for an Application for a Permit to Drill a well (APD) is $500.00, and those APDs remain valid for two years.[348]

[347] 3 WYO. CODE R. § 39 (LexisNexis 2016). The State Oil and Gas Supervisor issued a memorandum on April 25, 2016, stating that in order to give operators time to adjust to the new requirements, the WOGCC would implement the rule for June 2016 production (reported by July 31, 2016).

[348] 3 WYO. CODE R. §§ 4, 8 (LexisNexis 2016).

Chapter 20 • PETROLEUM MARKETING
2016 Annual Report [1]

2016 was not a hotbed of reported decisions involving the Petroleum Marketing Practices Act (PMPA). The limited number of reported decisions was matched by the limited scope of the PMPA issues courts addressed in those cases. The reported decisions involved rights of action and removal jurisdiction under the PMPA, the definition of a PMPA franchise, as well as termination grounds and the propriety of termination notices.

I. RIGHTS OF ACTION UNDER THE PMPA

In *Puma Energy Caribe, LLC v. Riollano-Caceres*,[2] the United States District Court for the District of Puerto Rico rejected a claim by the franchisor under the PMPA, by which the franchisor sought specific performance of the franchise agreement and also an injunction to prevent the franchisee from removing signage bearing the franchisor's trademark and to compel the franchisee to restore all signage bearing the trademark, which the franchisee already had removed. In that case, the defendant dealer entered into a supply agreement with the franchisor to buy and resell PUMA-branded fuels. The franchisee removed PUMA-signage from the station more than two months before the supply agreement was due to expire on November 30, 2015. The franchisor sued for trademark infringement under the Lanham Act and also brought claims for breach of contract under both the PMPA and state law. In granting the defendant's motion for summary judgment on the franchisor's PMPA claim, the court held that "courts have repeatedly recognized that the PMPA does not … provide franchisors with a cause of action[,]" such that the "[p]laintiff, as the franchisor, cannot rest its breach of contract claim on the PMPA."[3]

Similarly, in *AVP Metro Petroleum, LLC v. Sepahvand*,[4] the United States District Court for the Northern District of Oklahoma held that it lacked subject matter jurisdiction over a claim by the franchisor that the franchisee breached the supply agreement and a related promissory note by failing to make timely payments for fuel. There, the plaintiff franchisor sued in state court. The defendant franchisee asserted a counterclaim for unlawful termination in violation of the PMPA and removed the case to federal court. The court remanded the action, holding that the "[p]laintiff's claim is merely a collection action, and although the PMPA provides the defendant with certain rights regarding the motor fuel marketing agreement, it does not govern the plaintiff's attempt to collect the unpaid amount the defendant owes under the terms of the agreement …."[5] The court further held the "[p]laintiff's claim thus does not arise under the PMPA" and the defendant's PMPA counterclaim based on deficient notice of termination did not, "under the well-pleaded complaint rule … give rise to federal question jurisdiction over a case in which the the plaintiff has alleged state law claims only."[6] Accordingly, and because there were no allegations of diversity jurisdiction, the court held that it lacked subject matter jurisdiction and remanded the action to state court.

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[2]No. 14-1790 (JAG), 2016 U.S. Dist. LEXIS 115127 (D.P.R. Aug. 25, 2016).

[3]*Id.* at *11.

[4]No. 14-CV-0616-CVE-PJC, 2016 U.S. Dist. LEXIS 15543 (N.D. Okla. Feb. 9, 2016).

[5]*Id.* at *6.

[6]*Id.* at *6-7.

Likewise, in *Wallis Petroleum, L.C. v. Creve Coeur Oil and Car Wash, Inc.*,[7] the United States District Court for the Eastern District of Missouri remanded a collection action by a franchisor for failure to pay for fuel deliveries. In its state court petition, the franchisor asserted claims for breach of contract and alleged that it complied with of the section 2804 of the PMPA when it terminated the franchisee's franchise agreements. The plaintiff franchisor, a BP-branded jobber, also sought specific performance of defendant franchisee's obligation to remove the BP marks at the station sites. The defendant dealer removed the action to federal court, asserting federal question jurisdiction under the PMPA. In remanding the case, the court held that it lacked subject matter jurisdiction, in that the state court action was a contract claim by a franchisor, not a franchisee, and the franchisor was not seeking a declaration of rights under the PMPA.[8]

II. Definition of a PMPA Franchise

In *Kirman v. Bill Wolf Petroleum Co.*,[9] the United States District Court for the Southern District of New York addressed the issue of when a PMPA franchise relationship can exist absent a traditional supply relationship. The district court dismissed a complaint and denied a related request for a preliminary injunction by a dealer asserting a claim for a refusal to renew in alleged violation of the PMPA, on the grounds that the parties had no PMPA franchise relationship. In *Kirman*, the plaintiff dealer leased his station from defendant Williamsbridge Road Realty Corp. (WRRC), an affiliate of defendant Bill Wolf Petroleum Co. (BWPC). The lease required that the plaintiff dealer obtain fuel only from suppliers designated by WRRC and that plaintiff execute supply agreements with the designated suppliers. BWPC was the designated supplier. Initially, the site was BP-branded and, at WRRC's direction, the plaintiff purchased BP branded fuel from BWPC. When BWPC rebranded from BP to Shell, WRRC required the plaintiff dealer to rebrand to Valero, to avoiding competing with a nearby Shell-branded station supplied by BWPC. A few years later, the plaintiff signed a new lease and agreed to a rent increase in exchange for permission to obtain fuel from a supplier of his own choice. Although WRRC still prohibited the plaintiff from selling Shell fuel at the leased property, it did not designate the brand of fuel to be sold at the site. The plaintiff elected to rebrand the site to Gulf, procuring fuel from his own supply company. Five years later, WRRC notified the plaintiff that the lease would not be renewed and that the plaintiff must vacate the premises in thirty days.

The plaintiff sued WRRC, its president, and BWPC, claiming that the defendants violated the PMPA when they failed to renew the lease. In rejecting the claim, the court first stated the elements of a PMPA franchise: "(1) the ownership and control of a trademark (by the franchisor) and the authorization to use said trademark (by the franchisee), and (2) a contract for the sale, consignment, or distribution of motor fuel."[10] The court held that the allegations in the plaintiff's complaint did not satisfy either element, such that the parties did not have a PMPA franchise relationship.

The court reasoned that, because defendants, which were not Gulf-licensees, had no rights in the Gulf trademark, they could not "authorize or permit" the plaintiff to use it, as required by the first element and section 2801(3). The plaintiff argued that he satisfied that element because the defendants "'authorized or permitted' him to operate a Gulf station, solely by prohibiting him from operating a Shell station, and thus [d]efendants 'controlled' which trademarks he was permitted to use."[11] The court was not swayed, as

[7]No. 4:15 CV 1692, 2016 U.S. Dist. LEXIS 14858 (E.D. Mo. Feb. 18, 2016).
[8]*Id.* at *5-6.
[9]No. 16-cv-7550 (CM), 2016 U.S. Dist. Lexis 165327 (S.D.N.Y. Nov. 22, 2016).
[10]*Id.* at *11.
[11]*Id.* at *12.

"prohibition is the antithesis of authorization or permission" and the plaintiff's authorization to use the Gulf mark "presumably came from Gulf directly, or from [p]laintiff's supply agreement with …" its supplier, not the defendants.[12] For similar reasons, the court rejected the plaintiff's argument that its contract with the defendants qualified as a franchise under section 2801(1)(B)(i).[13] The court held that that section was inapplicable because the defendants "are not authorized by a refiner to … [use] the Gulf trademark, and [d]efendants are not supplied motor fuel by any such refiner."[14] The court reasoned that "the PMPA was 'designed to regulate … marketing practices of large, vertically integrated oil companies,' not individual landlords who own gas stations but have no ownership or control over motor fuel trademarks."[15]

The court also held that the plaintiff's allegations did not satisfy the second element – that a franchise agreement authorize or permit a retailer to use a trademark "in connection with the sale, consignment, or distribution of motor fuel"–because the plaintiff did not allege that any of the defendants "sold, consigned or distributed motor fuel to him" at the time of the nonrenewal.[16] Again, the court distinguished *Lasko*, which it criticized, noting the plaintiff "has not alleged that [d]efendants ordered him to purchase a particular brand of motor fuel in the same way … the defendant in *Lasko* ordered the plaintiff to purchase Amoco fuel."[17] Because the plaintiff's allegations, if true, would not establish both essential elements of PMPA franchise, the court dismissed the PMPA claims and refused to enjoin the defendants on that basis.[18]

III. TERMINATION FOR FAILURE TO PAY RENT AND PAY FOR FUEL

In *Total Petroleum Puerto Rico Corp. v. Quintana*,[19] the United States District Court for the District of Puerto Rico granted a temporary restraining order, pending a preliminary injunction hearing, in favor of the franchisor, which was seeking to enjoin the franchisee from continuing to use the franchisor's marks post-termination and to compel the franchisee to surrender the station property. As alleged in the complaint, the franchisor terminated the franchisee for, among other things, failure to make timely payments of bills for petroleum products and for rent due, and failure to operate the station.[20] In connection with the TRO motion, the franchisor contended that it was likely to prevail on its claim seeking a declaration that it terminated the franchisee in compliance with the PMPA. The

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[12]*Id.* at *12-13, *16-17.

[13]That section provides: "'The term "franchise" includes … any contact under which a retailer … is authorized or permitted to occupy leased marketing premises, which premises are to be employed in connection with the sale, consignment, or distribution of motor fuel under a trademark which is owned or controlled by … a refiner which supplies motor fuel to the distributor which authorizes or permits such occupancy ….'" *Id.* at *17.

[14]*Kirman*, 2016 U.S. Dist. Lexis 165327, at *17. The court distinguished Lasko v. Consumers Petrol. of Conn., Inc., 547 F. Supp. 211 (D. Conn. 1981), and found that the facts before it were more closely analogous to those in Ellis v. Walker Dev. Co., 884 F.2d 467 (9th Cir. 1989).

[15]*Kirman*, 2016 U.S. Dist. Lexis 165327, at *15 (internal citation omitted) (quoting Merlino v. Getty Petroleum Corp., 916 F.2d 52, 53 (2d Cir. 1990)).

[16]*Id.* at *17-18.

[17]*Id.* at *18.

[18]*Id.* at *18-19. Having dismissed the PMPA claim, the court declined to exercise supplemental jurisdiction over the pendant state law claims.

[19]No. 16-2979 (GAG), 2016 U.S. Dist. Lexis 166343 (D.P.R. Nov. 30, 2016).

[20]Verified Complaint at 20, Total Petrol. P.R. Corp. v. Quintana, No. 3:16-CV-02979 (D.P.R. Nov. 11, 2016).

court summarily agreed. In finding that the franchisor would suffer irreparable harm absent the requested TRO, the court held that:

> (a) Defendants' illegal acts are causing confusion as to the endorsement by and/or affiliation with Plaintiff; (b) Defendants' illegal acts are tarnishing and diluting the TOTAL Brand; (c) Plaintiff is suffering irreparable harm due to Defendants' failure to comply with the post-termination duties; (d) Plaintiff is suffering irreparable harm due to its exposure to environmental liability resulting from Defendants' illegal and unauthorized control over the underground storage tanks and plaintiff's inherent inability to ensure compliance with applicable rules and regulations; and (e) Plaintiff is suffering irreparable due to the inherent loss in market share, goodwill, and consumer endorsement resulting from Defendants' acts.[21]

After initially denying the TRO motion because the defendant had not been served, the court granted the renewed TRO motion ex parte, holding the defendants "have actively attempted to evade personal service of process.[22] With little in-depth analysis, the court ultimately held that the franchisor had established a likelihood of success on the merits and had established the remaining requirements for the issuance of the TRO.

IV. Franchisor Has No Obligation to Notify Franchisee of Nonrenewal Before Franchisor's Option Rights On Underlying Lease Expire

In *BP West Coast Products, LLC v. Crossroad Petroleum, Inc.*,[23] the United States District Court for the Southern District of California granted summary judgment in favor of the franchisor, BP West Coast Products, L.L.C. (BP), on its declaratory judgment action seeking a declaration that BP had lawfully terminated the PMPA franchises of fifty-three BP branded franchisees. Those franchisees were lessee-dealers whose stations BP leased from Thrifty Oil Co. (Thrifty) as part of package deal under a master agreement and individual lease agreements, known as master leases, for each site. The master leases, which were set to begin expiring in 2012, gave BP an option to extend their terms so long as BP exercised the options by July 2010. If BP wanted to extend any master lease, it had to extend them all.

When BP entered into franchise agreements with the fifty-three franchisees, each of them acknowledged that the station premises it leased was subject to the master lease between BP and Thrifty. At that time, BP did not provide the franchisees with a copy of the master lease for their sites. In May 2010, BP notified Thrifty that it would not be exercising the extension options. BP and Thrifty tried to work out a new deal for BP to lease the sites, but those efforts failed and Thrifty instead agreed to lease the sites to Tesoro Refining & Marketing Company (Tesoro). After the deadline for exercising the options passed, and after BP learned of the Tesoro deal, BP began sending the franchisees notices of nonrenewal/terminations. The notices, which were sent at least ninety days before each termination or nonrenewal was to take effect, advised the franchisees of the dates BP would lose its right to possess the sites. When BP caught wind that the franchisees were contemplating suing BP, BP filed the declaratory judgment action.

The court held that BP had complied with the PMPA, rejecting the various arguments to the contrary made by the franchisees. Some franchisees argued that the PMPA required BP to notify the franchisees within 120 days after it learned the underlying

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[21] *Total Petrol. P.R. Corp.*, 2016 U.S. Dist. Lexis 166343, at *3-4.
[22] *Id.* at *4-5.
[23] No. 12cv665 JLS (JLB), 2016 U.S. Dist. LEXIS 93758 (S.D. Cal. July 18, 2016).

lease would expire, which BP did not do. Relying on *Veracka v. Shell Oil Co.*,[24] and its progeny, the court rejected this argument, holding that the "PMPA did not require BP to notify the franchisees within 120 days of when it knew it would lose the right to grant possession of the gas station sites."[25] Other franchisees claimed that the termination was unlawful because BP failed to give 120 days' notice of its loss of the right to the trademark, but the court held that "because notice was proper with respect to the expiration of BP's lease, it does not matter if notice was improper with respect to BP's anticipated loss of the right to grant use of a trademark."[26] The court also found unpersuasive the argument that BP violated the PMPA because it did not give the franchisees copies of the underlying leases with Thrifty, as opposed to merely providing notice of the underlying leases.

Certain franchisees also argued that the terminations or nonrenewals violated the PMPA because BP had lease renewal options that it was required to offer to assign under section 2802(c)(4)(B). The court disagreed, holding that it was undisputed that "the renewal options had long since expired when BP gave the … [franchisees] the ninety-day notice" and that "[b]ecause BP no longer had the options itself, it had no obligation under the PMPA to offer to assign them to the franchisees."[27] The franchisees also argued that BP's termination and nonrenewal "unreasonable" because BP allowed the extension options to lapse before notifying the franchisees of termination or nonrenewal, to "ensure that it would not have to offer to assign [the] options," thereby doing an "'end run' around the PMPA."[28] Despite acknowledging that courts are willing to "take a close look at the" circumstances and "be wary of attempts by franchisors to 'end a franchise relationship with one operator while retaining control of the premises'", it held that, in the case before it, "there is no factual question of whether BP possessed extension options during the ninety day notice period and BP did not retain control over or possession of these gas station[s] … after the underlying lease[] expired."[29]

Lastly, because BP's loss of possession of the premises provided a reasonable ground for termination under the PMPA, the court held that it did not need to decide whether BP engaged in a regional "market withdrawal," within the meaning of the PMPA, and was therefore required to follow certain other procedures under the PMPA. In doing so, the court reasoned that "because BP has established that it had a valid reason to terminate these franchises under 15 U.S.C. [section] 2802," in that a "'franchisor needs to provide only one valid reason for termination under the PMPA.'"[30]

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[24]655 F.2d 445 (1st Cir. 1981).

[25]*BP W. Coast Prods., LLC*, 2016 U.S. Dist. LEXIS 93758, at *139.

[26]*Id.* at *142.

[27]*Id.* at *146.

[28]*Id*. at *147.

[29]*Id.* at *148-49. In this way, the court factually distinguished Mustang Mktg., Inc. v. Chevron Prods. Co., 406 F.3d 600 (9th Cir. 2005), where there was a factual question as to whether the franchisor's option had in fact expired and whether the franchisor intended to leave the marketing premises after terminating the franchise.

[30]*BP W. Coast Prods., LLC*, 2016 U.S. Dist. LEXIS 93758, at *149-50 (quoting, in part, PDV Midw. Ref., L.L.C. v. Armada Oil & Gas Co., 305 F.3d 498, 508 (6th Cir. 2002)).

Chapter 21 • PUBLIC LAND AND RESOURCES
2016 Annual Report[1]

The year 2016 saw the issuance of the Bureau of Land Management's final rulemaking revising the Federal Land Policy Management Act (FLPMA) and the Mineral Leasing Act (MLA) regulations governing rights-of-way across federal public lands. The year 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: Quiet Title Act actions to establish R.S. 2477 rights-of-way; potential FLPMA and National Forest Management Act (NFMA) Preemption of state statutes; the Taylor Grazing Act; and the Wild Free-Roaming Horses and Burros Act.

I. BLM FINAL RULEMAKING REVISING FLPMA AND MLA RIGHT-OF-WAY REGULATIONS

In late 2014, the Bureau of Land Management (BLM) proposed rules to amend two current Code of Federal Regulations (C.F.R.) parts: (a) 43 C.F.R. Part 2800, which addresses rights-of-way under the Federal Land Policy Management Act (FLPMA);[2] and (b) 43 C.F.R. Part 2880, which addresses rights-of-way under the federal Mineral Leasing Act (MLA).[3] On December 19, 2016, the BLM issued its final rule on the matter (Final Rule).[4] The Final Rule is effective January 18, 2017.[5]

Among other things, the Final Rule:

- Includes Part 2800 provisions to promote the use of preferred areas for solar and wind development, termed "designated leasing areas" (DLAs).[6]
- Addresses, under Part 2800, the terms and conditions for solar and wind energy development rights-of-way issued under the regulations.[7]
- Makes some changes, under Part 2800, affecting all BLM rights-of way; other changes affect only specific rights-of-way, such as those for transmission lines with a capacity of 100 kilovolts or more.[8]
- Expands the existing Part 2800 regulations to allow the BLM to offer lands competitively on its own initiative, both inside and outside DLAs, even in the absence of identified competition.[9]
- Includes various provisions under Part 2800 to incentivize development inside of DLAs.[10]

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[1]This report was prepared by Stan N. Harris, Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, New Mexico. 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 author.

[2]43 U.S.C. §§ 1701-87 (2016).

[3]30 U.S.C. §§ 181-287 (2016).

[4]Final Rulemaking, Competitive Processes, Terms, and Conditions for Leasing Public Lands for Solar and Wind Energy Development and Technical Changes and Corrections, 81 Fed. Reg. 92,122 (Dec. 19, 2016) (to be codified at 43 C.F.R. pts. 2800 and 2880).

[5]*Id.* at 92,122.

[6]*Id.*

[7]*Id.*

[8]*Id.*

[9]81 Fed. Reg. at 92,123.

[10]*Id.*

- Updates and codifies the Part 2800 acreage rent for solar and wind energy authorizations.[11]
- Updates and codifies the Part 2800 megawatt capacity fee that the BLM already charges under existing policies.[12]
- Adds and revises definitions under Part 2800 for numerous items, mostly pertaining to solar and wind energy development.[13]
- Revises the Part 2800 rights-of-way terms and conditions section in its entirety, and adds specific terms and conditions for solar and wind energy grants and leases.[14]
- Adds a new section under Part 2800 describing bonding requirements.[15]
- Clarifies that if a Part 2800 or Part 2880 grant holder applies for a renewal before the grant expires, the grant will not expire until a decision on the renewal request has been made.[16]
- States that the BLM will not process an application under Part 2800 or Part 2800 if the applicant is in trespass.[17]
- Adds a provision to Part 2880 that describes several additional pre-application steps, including pre-application meetings, to be taken if an application is for a pipeline 10 inches or more in diameter.[18]
- States that a Part 2880 application may be denied if the required plan of development (POD) fails to meet the development schedule and other requirements for oil and gas pipelines.[19]
- Makes Part 2800 bonding requirements applicable to Part 2880 grants.[20]

II. REVISED STATUTE 2477 (R.S. 2477) AND THE QUIET TITLE ACT (QTA)

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.[21] R.S. 2477 presented a free right-of-way which takes effect as soon as it is accepted by a state.[22] Although repealed in 1976 by the passage of FLPMA, any valid, existing R.S. 2477 rights-of-way are preserved.[23] Actions to establish R.S. 2477 claims are brought pursuant to the federal Quiet Title Act (QTA), which allows a plaintiff to 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.[24]

In *State of Alaska Department of Natural Resources v. United States*,[25] the State of Alaska sought to establish R.S. 2477 public rights-of-way over several trails running through lands allotted to two individual Native Americans (the Purdys). The title to the

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[11] *Id.*
[12] *Id.*
[13] *Id.* at 92,126.
[14] 81 Fed. Reg. at 92,128.
[15] *Id.* at 92,129.
[16] *Id.* at 92,130.
[17] *Id.* at 92,131.
[18] *Id.*
[19] 81 Fed. Reg. 92,122, at 92,132.
[20] *Id.*
[21] Mills v. United States, 742 F.3d 400, 403 (9th Cir. 2014).
[22] *Id.*
[23] *Id.* at 403 n.1.
[24] 28 U.S.C. § 2409a(a) (2016).
[25] 816 F.3d 580 (9th Cir. 2016).

Purdys' land had been transferred to them by the United States under allotment certificates requiring prior approval from the United States before the land could be alienated by the Purdys.[26] The state sued under the QTA, and the district court ruled that the quiet title claim was barred.[27] The Ninth Circuit affirmed.

In particular, the *State of Alaska* court held that the state would have to "name the United States as a defendant because it [held] an interest in the Purdys' allotment[] (by virtue of the restraint on alienation), [of the land] and [because] recognition of … R.S. 2477 rights-of-way [across that allotment] would impair the United States' interest."[28] However, though the QTA generally waives the United States' immunity from suit with respect to R.S. 2477 claims, the QTA excludes from its scope claims involving "trust or restricted Indian lands."[29] Under Ninth Circuit precedent, because the federal government had a "colorable claim" that the Purdys' land was restricted Indian land, the QTA's Indian lands exception applied even without adjudication of whether an R.S. 2477 right-of-way had, in fact, been established over the land at issue prior to its allotment to the Purdys.[30] The appeals court therefore held that the state's QTA claim was correctly dismissed for lack of subject matter jurisdiction.[31]

Additionally, however, the *State of Alaska* court held that the district court erred in dismissing the state's separate condemnation claim against the Purdys, pursuant to 25 U.S.C. section 357, which allows for condemnation of Indian allotted lands for public purposes.[32] While the district court reasoned that the United States had not waived its sovereign immunity for such a claim, the appeals court ruled that federal immunity against the claim had been waived by 25 U.S.C. section 357's authorization of such condemnation actions.[33]

In *Northern New Mexicans Protecting Land Water & Rights v. United States*,[34] an organization representing individual property owners sued the United States under the QTA to have several roads declared R.S. 2477 roads. The government moved to dismiss, among other reasons, on the grounds that the court lacked jurisdiction because the plaintiffs had not pled their claim with particularity.[35] The district court agreed.

In so doing, the court first noted that the QTA's "pleading requirements are a prerequisite to the United States' waiver of sovereign immunity," and that the plaintiffs therefore must comply with 28 U.S.C. section 2409a(d) to establish the court's jurisdiction.[36] 28 U.S.C. section 2409a(d), in turn, mandates that "a complaint seeking to quiet title against the United States must identify the plaintiff's property claims, as well as the … [government's] adverse claims in that same property."[37] Thus, a complaint lacking "specific averments regarding a quiet-title claim's basis fails to establish that the … [government] has waived its sovereign immunity."[38]

Turning to the facts of the case, the *Northern New Mexicans* court held that the plaintiff "fail[ed] to allege with particularity the [claimed] rights-of-ways' actual location, their length, their course, or their widths," nor had plaintiff described the location of its

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[26] *Id.* at 583.
[27] *Id.* at 584.
[28] *Id.*
[29] *Id.* at 585; *see also* 28 U.S.C. § 2409a(a).
[30] *State of Alaska Dept. of Nat. Res.*, 816 F.3d at 585-86.
[31] *Id.* at 586.
[32] *Id.*
[33] *Id.*
[34] 161 F. Supp. 3d 1020 (D.N.M. 2016).
[35] *Id.* at 1029.
[36] *Id.* at 1049.
[37] *Id.* at 1050.
[38] *Id.*

own property that these rights-of-way purportedly served.[39] The plaintiff also only vaguely alleged that the claimed R.S. 2477 roads were established sometime before 1900.[40] Further, the plaintiff did "not identify the 'right, title, or interest claimed by the United States.'"[41] As a consequence, the district court held that the plaintiff failed to plead its quiet title claim with the particularity required by the QTA with respect to the nature of its claims in the alleged rights-of-way, the circumstances under which it acquired those rights-of-way, and the government's interests.[42] The court therefore dismissed the QTA claim for lack of jurisdiction.[43]

III. Potential FLPMA and NFMA Preemption of State Statutes

In *Bohmker v. Oregon*,[44] a federal district court considered the potential preemptive effect of FLPMA and the National Forest Management Act (NFMA)[45] on a recently-enacted state statute. Under FLPMA, the Bureau of Land Management (BLM) is "responsible for managing the mineral resources on federal forest lands."[46] Under the NFMA, the Forest Service is "responsible for the management of … surface impacts of mining on federal forest lands."[47]

Oregon Senate Bill 838 (SB 838) was enacted to curb certain types of mining activities in Oregon's state waters and rivers. In particular, SB 838 prohibited "instream mining that uses any form of motorized equipment within certain … areas[,] including the beds … [and] banks of the waters of the state containing … salmon habitat."[48] Several individual miners, mining groups, and mining-related businesses brought suit against the state, claiming that SB 838 is preempted by federal law.[49] Among other things, the plaintiffs contended that the United States Supreme Court, in *California Coastal Commission v. Granite Rock Co.*,[50] held that "federal law would preempt a state land use law that extended on to federal land to prohibit otherwise lawful mining activity."[51] In particular, the plaintiffs pointed to dicta in *Granite Rock* in which the Supreme Court assumed, without deciding, "that the combination of the NMFA and the FLPMA pre-empts the extension of state land use plans onto unpatented mining claims in national forest lands."[52]

The *Bohmker* court, however, noted that in *Granite Rock* the "[c]ourt [had] found that land use planning and environmental regulation … are distinct activities, capable of differentiation."[53] Because the "purpose of SB 838 … [was] to regulate the environmental impacts of the prohibited [mining] activity", and because SB 838 did not "mandate particular uses of the land nor prohibit" mining altogether, the district court found SB 838

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[39] *N. New Mexicans Protecting Land & Water Rights*, 161 F. Supp. 3d at 1051.
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] 172 F. Supp. 3d 1155 (D. Or. 2016).
[45] 16 U.S.C. §§ 1600-87 (2016).
[46] *Bohmker*, 172 F. Supp. at 1163 n.2.
[47] *Id.*
[48] *Id.* at 1157.
[49] *Id.*
[50] 480 U.S. 572 (1987).
[51] *Bohmker*, 172 F. Supp. 3d at 1163.
[52] *Granite Rock*, 480 U.S. at 585.
[53] *Bohmker*, 172 F. Supp. 3d at 1164.

to be a "reasonable environmental regulation that is not preempted by federal regulations."[54]

IV. THE TAYLOR GRAZING ACT

In *United States v. Estate of Hage*,[55] the Ninth Circuit Court of Appeals considered a suit by the federal government for trespass and injunction against two Nevada ranchers grazing on federal lands in violation of the Taylor Grazing Act of 1934.[56]

The Taylor Grazing Act had revoked the previous longstanding custom of allowing persons to use open, unreserved federal lands for grazing livestock, and replaced it with a regime whereby persons must obtain an express statutory permit under the Secretary of Interior's rules and regulations to graze livestock on public lands.[57] The permit does not create any property rights, and is revocable by the government.[58] Preference in the issuance of grazing permits is given to owners of water rights, but such ownership has no effect on the requirement that a rancher obtain a grazing permit before allowing cattle to graze on federal lands.[59]

The defendant ranchers had frequently grazed their cattle on public lands without a federal permit.[60] The defendants were also the owners of certain water rights perfected in the late 1800s and early 1900s.[61] From this, the district court had concluded that the ranchers' water rights gave them an easement by necessity to access water sources on public land, and that this easement in turn allowed the ranchers to bring cattle with them onto federal lands.[62] The district court issued an injunction against the government, requiring it to "obtain permission from the court before issuing trespass notices against [d]efendants", and requiring the government to issue grazing permits to the defendants.[63] The district court also ruled that, although the government had proved that defendants' cattle had grazed extensively on federal lands, the government had only proven trespass in those instances in which unauthorized grazing occurred more than a half mile from a water source.[64] The district court therefore awarded the government $165.88 in trespass damages.[65]

The Ninth Circuit Court of Appeals reversed the district court's ruling. The court held that defendants' water rights did not include, as a matter of Nevada state law, an implicit, appurtenant grazing right on federal lands, and any such right had been preempted by the Taylor Grazing Act.[66] Further, the defendants had not established a right-of-way pursuant to R.S. 2477, because they had not "shown that any roads exist[ed], let alone that Nevada established the alleged roads as public 'highways' under Nevada law."[67] The "[d]efendants' unauthorized grazing of cattle on federal lands was unlawful, and their water rights [had] no effect on the analysis."[68]

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[54] *Id.*
[55] 810 F.3d 712 (9th Cir.), *cert. denied*, 2016 U.S. LEXIS 6354 (U.S. 2016).
[56] 43 U.S.C. § 315(b) (2016).
[57] *Estate of Hage*, 810 F.3d at 716-17.
[58] *Id.* at 717.
[59] *Id.*
[60] *Id.* at 718.
[61] *Id.* at 715.
[62] *Estate of Hage*, 810 F.3d at 715.
[63] *Id.* at 716.
[64] *Id.*
[65] *Id.*
[66] *Id.* at 719.
[67] *Estate of Hage*, 810 F.3d at 719-20.
[68] *Id.* at 720.

In addition, the appeals court addressed the district court's conduct in deciding the case, and as a result issued specific instructions to reassign the case on remand to another judge. In particular, the appeals court ruled that although defendants had openly trespassed on federal lands, the district court had not simply "resolv[ed] the fact-specific inquiries as to when and where the cattle grazed illegally, … [but instead] applied an easement by necessity theory that plainly contravenes the law."[69] The district court had also encouraged the defendants to file a counterclaim that was plainly time-barred, and had "grossly abused the power of contempt by holding two federal agency officials in contempt of court for taking ordinary, lawful actions that had no effect whatsoever on [the] case."[70] The district court also showed bias and prejudgment of the case.[71] As a result, the appeals court remanded the matter with an instruction to the district court's chief judge "to assign the case to a different district judge."[72]

V. THE WILD FREE-ROAMING HORSES AND BURROS ACT (WILD HORSES ACT)

The Wild Free-Roaming Horses and Burros Act (Wild Horses Act or Act)[73] 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.[74] Section 3 of the Wild Horses Act requires the Bureau of Land Management (BLM) to maintain a current inventory of such horses and burros to determine appropriate management levels.[75] Section 4 of the Act provides that if wild horses stray from public lands onto private land, the private landowner may inform the BLM, which shall arrange to have the animals removed.[76]

In *American Wild Horse Preservation Campaign v. Jewell*,[77] a wild horse protection organization challenged the BLM's treatment of wild horses on certain so-called "Checkerboard" lands (unfenced western lands in which Congress granted a railroad odd-numbered lots of public lands for its railroad right-of-way, thereby creating a "checkerboard" of public and private lands).[78] A private grazing association had used both private and public Checkerboard lands to graze livestock, and requested under Section 4 of the Act that wild horses be removed from its private land.[79] BLM decided that it would remove all wild horses from both the public and private checkerboard lands at issue because it determined that it was practically infeasible to remove wild horses solely from the private lands sections of the Checkerboard.[80] The plaintiff horse protection organization argued that the BLM had thereby violated the Wild Horses Act.[81]

The district court disagreed with the plaintiff, but the Tenth Circuit Court of Appeals reversed the district court's decision. In so doing, the appeals court recognized the practical realities that wild horse numbers within the Checkerboard had proven very difficult to control.[82] However, those realities did not provide BLM with the authority to

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[69] *Id.* at 722.
[70] *Id.*
[71] *Id.*
[72] *Estate of Hage*, 810 F.3d at 724.
[73] Pub. L. No. 92-195, 85 Stat. 649 (1971) (codified into 16 U.S.C. §§ 1331-1340 (2016)).
[74] *See* Mountain States Legal Found. v. Hodel, 799 F.2d 1423, 1433 (10th Cir. 1986).
[75] 16 U.S.C. § 1333(b) (2016).
[76] 16 U.S.C. § 1334 (2016).
[77] No. 15-8033, 2016 U.S. App. LEXIS 19511 (10th Cir. Oct. 24, 2016).
[78] *Id.* at *8-9.
[79] *Id.* at *9-10.
[80] *Id.* at *14-15.
[81] *Id.* at *27-28.
[82] *Jewell*, 2016 U.S. App. LEXIS 19511, at *33.

construe private lands under Section 4 as public lands, and the appeals court determined that BLM had improperly removed horses from the public lands section of the Checkerboard.[83]

[83] *Id.* at *34.

Chapter 22 • RENEWABLE, ALTERNATIVE, AND DISTRIBUTED ENERGY RESOURCES
2016 Annual Report[1]

The following sections provide an overview of items notable to the Renewable, Alternative, and Distributed Energy Resources (RADER) community from 2016.

I. Strong Year For Solar and Wind Industries

On the heels of the extension by Congress of the solar investment and wind production tax credits at the end of 2015, the United States renewable energy industry experienced a strong year in 2016. According to the United States Energy Information Agency (EIA), through the first nine months of 2016, renewable energy sources, including hydro-electric power, made up 15.1% of the total United States electric generation, a significant increase from of the corresponding period in 2015.[2] As of early 2017, EIA projected that for the third consecutive year, more than half of new generation capacity in 2016 would be renewable, with the solar and wind energy sectors being the primary drivers of renewable energy installed capacity growth. Through Q3 2016, the U.S. wind industry added 1.725 GW, bringing total wind installed capacity to 75.7 GW,[3] and wind project developers reported over 20 GW of wind capacity under construction or in advanced development.[4] With over 4.1 GWdc of new solar PV, Q3 2016 was the United States solar market's largest quarter ever, bringing total installed solar PV capacity to 35.8 GW, and Q4 2016 was expected to break this record with an additional anticipated installation of 4.8 GWdc.[5] Through Q3 2016, driven primarily by the utility PV sector, solar accounted for 39% of all new United States generating capacity additions, ranking second only to natural gas during the period.[6] While California remains the leader in renewable energy, particularly solar, states continue to make headway throughout the United States. As of Q3 2016, Georgia quadrupled solar generation compared with the first nine months of 2015; Utah doubled its renewable generation capacity from geothermal, solar, and wind during the first nine month of 2016; and, in December 2016, Mississippi saw the start of construction of its largest ever utility scale solar PV facility.[7]

II. Uncertainty Regarding The Trump Administration

While the year saw many important policy developments for the renewables sector, both at the state and the federal levels, the headlines have undoubtedly been stolen by the election of Donald Trump as the next president of the United States and by speculation as to his plans for the renewables sector and energy policy more broadly. President-elect Trump repeatedly pledged to significantly reshape the federal government's energy and environmental policies in favor of what he described as an "all-of-the-above" energy

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[1]This section was written and edited by Adam Hankiss, of Counsel, Morrison & Foerster LLP, and Max Friedman, Associate, Latham & Watkins LLP. Contributions were prepared by Benjamin Fox and Egbert de Groot, Associates at Morrison & Foerster LLP.

[2]U.S. Energy Info. Admin. et al., Electric Power Monthly with Date for September 2016 at tbl. ES1.B (2016).

[3]Am. Wind Energy Ass'n, U.S. Wind Industry Third Quarter 2016 Market Report 3 (2016).

[4]*Id.*

[5]Solar Energy Indus. Ass'n, Solar Market Insight Report 2016 Q4, at 1 (2016).

[6]*Id.*

[7]Daniel Fleischmann, *Renewable Energy in US Gained 24 Percent Through First Nine Months of 2016*, Renewable Energy World (Dec. 1, 2016).

policy, including drastically reducing regulations and focusing attention on natural gas, oil, and coal.[8] No detailed policy proposals have been put forward as of the end of 2016, but certain key appointments at the end of the year, such as the nomination of Oklahoma Attorney General Scott Pruitt (a staunch opponent of the Obama administration's Clean Power Plan) to head the EPA, further reinforced the anticipated shift away from the Obama administration's energy, environmental, and climate policies, including pulling back from the Paris Agreement and unwinding the Clean Power Plan. While many industry experts and commentators envision doomsday scenarios, others are less pessimistic, emphasizing that the expected focus by the Trump administration on job creation may override any pressure to disfavor renewables, which are major employers and engines of growth in numerous states, including many "red" states. For the same reasons, there is optimism that the Trump administration will not eliminate or accelerate the phase-out of existing federal tax incentives for solar and wind, some of which are set to expire by their own terms by 2019 for wind and 2022 for solar.[9] However, adoption of currently pending legislation regarding additional tax incentives (such as tax credits for energy storage facilities) or additional extensions of solar and wind tax credits seem unlikely in light of Trump's pledges to eliminate tax credits and deductions more broadly. Naturally, a significant reduction in the corporate tax rate, as proposed by President-elect Trump, would decrease the value of some of the tax incentives available to solar and wind developers, such as accelerated depreciation, and hence may make the terms of available financing for solar and wind projects less favorable.[10]

Overall, even if some of the anticipated policy and regulatory changes of the Trump administration are implemented, such as pulling back from the Paris Agreement and unwinding the Clean Power Plan, many commentators predict that investment in renewables and clean energy technologies is unlikely to be significantly impacted, in large part due to reductions in the cost of wind and solar power, the growing movement of corporate procurement of renewables and the continued expansion of state level renewable portfolio standards and related policies.[11]

III. CLEAN POWER PLAN: LITIGATION AND POTENTIAL ROLLBACK

The year began auspiciously for the Obama administration's Clean Power Plan (the Plan), but subsequent events have called into question whether the regulations will ever actually come into effect. The Plan, finalized in 2015, is the EPA's most expansive effort to curtail greenhouse gas (GHG) emissions from new and existing power plants and to incentivize the replacement of existing coal and other fossil fuel-powered plants with renewable energy sources.[12]

Twenty-four states and industry groups brought suit to challenge the Plan in *West Virginia v. EPA*. In January, the federal D.C. Circuit Court declined to stay implementation of the Clean Power Plan during the litigation, which would have required states to prepare initial compliance plans by September.[13] On February 9th, however, the Supreme Court overruled the D.C. Circuit, opting to stay the Plan until a final ruling had been reached in

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[8]Christopher Carr & Robert Fleishman, *Energy Policy in the Trump Era: Part 1*, LAW 360 (Dec. 1, 2016).
[9]*Id.*
[10]Joe Ryan & Brian Eckhouse, *Trump's Tax Proposals Would Threaten Wind and Solar Investment*, BLOOMBERG (Nov.7, 2016, 1:52 PM) (updated on Nov. 7, 2016, 11:01 PM).
[11]Carr & Fleishman, *supra* note 8.
[12]Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) (final rule).
[13]Order, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Jan. 21, 2016).

the litigation.[14] Interestingly, with the four liberal justices dissenting from the stay, this decision was only made possible with the support of Justice Antonin Scalia, who passed away only four days later.

In September, the D.C. Circuit opted to hear oral argument in the case in a ten-judge en banc panel.[15] Four of the ten judges are Obama appointees, and two others were appointed by President Clinton, leading many to suspect that the court is inclined to support the EPA's more expansive interpretation of its authority.[16] However, a favorable ruling by the court, expected in early 2017, may have been rendered essentially moot by the results of the presidential election. Not only may President-elect Trump appoint a Supreme Court justice inclined to rule against the Plan on a near certain appeal of any favorable decision by the circuit court, the new management of the EPA under the Trump administration is likely to repeal or roll back much of the Clean Power Plan. Indeed, Trump's nominated EPA Director, Oklahoma Attorney General Scott Pruitt, is among those challenging the Plan in court.[17] If the Plan does survive legal challenge, however, the EPA could only repeal it through a new federal rulemaking process, which would likely take years and face protracted challenges from states that support the Plan.[18] During that period, the Plan would remain in effect, but the EPA might signal to states its intent to ignore the regulations. In short, regardless of the outcome of the pending litigation, the Plan is unlikely ever to see complete implementation.

IV. PARIS AGREEMENT AND MARRAKESH CONFERENCE

While the Paris Agreement reached in late 2015 constituted a major milestone in the international community's efforts to combat climate change, including through a shift away from GHG-intensive energy, 2016 has seen both critical advances toward the implementation of the Agreement and also potential setbacks. April 22nd saw the official signing ceremony for the Agreement at the United Nations headquarters.[19] As of the year's end, 194 parties have signed the Agreement and 117 have ratified it, including the United States, China, and the European Union.[20] On October 5th, the conditions necessary for the Agreement to enter into force were met, with more than fifty-five parties accounting for at least 55% of total global GHG emissions having ratified; as such, the Agreement went into force thirty days later, on November 4th.[21]

Soon thereafter, the parties met again in Marrakech, Morocco, for a UNFCCC conference to plan the implementation of the Paris Agreement in a more detailed manner.[22] Looming over the negotiations was the recent election of Donald Trump in the United States, which raised the possibility that the United States might withdraw from the Paris Agreement, or at the very least step back from its leadership role. French President Francois

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[14]Order in Pending Case, West Virginia v. EPA, No. 15A773 (U.S. Feb. 9, 2016).
[15]Jonathan H. Adler, *The en banc D.C. Circuit Meets the Clean Power Plan*, THE VOLOKH CONSPIRACY, WASH. POST (Sept. 28, 2016).
[16]*Id.*
[17]Logan Layden, *Pruitt Gets a Win as Supreme Court Puts EPA's Clean Power Plan on Hold*, STATE IMPACT OKLA. (Feb. 10, 2016, 3:48 PM).
[18]Clark Mindock, *What Will Trump do to the Clean Power Plan? EPA Regulations Under Fire but the President-Elect May Have Difficulties*, INT'L BUS. TIMES (Nov. 18, 2016, 8:32 AM).
[19]*Paris Agreement – Status of Ratification*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE (last visited Mar. 5, 2017).
[20]*Id.*
[21]*Id.*
[22]*Marrakech Conference Information Hub*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE (last visited Feb. 25, 2017).

Hollande made clear that the Agreement was "irreversible," and asserted that he would lead negotiations with President-elect Trump to ensure United States compliance with its commitments; even without the United States, however, Hollande declared that the world would press forward with the Agreement.[23] Under Article 28 of the Paris Agreement, the United States could, in fact, withdraw, but it cannot do so for three years following the Agreement's entry into force; at least one year of notice of intent to withdraw is also required.[24] Regardless of any actions taken by the United States in coming years, the framework set out in the Paris Agreement will continue to have important implications for the development of renewable energy around the world, likely for decades to come.

V. STATE-LEVEL TRENDS

2016 saw a number of important state-level legislative and regulatory developments, many reflecting positive changes for the future of renewable energy, and a few representing significant setbacks. With an incoming administration seemingly focused on promoting fossil fuels and scaling back changes to energy and climate policy enacted by the Obama administration, much of the emphasis for promoting renewable energy policies is expected to further shift to state-level policies in the coming years.

A. Renewable Portfolio Standards

In California, the legislature followed up its 2015 passage of S.B. 350, which increased the state's renewable energy procurement goal to 50% by 2030, by narrowly passing S.B. 32, which requires the state to reduce GHG emissions to 40% below 1990 levels by 2030.[25] The law will require aggressive action by the state in the coming decade to meet the targets, including a rapid expansion of renewable energy production, effectively tripling the pace at which the transition will need to occur.[26]

In August, New York's Public Service Commission approved the state's Clean Energy Standard, establishing that utilities and other New York energy suppliers must procure 50% of energy used in the state from renewable sources by 2030; the plan also includes intermediate benchmarks of 26% by 2017 and 30% by 2021.[27] Massachusetts also increased the commonwealth's commitment to renewables in August, passing H. 4568, which committed to purchasing approximately 1,600 MW of offshore wind power (discussed in greater depth below) and established a Property Assessed Clean Energy (PACE) program that allows commercial and industrial property owners to finance renewable energy upgrades that are repaid over time through a property tax assessment.[28] Continuing a busy August, Oregon passed S.B. 1547, which requires 50% of energy provided by utilities to come from renewable sources by 2040 and also requires the state's two largest utilities to cease purchases of out-of-state coal-generated energy by 2030.[29] In another positive development just before the end of the year, Ohio Governor John Kasich

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[23]Kate Samuelson, *Donald Trump Must Respect 'Irreversible' Paris Climate Deal, French President Hollande Says*, TIME (Nov. 15, 2016).

[24]Conference of the Parties on its Twenty-first Session, Paris, France, Nov. 30-Dec. 11, 2015, *Adoption of the Paris Agreement*, Draft Decision -/CP 21, UN Doc. FCCC/CP/2015/L.9/Rev.1 at art. 28 (Dec. 12, 2015).

[25]S.B. 32, 2015-2016 Sess. (Cal. 2016).

[26]Chris Megerian & Liam Dillon, *Gov. Brown Signs Sweeping Legislation to Combat Climate Change*, L.A. Times (Sept. 8, 2016).

[27]Press Release, N.Y. State, Governor Cuomo Announces Establishment of Clean Energy Standard that Mandates 50 Percent Renewables by 2030 (Aug. 1, 2016).

[28]H. 4568, 189th Gen. Court, 2015-2016 Sess. (Mass. 2016).

[29]S.B. 1547, 78th Leg. Assemb., 2016 Reg. Sess. (Or. 2016).

effectively put the State's renewable energy standards back in effect by vetoing a bill that would have extended a freeze on the law that requires utilities in the state to purchase 12.5% of their power form renewable sources by 2027.[30]

However, not all legislative efforts to expand renewable energy were successful. Most notably, Maryland's governor, Larry Hogan, vetoed HB 1106, which would have created a 25% renewable portfolio standard for the state by 2020.[31]

B. Net Metering

Following setbacks in Nevada and Hawaii at the end of 2015, 2016 continued to be a tumultuous year for net metering at the state level as utility regulators, politicians, the rooftop solar installation industry, and other distributed solar proponents tried to define (or redefine) the costs and benefits of connecting smaller scale distributed solar installations to the grid and paying the owners of such systems for energy delivered to the system. Of the forty-one states that had net metering rules in effect as of the beginning of the year,[32] twenty-two states considered or enacted changes to net metering policies just in Q3 of 2016,[33] and net metering rules were subject to legislative or regulatory action in many others throughout the year.

In April, Gov. Paul LePage of Maine vetoed L.D. 1649, a bill that would have revised the state's net metering policy to require utilities to purchase an aggregate solar energy generated by private solar generators.[34] By September, Maine's Public Utilities Commission (PUC) had issued a draft proposal to phase out the state's net metering program entirely over the next fifteen years.[35] This proposal has generated intense debate in the state with strong push back from the solar installation industry, and resolution of the issue is currently in front of the state legislature.[36]

In some good news for Nevada net metering customers, following a state court determination in September that the PUC's 2015 changes to the rate structure denied customers' right to fairness and due process, the PUC partially reversed its 2015 decision to increase monthly charges and decrease the credits customers receive for generated energy,[37] voting to grandfather net metering customers who applied for a residential solar system prior to December 31, 2015.

In its landmark Net Energy Metering (NEM) 2.0 ruling, the California PUC voted to uphold its net metering policy for a four-year period, allowing net metering customers to receive payments equal to the retail rate of electricity for the surplus energy produced by distributed generators. However, the PUC's decision also required that net metering

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[30]Chris Martin, *Ohio Governor Vetoes Bill to Extend Freeze on Renewable Energy*, BLOOMBERG (Dec. 27, 2016).

[31]Legis. History, H.B. 1106, 2016 Reg. Sess. (Md. 2016).

[32]N.C. CLEAN ENERGY TECH. CTR. ET AL., THE 50 STATES OF SOLAR, 2015 POLICY REVIEW – Q4 QUARTERLY REPORT, at p. 13 (2016).

[33]*The 50 States of Solar Report: 42 States Took Action on Distributed Solar Policy and Rate Design during Q3 2016*, N.C. CLEAN ENERGY TECH CTR. (Oct. 25, 2016).

[34]Kevin Miller, *Lawmakers Uphold LePage Veto Killing Bill to Boost Solar Energy*, PORTLAND PRESS HERALD (Apr. 30, 2016).

[35]Tux Turkel, *Maine PUC Proposing to Phase Out Incentives for Home Solar Panels*, PORTLAND PRESS HERALD (Sept. 14, 2016).

[36]*Id.*

[37]Krysti Shallenberger, *Nevada Regulator Excludes 'Grandfathering' Provision in New Net Metering Proposal*, UTILITYDIVE (Feb. 11, 2016).

customers move to time-of-use rates,[38] a change that introduces some unpredictability for consumers, as they may not be able to adequately forecast the revenue stream available to them during the life of their projects.[39] Importantly, the decision also preserves retail net metering rates for existing customers for a period of twenty years after their interconnection, providing investment certainty.[40]

At end of the year, the Arizona Corporation Commission approved changes to the State's net metering rules, including lowering the amount of credits that net metering customers may receive for delivering excess energy to the grid, limiting how long customers keep their rates, and eliminating customers' ability to "carry forward" credits generated in a month to be applied to energy usage in subsequent months.[41] In contrast, in April 2016, Massachusetts, enacted Bill HB 4173, increasing the net metering caps by three percentage points for private and public projects to 7% and 8%, respectively. Systems that qualify for net metering prior to the cap being reached will be grandfathered at the higher rate for twenty-five years.[42]

In New York, as of year-end, the rate for net metered customers remained uncertain pending the conclusion of New York Public Service Commission's rulemaking proceeding regarding the compensation for distributed energy resources as part of the State's broader, "Reforming the Energy Vision" (REV) initiative. However, pursuant to a 2015 decision of the New York Department of Public Service, the State's net metering caps remained suspended until the new rate for net metered energy is finalized under the REV process.[43] A report released by the staff of the Department of Public Service in October 2016 proposed to transition New York away from net metering and instead price distributed energy resources based on energy, grid, and environmental values.[44] The regulators are expected to take action on the recommendation in early 2017.[45]

VI. POLICY DEVELOPMENTS AT THE FEDERAL LEVEL

A. Demand Response—FERC v. EPSA

In an important development for the renewable and distributed energy, and energy conservation industries, the Supreme Court upheld FERC's jurisdiction to regulate demand response in *Federal Energy Regulatory Commission v. Electric Power Supply Ass'n*

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[38]Order Instituting Rulemaking to Develop a Successor to Existing Net Energy Metering Tariffs Pursuant to Public Utilities Code Section 2827.1, and to Address Other Issues Related to Net Energy Metering, No. 16-01-044 (Cal. Pub. Util. Comm'n Jan. 28, 2016).

[39]Jeff St. John, *Breaking: California's NEM 2.0 Decision Keeps Retail Rate for Rooftop Solar, Adds Time-of-Use*, GREENTECH MEDIA (Jan. 28, 2016).

[40]Herman K. Trabish, *Inside the Decision: California Regulators Preserve Retail Rate Net Metering Until 2019*, UtilityDIVE (Feb. 1, 2016).

[41]Order Amending Decision No. 75859, In the Matter of the Commission's Investigation of Value and Cost of Distributed Generation, No. E-000001-14-0023 (Ariz. Corp. Comm'n Jan. 13, 2017).

[42]H. 4173, 189th Gen. Court, 2015-2016 Sess. (Mass. 2016).

[43]Christian Roselund, *New York State Quietly Lifts the Cap on Net Metering*, PV MAGAZINE (Oct. 23, 2015); *see also* Notice Soliciting Comments and Proposals on an Interim Successor to Net Energy Metering and of a Preliminary Conference, In the Matter of the Value of Distributed Energy Resources, No. 15-E0751 (N.Y. Pub. Serv. Comm'n Dec. 23, 2015).

[44]Elisa Wood, *New York Unveils New Way to Price Distributed Energy Resources*, MICROGRID KNOWLEDGE (Oct. 28, 2016).

[45]Robert Walton, *How do you Value DERs? New York PSC Staff Rolls Out New Pricing Scheme for REV*, UtilityDIVE (Nov. 16, 2016).

(*EPSA*)[46] on January 25, 2016. The ruling, which upholds FERC's jurisdictional authority in FERC Order 745, is a big win for energy conservation service providers, like EnerNOC, and also has significant positive implications for distributed resources, such as energy storage, rooftop solar, and other consumer-side energy technologies.[47]

In the case, which some experts labeled as one of the most significant energy law cases of all time, EPSA had challenged FERC's Order 745 which requires wholesale market operators to, in certain circumstances, pay consumers the localized marginal price of energy for reducing their electricity demand during periods of high demand. The case centered on the division of responsibility between federal regulators for interstate sales of electric energy and state regulators for intrastate sales of electricity, a "bright line" division of responsibility that traditionally had tracked wholesale sales of electricity and resale of electricity for retail, respectively. However, as the electricity system has evolved to incorporate smart technologies, distributed generation, and variable sources of energy, the previously clear demarcation has come into question, and in *FERC v. EPSA*, the Supreme Court strongly endorsed the pragmatic approach that FERC took in its rule, allocating authority over a resource that stood on both sides of that line by attempting to apply the basic principles behind the FPA's jurisdictional "bright line" test.[48]

B. Electric Cooperatives and Municipal Utilities

In another important development, in June 2016, the FERC confirmed that electric cooperatives and municipal utilities may purchase power from small energy providers under federal law, despite restrictive contracts with their bulk suppliers that limit the ability of co-ops and municipal utilities to choose the source of their power.[49] Some believe that FERC's order could open up a potential 400 GW renewables market.[50]

C. FERC Proposed Rule for Energy Storage/Aggregated Distributed Energy Resources

With the energy storage sector growing quickly,[51] FERC released in November a proposed rule to "remove barriers to the participation of electric storage resources and distributed energy resource aggregations in the organized wholesale electric markets."[52] In particular, FERC has recognized that existing rules cater to traditional generation and load technologies and are not suitable for emerging technologies, such as battery storage. In addition, FERC has invited comment on a proposal to allow distributed energy resource aggregators to participate in organized wholesale energy markets, which would expand

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[46]136 S. Ct. 760 (2016).

[47]Ian McClenny, *FERC vs. EPSA Ruling: A Win for Demand Response and Energy Storage*, NAVIGANT RESEARCH BLOG (Feb. 1, 2016).

[48]Matthew R. Christiansen, *FERC v. EPSA, Functionalism and the Electricity Industry of the Future*, 68 STAN. L. REV. 100 (2016).

[49]*Federal Energy Regulation Commission Rules in Favor of Clean Energy*, S. ENVTL. LAW CTR. (July 1, 2016).

[50]Laurie Guevara-Stone, *Top 13 Clean Energy Developments of 2016*, RMI OUTLET (Jan. 4, 2017).

[51]According to Navigant Research's Q3 2016 market update, annual deployments of energy storage in 2016 could reach 300-MW, surpassing the 221MW of deployed storage capacity in 2015. Peter Maloney, *After a Banner Year, Energy Storage on Track to Best 2015's Record-Setting Growth*, UTILITY DIVE (Oct. 11, 2016).

[52]Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators, 81 Fed. Reg. 86,522 (Nov. 30, 2016) (to be codified at 18 C.F.R. pt. 35).

opportunities for electric storage resources, distributed generation, thermal storage, electric vehicles, and supply equipment.[53] While many view the proposed rules (if adopted) as a significant boost to the storage industry, what shape these rules ultimately take and what their impact will be will very much depend on industry feedback and how the rulemaking process unfolds under the new administration.

VII. Offshore Wind Moves Forward in New England

In early December 2016, for the first time in American history, an off-shore wind farm began generating electricity at commercial scale. At Deepwater Wind's 30 MW Block Island project off the coast of Rhode Island, turbines, inter-array cables, and an export cable connecting to a new substation were all installed over the summer,[54] and the commissioning process and operations protocols were finalized with ISO New England, the regional independent system operator.[55] As noted above, Massachusetts has also passed a law expanding its reliance on off-shore wind power, starting with the Cape Wind project, a wind farm off the coast of Cape Cod that has completed its state and federal permitting requirements, overcome numerous legal challenges, obtained approval for its Construction and Operations Plan from the United States Department of the Interior, and is currently in the process of obtaining financing and securing commercial contracts.[56]

VIII. BLM Finalizes New Leasing Rules for Renewables

On November 10th, just as the election results were throwing federal energy policy into a state of upheaval, the federal Bureau of Land Management (BLM) finalized a rule to "facilitate responsible solar and wind energy development on BLM-managed public lands and to ensure that the American taxpayer receives fair market value for such development."[57] The final rule promotes renewable energy development in certain zones known as "designated leasing areas" (DLAs). The new rule promotes renewable energy leases, also referred to as "grants" or federal "rights-of-way," within certain zones pre-screened by the BLM and "identified as having high energy generation potential, access to transmission (either existing or proposed), and low potential for conflicts with other resources."[58] The new rule, for the first time, allows the BLM to offer lands on its own initiative for competitive bidding among potential renewables developers.[59] Development is still possible outside of DLAs, but the rule incentivizes development within DLAs through various means.[60]

The BLM is required to obtain "fair market value" for leases of federal land, and the new rule provides clarification as to what this means for solar and wind energy projects: different counties will establish agricultural land values for each acre, and rent will be assessed using a 10% encumbrance value for land used in wind energy projects and a 100%

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[53] *Id.*

[54] Press Release, DeepwaterWind, America's First Offshore Wind Farm Powers Up (Dec. 12, 2016).

[55] *Deepwater's Block Island, Rhode Island, Wind Farm to Start Up Soon*, Reuters (Dec. 2, 2016).

[56] *Cape Wind Project Status & Timeline*, Cape Wind (last visited Mar. 5, 2017).

[57] Competitive Processes, Terms, and Conditions for Leasing Public Lands for Solar and Wind Energy Development and Technical Changes and Corrections, 81 Fed. Reg. 92,122 (Dec. 19, 2016) (to be codified at 43 C.F.R. pts. 2800 and 2880).

[58] *Id.*

[59] *Id.* at 92,123.

[60] *Id.*

encumbrance value for solar projects.[61] Finally, the capacity fees the BLM currently charges for each megawatt of power generated on the BLM lands have been changed to set new capacity factors for wind, solar photovoltaic, concentrated solar, and concentrated solar with storage projects, increasing the capacity fee for each megawatt of wind energy, while reducing the fee for solar projects.[62]

IX. SIGNIFICANT TRANSACTIONS IN 2016

2016 was marked by a number of headline-grabbing corporate transactions in renewables, including some notable transactions that demonstrated the dangers of overly aggressive expansion in the sector. SunEdison, which for the last several years had been the fastest growing renewable energy company in the country, was forced to file for Chapter 11 bankruptcy on April 21st, the result of years of debt-fueled acquisitions that overstretched the company's balance sheets,[63] and by August, the court determined that SunEdison's debts exceeded its assets so substantially that the company's shareholders would not have any say in the course of the bankruptcy proceedings.[64]

Another major player in the solar industry, SolarCity, also had a difficult year, seeing share prices fall by 60% and accruing over $3 billion in debts as it spent its cash reserves at a rapid pace.[65] But none of that stopped Elon Musk, the chairman and largest shareholder of both Solar City and TESLA to orchestrate the acquisition of Solar City by Tesla in a deal valued at approximately $2.1 billion.[66] While many criticized the acquisition as nothing more than an effort by Musk to bolster one failing company with another that has itself struggled to achieve profitability, Musk and others have argued that the acquisition will be a significant step towards Mr. Musk's vision of creating an integrated sustainable energy company, or as some commentators put it a "one-stop shop" for clean energy consumers,[67] which Tesla demonstrated in October with a presentation of new solar PV roof shingles that can be integrated with a Tesla home battery system and hooked up to a Tesla car, theoretically satisfying a family's home energy and automotive needs.[68] Whether Musk can transform his vision into a profitable reality is to be seen, but Tesla's shareholders approved the merger on November 17th.[69]

Finally, Bill Gates dominated the clean energy headlines at the end of the year with the formation of Breakthrough Energy Fund, a $1 billion clean energy fund that aims to reduce GHG emissions to almost zero by financing emerging clean energy technologies. In addition to Bill Gates, the fund includes other well-known tech industry players, such as Alibaba founder Jack Ma and Amazon founder Jeff Bezos.[70]

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[61] *Id.*

[62] 81 Fed. Reg. at 92,123-24.

[63] Tom Hals & Nichola Groom, *Solar Developer SunEdison in Bankruptcy as Aggressive Growth Plan Unravels*, REUTERS (Apr. 22, 2016).

[64] Peg Brickley, *SunEdison Shareholders Lose Fight for Say in Bankruptcy*, WALL ST. J. (Aug. 12, 2016) (subscription).

[65] Seth Fiegerman, *Tesla Shareholders Approve Solarcity Merger*, CNNMONEY (Nov. 17, 2016).

[66] *Id.*

[67] *See, e.g.*, Russ Mitchell & Samantha Masunaga, *Tesla-SolarCity Merger Embodies Elon Musk's Audacious Plan for Clean Energy*, L.A. Times (Aug. 1, 2016).

[68] Fiegerman, *supra* note 65.

[69] *Id.*

[70] Kirsten Korosec, *Bill Gates is Heading a $1 Billion Clean Energy Venture Fund*, FORTUNE (Dec. 11, 2016).

Corporate procurement of renewable energy in the United States, mostly in the form of corporate PPAs, has expanded dramatically over the last five years due to a confluence of factors, including corporate social responsibility goals, concerns over fossil fuels' price volatility, long-term climate and energy policies, and the falling costs of renewable energy.[71] Corporate purchasers continue to be particularly active in the United States wind energy sector, but solar PV is taking a more and more significant role.[72] While corporate renewable energy procurement fell from a high water mark in 2015 – as of December 15, 2016, 1.56 GW of contracted renewable energy capacity has been publicly announced in the United States and Mexico, as compared to 3.24 GW of capacity in 2015[73]– most industry experts expect corporate procurement to grow steadily. Bloomberg New Energy Finance, a new dedicated industry publication, predicts that that the top 50 U.S. corporate buyers of solar and wind energy will add 17.4 GW by 2020 and another 63.4 GW by 2025. Underpinning these predictions, 2016 saw many important transactions and announcements of corporate commitment. In December 2016, Google announced that it will procure 100% of its electricity needs from renewable energy sources by 2017,[74] while Microsoft, the third largest corporate purchaser of renewable energy in 2016 after Google and Amazon,[75] signed its biggest wind power deal to date, involving the purchase of bundled and unbundled RECs from wind energy projects in Wyoming and Kansas with an aggregate capacity of 237 MW.[76] Other noteworthy transactions included Amazon Web Services' (AWS) planned purchase of power from five new solar PV farms for its Virginia data centers in a joint transaction with Dominion Resources, involving novel contractual structures;[77] 100+ MW deals by Johnson & Johnson, Apple, and Switch; and a 70+ MW solar deal by Walmart in the Southeast.[78]

[71] *See* AM. COUNCIL ON RENEWABLE ENERGY, CORPORATE RENEWABLE ENERGY PROCUREMENT: INDUSTRY INSIGHTS (2016).
[72] *See* PWC, CORPORATE RENEWABLE ENERGY PROCUREMENT SURVEY INSIGHTS (2016).
[73] *See* *BRC Deal Tracker, Corporate Renewable Deals 2010-2017*, BUS. RENEWABLES CTR. (last visited Mar. 5, 2017).
[74] Julian Spector, *Google Will Achieve 100 Percent Renewable Energy in 2017*, GREENTECH MEDIA (Dec. 6, 2016).
[75] BLOOMBERG NEW ENERGY FIN., CORPORATE RENEWABLE ENERGY PROCUREMENT MONTHLY (Dec. 2016).
[76] *Id.*
[77] *Id.*
[78] Peter Bronski, *Corporate Renewables Surging: Bloomberg New Energy Finance Weighs In*, CORONAL ENERGY (Sept. 21, 2016).

Chapter 23 • WATER RESOURCES
2016 Annual Report[1]

I. FEDERAL DEVELOPMENTS

A. Alaska

1. Judicial

In *Sturgeon v. Frost*,[2] the United States Supreme Court reversed and remanded the Ninth Circuit's decision to uphold the district court's rejection of challenges to National Park Service (NPS) regulations prohibiting the use of hovercraft on the Nation River within the boundaries of NPS administered lands. In its decision, the Court rejected the Ninth Circuit's interpretation of section 103(c) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. section 3103(c). On remand, the Court directed the lower court to consider: 1) whether the river qualifies as "public land" for purposes of ANILCA, 2) whether the Park Service has authority under 54 U.S.C. section 100751 to regulate Mr. Sturgeon's activities, even if the river is not "public land", and 3) whether the Park Service has authority under ANILCA over both "public" and "non-public" lands

[1]This chapter summarizes significant state and federal developments in water resources in late 2015 and 2016. 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 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 Lyle and Nicholas Ostrovsky, 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, Robert E. Donlan, Peter Kiel, Christopher Sanders, Craig A. Carnes, Shane Conway McCoin, and Shawnda M. Grady, Ellison, Schneider & Harris L.L.P., Sacramento, California; for Colorado, Dulcinea Hanuscak, 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, Therese A. Ure, shareholder, and Lindsay Thane, J.D. paralegal, Schroeder Law Offices, P.C., Reno, 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, Drew Miller, Kemp Smith LLP, Austin, Texas; for Utah, Rachel S. Anderson, Fabian VanCott, Salt Lake City, Utah; for Washington, Tadas Kisielius, 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.

[2]136 S. Ct. 1061 (2016).

within the boundaries of conservation system units in Alaska. The Ninth Circuit heard argument on remand on October 23, 2016.

B. California

In *Pacific Coast Federation of Fishermen's Ass'n v. United States Department of the Interior*,[3] the United States Ninth Circuit Court of Appeal held that the United States Bureau of Reclamation (Reclamation) abused its discretion under the National Environmental Policy Act in preparing the environmental assessment (EA) in relation to its approval of eight interim two-year water delivery contracts by not fully and meaningfully considering the alternative of reduced maximum delivery quantities. The court remanded the case back to the district court with instructions for Reclamation to consider a reduced maximum delivery quantity alternative in any future EA.

C. Colorado

The United States Forest Service amended its internal directives[4] for ski areas in its Special Uses Handbook[5] which address the sufficiency of water for operation of ski areas on National Forest System lands. The final directive includes a definition of the phrase "sufficient quantity of water to operate the ski area" and clarifies when and how the holder of a ski area permit must show sufficiency of water to operate the permitted ski area and new ski area water facilities. The final directive also addresses the availability and maintenance of federally-owned and permittee-owned ski area water rights during the permit term and on permit revocation or termination.

D. Kansas

On August 24, 2016, the Republican River Compact Administration approved two long-term agreements among Kansas, Colorado, and Nebraska.[6] Under the agreements, Colorado will receive full credit for its augmentation deliveries on the North Fork Republican River, and will retire an additional 25,000 groundwater-irrigated acres in the South Fork Republican River basin in order to improve flows into Kansas. Nebraska will receive full credit for its compliance activities so long as the "compliance water" is delivered to Harlan County Reservoir in Nebraska for use in Kansas.[7]

E. Nevada

The Ninth Circuit Court of Appeals determined in *United States v. Estate of Hage*[8] that ownership of a water right does not allow a rancher to graze his cattle on federal lands near the source of his water right without a federal grazing permit. Here, the defendant grazed cattle on federal public land without a grazing permit, claiming he had an easement by necessity to access the water on public lands within a half mile of the water source where he possessed water rights. The Ninth Circuit found that water rights do not also allow an appurtenant right to graze.

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[3]No. 14-15514, 2016 U.S. App. LEXIS 5717 (9th Cir. Mar. 28, 2016).
[4]Ski Area Water Clause, 80 Fed. Reg. 81,508 (Dec. 30, 2015).
[5]U.S. FOREST SERVICE, FOREST SERVICE HANDBOOK, 2709.11-SPECIAL USES HANDBOOK, CH. 50 (2016).
[6]*Republican River Compact*, KAN. DEP'T OF AGRIC. (last visited Mar. 3, 2017).
[7]*Id.*
[8]810 F.3d 712 (9th Cir. 2016).

F. New Mexico

A federal district court found that Spain extinguished aboriginal water rights for three Pueblos in northern New Mexico, which represents a significant change in New Mexico law. In the Jemez River Adjudication,[9] a magistrate judge found that "the Pueblos [of Santa Ana, Zia, and Jemez] possessed aboriginal water rights prior to the Spanish occupation of New Mexico, but conclude[d] that the Spanish crown exercised complete dominion and control over New Mexico in a manner adverse to the Pueblos and thus extinguished the Pueblos' aboriginal water rights."[10] The United States and the Pueblos argued that because the Spanish crown took no affirmative act to extinguish the aboriginal title to water rights, the Mexican government properly recognized the rights, as did the United States in the Treaty of Guadalupe Hidalgo in 1848. The court rejected that argument. The proposed decision is subject to objections.

In *New Mexico v. Aamodt*,[11] the federal district court approved a settlement of tribal water rights for the Pueblos of Tesuque, Pojoaque, Nambe, and San Ildefonso. The court rejected about 800 objections that raised complaints about the procedure for the approval of the settlement, concerns about the implementation of the settlement, and disagreements about the application of state and federal laws. The settlement quantifies the Pueblos' water rights and authorizes construction of a regional water system to distribute water to the Pueblos and the Santa Fe County Water Utility.

G. Oregon

In *Bohmker v. Oregon*,[12] the United States District Court for the District of Oregon considered Senate Bill (SB) 838 (2016), which places a moratorium until 2021 on using motorized equipment to extract precious metals from the beds or banks of the waters of the state. The court found SB 838 is a legitimate way to protect water quality and fish habitat and is not in direct conflict with or preempted by various federal land use and environmental laws regulating mining and the waters of a state. Particularly, SB 838 is not preempted by federal law as it does not violate the Mining Act's guarantee that federal lands will be free and open to mineral discovery. Instead, SB 838 only limits the form of mining used in certain areas, and does not prohibit mining altogether. The court found that SB 838 constitutes a reasonable environmental law to protect Oregon's natural resources, including fish, wildlife, riparian areas, and water quality.

In *Juliana v. United States*,[13] the plaintiffs sued the United States for violating their constitutional due process rights by failing to take action to curb the continuing increase in carbon pollution, ocean acidification, and ocean warming. The magistrate judge found the plaintiffs had standing to assert their novel claim, and noted the Due Process Clause imposes an affirmative obligation on the government to ensure due process interests are not infringed upon by government action. The court also found a public trust obligation, for example, through the United States Environmental Protection Agency's duty to protect the public from pollution and the federal government's authority to protect territorial waters off the West Coast and their resources for public enjoyment. The United States District Court for the District of Oregon affirmed Judge Coffin's Findings and Recommendations on November 10, 2016. In her opinion[14] she stated the fundamental

[9]Proposed Findings and Recommended Disposition Regarding Issues 1 and 2, at 1, United States v. Abouselman, No. 6:69-cv-07896 (D.N.M. Oct. 4, 2016).
[10]*Id.* at 1.
[11]171 F. Supp. 3d 1171 (D.N.M. 2016).
[12]172 F. Supp. 3d 1155 (D. Or. 2016).
[13]No. 6:15-cv-1517-TC, 2016 U.S. Dist. LEXIS 52940 (D. Or. Apr. 8, 2016).
[14]No. 6:15-cv-01517-TC, 2016 U.S. Dist. LEXIS 156014 (D. Or. Nov. 10, 2016).

right at issue is the right to a climate system capable of sustaining human life and free from governmental action affirmatively and substantially damaging the climate system because the federal government has a public trust responsibility to protect resources, such as the territorial seas and the navigable waters.

In *Oregon Wild v. United States Forest Service*,[15] the plaintiffs asserted the Forest Service's 2011 consultation failed to consider the benefits of critical habitat on the threatened Klamath River bull trout and the impact of grazing permits on public land when compared with cumulative effects and climate change. The court determined the Forest Service satisfied the consultation requirement of the Endangered Species Act because it considered the effect of grazing on recovery and conservation of the Klamath River bull trout. The court also found the Forest Service did not ignore its duties under section 313 of the Clean Water Act by permitting grazing near streams with bull trout because the Forest Service implemented measures to achieve compliance with Oregon Department of Environmental Quality water temperature standards.

The court also determined the Wild and Scenic Rivers Act (WSRA) requirement to "protect and enhance" the Upper Sycan River's outstandingly remarkable values is not inconsistent with other public uses. The Court deferred to the Forest Service's judgment and found that grazing is still compatible with WSRA obligations and may be permitted on the banks of the Sycan River.

H. Wyoming

In *Montana v. Wyoming*,[16] concerning the dispute over the 1950 Yellowstone River Compact (Compact), the United States Supreme Court upheld the findings of the Special Master. See the 2016 Water Resources chapter in the Year In Review for a summary of the findings of the Special Master. The Court remanded the case to the Special Master to determine damages and other appropriate relief.

Montana and Wyoming submitted a joint memorandum[17] articulating the issues that must be resolved in the remedies phase of the proceedings, including: (1) the amount of damages to which Montana is entitled based on Wyoming's liability for 2004 and 2006; (2) how costs should be allocated for the proceeding; and (3) whether the Court should issue affirmative relief, and if so, what such relief should be.

On April 27, 2016, Wyoming moved for summary judgment,[18] seeking judgment against itself to pay Montana $20,340, plus prejudgment interest, and dismissal of the case with prejudice. Wyoming claims Montana's damages are limited to the cost of readily available replacement water, injunctive relief is not appropriate because there is no cognizable danger of Wyoming violating the Compact again, the specific controversy Montana brought to the Court has been resolved and Montana is not entitled to further declaratory relief, and costs should not be awarded to either party because each state prevailed on some issues in the proceedings. On May 27, 2016, Montana moved for summary judgment to declare that the Compact protects Montana's water right in the Tongue River Reservoir, to fill 72,500 acre-feet, less carryover storage, each year.[19] The parties are awaiting a decision from the Special Master on both motions.

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[15]No. 1:15-cv-00895-CL, 2016 U.S. Dist. LEXIS 79006 (D. Or. Mar. 3, 2016).

[16]136 S. Ct. 1034 (2016).

[17]Joint Memorandum Regarding Issues, Procedure, and Proposed Schedule for Remedies Phase, Montana v. Wyoming, No. 137 (U.S. Apr. 25, 2016).

[18]Wyoming's Motion for Summary Judgment as to Remedies, Montana v. Wyoming, No. 137 (U.S. Apr. 27, 2016).

[19]Montana's Motion and Brief for Summary Judgment on Tongue River Reservoir, Montana v. Wyoming, No. 137 (U.S. May 27, 2016).

A. Alaska

No significant state developments were reported for 2016.

B. Arizona

1. Legislative

In 2016, the Legislature extended the existing exemption from irrigation water duty limits, conservation requirements, and certain fees applicable in the Buckeye waterlogged area to December 31, 2024.[20] The Legislature also expanded potential uses of Arizona Water Protection Fund monies to projects that increase water availability.[21] In S.B. 1399, the Legislature required the State Land Commission and the Director of Water Resources to develop a plan to create additional water storage on state trust lands.[22]

2. Judicial

In *Silver v. Pueblo Del Sol Water Co.*,[23] the Arizona Court of Appeals held that the Arizona Department of Water Resources (ADWR), in determining whether a 100-year adequate water supply is available for new subdivisions, must "give educated consideration to … unquantified priority federal reserved water rights … until such [rights are] … quantified in … [Arizona's] General Stream Adjudication for the Gila River System and Source."[24] The court explained that, once adjudicated, federal water rights will have priority over any state-based water rights vested after the date of the federal reservation and therefore such state-based water rights may be at risk of being unavailable.[25] The court also held, however, that ADWR is not required to consider separately the potential impact of proposed groundwater pumping on federal water rights.

C. California

1. Legislative

On August 29, 2016, California Governor Jerry Brown signed Senate Bill (SB) 814.[26] The bill prohibits excessive water use by residential customers in single-family residences or multiunit housing complexes during specified periods. SB 814 requires fully metered urban water suppliers to institute a method to identify and discourage excessive water use by establishing: (1) a rate structure that includes block tiers, water budgets, or rate surcharges over and above base rates for excessive water use; or (2) an excessive water use ordinance, rule, or tariff condition that includes a definition of, or a procedure to identify and address, excessive water use.

On September 23, 2016, Governor Brown signed Assembly Bill 1755,[27] enacting the Open and Transparent Water Data Act (Act). The Act requires the Department of Water

[20] ARIZ. REV. STAT. ANN. §§ 45-411.01, 45-519 (2016).
[21] ARIZ. REV. STAT. ANN. §§ 45-2101, 45-2113 (2016).
[22] S.B. 1399, 52nd Leg., 2d Reg. Sess. (Ariz. 2016).
[23] 384 P.3d 814 (Ariz. Ct. App. 2016).
[24] *Id.* at 825.
[25] *Id.* at 815.
[26] S. 814, 2016-17 Reg. Sess. (Cal. 2016).
[27] A.B. 1755, 2016-2017 Reg. Sess. (Cal. 2016).

Resources (DWR) to: (1) create, operate, and maintain a statewide water data system; and (2) develop protocols for data sharing, documentation, quality control, public access, and promotion of open-source platforms and decision support tools related to water data.

On September 23, 2016, Governor Brown signed Assembly Bill 2594.[28] The bill allows a public entity that captures stormwater from urban areas to, under certain conditions, augment the entity's existing water supplies.

On September 25, 2016, Governor Brown signed Senate Bill 7,[29] which is aimed at conserving water in multifamily residential rental buildings and establishing related submetering practices. Senate Bill 7 also authorizes the Department of Housing and Community Development to develop building standards that require the installation of water meters or submeters in multiunit residential buildings. The bill also adds a requirement to the existing Water Measurement Law that a water purveyor measure the quantity of water supplied to each individual dwelling unit as a condition of providing new water service to a newly constructed multiunit residential structure or mixed-use residential and commercial structure.

2. Judicial

In *Newhall County Water District v. Castaic Lake Water Agency*,[30] Division Eight of the Second Appellate District of the California Court of Appeal held that a public water agency's wholesale water rate for supplying imported surface water to retail water suppliers violated Article XIII C of the California Constitution (Proposition 26) because: (1) the method of allocation under the rate did not "'bear a fair or reasonable relationship to the [retail water supplier's] burdens on, or benefits received from ….'" the public water agency; and (2) the public water agency's groundwater management activities in the basin were not a "'service . . . provided directly to the [retail water supplier] that is not provided to those not charged'", but instead constituted activities that benefited the entire basin.[31] (Cal. Const., Art. XIII, section 1(e).)

On December 8, 2015, following a rehearing in *Great Oaks Water Co. v. Santa Clara Valley Water District*,[32] the Sixth Appellate District of the California Court of Appeal held that the Santa Clara Valley Water District acted within the scope of its authority under the Santa Clara Valley Water District Act[33] in imposing a groundwater extraction fee, finding the fee is a property-related charge pursuant to Article XIII D of the California Constitution (Proposition 218).[34]

On March 23, 2016, the California Supreme Court granted Great Oaks Water Company's Petition for Review,[35] but deferred briefing on the matter pending its decision in *City of San Buenaventura v. United Water Conservation District*,[36] in which Division Six of the Second Appellate District of the California Court of Appeal concluded that a water conservation district's groundwater pumping fees are not property-related fees subject to the restrictions imposed under Proposition 218 or taxes under Proposition 26.

On May 10, 2016, Division Three of the Fourth Appellate District of the California Court of Appeal issued decisions for publication in *Center for Biological Diversity v.*

[28]A.B. 2594, 2016-2017 Reg. Sess. (Cal. 2016).
[29]S.B. 7, 2016-2017 Reg. Sess. (Cal. 2016).
[30]197 Cal. Rptr. 3d 429 (Cal. Ct. App. 2016).
[31]*Id.* at 431, 437.
[32]196 Cal. Rptr. 3d 171 (Cal. Ct. App. 2015).
[33]CAL. WATER CODE §§ 60-1 to 60-356 (West 2016).
[34]CAL. CONST. art. XIII D.
[35]*Appellate Courts Case Information, Supreme Court Case: S231846*, CAL. CT.'S (last visited Mar. 3, 2017).
[36]185 Cal. Rptr. 3d 207 (Cal. Ct. App. 2015).

County of San Bernardino[37] (CBD Case), and *Delaware Tetra Technologies, Inc. v. County of San Bernardino*[38] (DE Tetra-Tech Case). Two of six cases then pending before the court challenging a proposed public/private partnership to pump fresh groundwater from an underground aquifer located below property in the Mojave Desert for transport to customers in Los Angeles, Orange, Riverside, San Bernardino, and Ventura Counties (Project). In the *CBD Case*, the court affirmed the trial court's denial of a petition for writ of mandate that challenged the approval of the Project under the California Environmental Quality Act (CEQA).[39] In the *DE Tetra-Tech Case*, the court also affirmed the trial court's denial of a petition for writ of mandate that challenged a county resolution authorizing the execution of a memorandum of understanding related to the Project without first performing CEQA review.[40]

On August 23, 2016, in the *Delta Stewardship Council Cases*,[41] seven coordinated lawsuits challenging the Delta Stewardship Council's (Council) Delta Plan and corresponding regulations and Programmatic Environmental Impact Report, the Council filed an appeal of the Superior Court's June 24, 2016 ruling invalidating the Delta Plan based on findings that it lacked enforceable, quantifiable targets for some of its performance measures and failed to adequately promote options for conveying water across the Sacramento-San Joaquin River Delta. The June 24, 2016 ruling was issued in response to several motions for clarification of the court's May 18, 2016 ruling, which found (among other things) that the Delta Plan regulations failed to comply with the Sacramento-San Joaquin Delta Reform Act of 2009 and the Administrative Procedures Act.

3. Administrative

On March 21, 2016, the Office of Administrative Law approved a resolution by the State Water Resources Control Board (SWRCB) adopting an Emergency Regulation for Measuring and Reporting Water Diversions, outlining new measurement and reporting requirements for many California water diverters pursuant to SB 88. The new regulation requires annual reporting on diversion and use of water. In periods of drought, the SWRCB may require more frequent reporting in affected areas. The regulation provides requirements for both accuracy and monitoring frequency of measurement devices. Larger diversions, storage reservoirs, and ponds are subject to more stringent measuring and monitoring requirements. However, the regulation also allows diverters to propose an alternative measuring method or compliance approach under certain circumstances.

On May 9, 2016, California Governor Jerry Brown issued Executive Order B-37-16 (EO).[42] The EO included a number of directives focused on using water more wisely, eliminating water waste, strengthening local drought resilience, and improving agricultural water use efficiency and drought planning. The EO directed the SWRCB to adjust its emergency conservation regulations to recognize the differing water supply conditions that exist across California and to develop a proposal to achieve the 25% mandatory reduction in potable urban water use required in Executive Order B-29-15,[43] as well as to prohibit practices that waste potable water. The EO also directed DWR and the SWRCB to develop new water use targets as part of a permanent framework for urban water agencies and to

[37]201 Cal. Rptr. 3d 898 (Cal. Ct. App. 2016), *as modified by* 2016 Cal. App. LEXIS 404 (May 18, 2016) (modification does not affect a change in the judgment).
[38]202 Cal. Rptr. 3d 145 (Cal. Ct. App. 2016).
[39]*Ctr. for Biological Diversity*, 201 Cal. Rptr. 3d at 902-03.
[40]*Del. Tetra Techs., Inc.*, 202 Cal. Rptr. 3d at 147.
[41]Press Release, Delta Stewardship Council, Council Appeals June 24 Ruling of Sacramento County Superior Court (Aug. 23, 2016).
[42]Cal. Exec. Order No. B-37-16 (May 9, 2016)
[43]*Id.*

require urban water agencies to issue monthly reports on water usage, conservation, and enforcement. The EO further directed DWR and the SWRCB to guide actions to minimize water system leaks and direct urban and agricultural suppliers to accelerate their data collection, improve water system management, and prioritize capital projects to reduce water waste. The EO also directed DWR to strengthen requirements for urban Water Shortage Contingency Plans and to update existing requirements for Agricultural Water Management Plans, as well as to require the completion of Agricultural Water Management Plans for water suppliers with over 10,000 acres of irrigated land.

On May 18, 2016, the SWRCB adopted an emergency water conservation regulation.[44] The new regulation, which took effect in June 2016 and will continue through January 2017, prohibits specified end-user actions relating to the use of potable water. The significant change from the prior regulation is the use of a conservation approach that allows urban water suppliers to replace their previously assigned percentage conservation standards with a localized "stress test" standard based on a determination made by each urban water supplier assuming certain conditions, including extended drought. The regulation also requires wholesale water suppliers to estimate the water supply that will be available to urban water suppliers through 2019.

On September 23, 2016, in relation to the continuing effort to remove several dams on the Klamath River, the Klamath River Renewal Corporation (KRRC) filed two applications[45] with the Federal Energy Regulatory Commission (FERC) necessary to decommission the river's four large hydroelectric dams. The filing of these applications marks a major milestone contemplated in the April 2016 amendments to the Klamath Hydroelectric Settlement Agreement, which outlines the framework for decommissioning and removing the four hydroelectric dams. The FERC and other agencies are expected to conduct a series of public hearings to address the applications over the course of the next few years.[46]

The SWRCB is engaged in a multi-phase process to develop and implement updates to its *Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary* (Bay-Delta Plan). The phases include: (1) Phase 1: development of lower San Joaquin River flow objectives and southern Delta salinity objectives; (2) Phase 2: development of (i) Delta outflow objectives, (ii) export/inflow objectives, (iii) Delta Cross Channel Gate closure objectives, (iv) Suisun Marsh objectives, (v) reverse flow objectives for Old and Middle Rivers, (vi) floodplain habitat flow objectives, (vii) changes to the monitoring and special studies program, and (viii) other changes to the program of implementation; (3) Phase 3: consideration of changes to water rights and other actions to implement the changes from Phase 1 and Phase 2; and (4) Phase 4: development of flow objectives in the Sacramento River Watershed to address public trust needs. The SWRCB is currently working on Phase 1 and Phase 2.[47]

Since the passage of the Sustainable Groundwater Management Act (SGMA) in 2014, state and local agencies have taken a number of actions to implement the law. Local agencies have begun forming groundwater sustainability agencies[48] (GSA) that will be responsible for establishing groundwater sustainability plans (GSP) or acceptable

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[44]CAL. WATER CODE § 863 (West 2016).

[45]KLAMATH RIVER RENEWAL CO., THE KLAMATH RIVER RENEWAL CORPORATION BEGINS IMPLEMENTATION OF KLAMATH HYDROELECTRIC SETTLEMENT AGREEMENT (2016).

[46]DEP'T OF INTERIOR, KLAMATH HYDROELECTRIC SETTLEMENT AGREEMENT (Feb. 18, 2010) (as amended Apr. 6, 2016).

[47]*San Francisco Bay/Sacramento—San Joaquin Delta Estuary (Bay-Delta) Watershed Efforts*, CAL. ENV'L PROT. AGENCY, STATE WATER RES. BD. (last updated Jan. 4, 2017).

[48]*Groundwater Sustainability Agencies*, CAL. DEP'T WATER RES., SUSTAINABLE GROUNDWATER MGMT. (last updated Feb. 23, 2017).

alternatives. DWR also finalized groundwater basin boundary modifications[49] pursuant to a process authorized by SGMA and adopted GSP emergency regulations[50] that address the components of GSPs, alternatives to GSPs, GSP coordination agreements, and the methods and criteria DWR will use to evaluate each. DWR is currently developing best management practices for the sustainable management of groundwater basins.[51]

D. Colorado

1. Legislative

House Bill 16-1005[52] legalized rain barrel collection of precipitation, with much media attention. Article 96.5 allows for collection of precipitation from residential rooftops using a maximum of two "rain barrels" with a combined storage capacity of one hundred ten gallons. The precipitation may be used for outdoor purposes on the residential property, including irrigation of lawns and gardens. Rain barrel use is subject to curtailment by the State Engineer under C.R.S. section 37-92-502(2)(a). Additionally, C.R.S. section 25-1.5-210 was added to require the Department of Public Health and the Environment to develop best practices for rain barrel collection and C.R.S. section 38-33.3-106.5(1)(j) was added to specify that common interest community associations cannot prohibit residential rain barrel use.

The state legislature amended C.R.S. section 23-31-313[53] to allow for wildfire risk mitigation to include secondary treatment of woody fuels by broadcast burning as a means to promote community watershed restoration.

C.R.S. section 37-92-310[54] was added to declare that the United States Forest Service (Forest Service) and the Bureau of Land Management (BLM) are subject to the jurisdiction of the Colorado Water Courts with regard to their water rights in Colorado. However, the Colorado State and Division Engineers are not authorized to enforce or administer efforts by the Forest Service or BLM that require any transfer of title to water rights to these organizations. No entity can restrict use or alienability of the water right as a condition on certain authorizations to use federally owned land or require a third party supplying water to a special use permittee to supply the water for a defined period of time or in a set amount.

C.R.S. sections 37-60-133, 37-80-123, 37-92-305(4)(c) and (19), 37-92-308[55] were added to provide mechanisms through which up to fifty percent of agricultural water rights may be transferred to other uses on a temporary basis once decreed for use as "agricultural protection water rights." The remainder of the absolute decreed agricultural water rights must continue to be used for agricultural purposes.

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[49] *Basin Boundary Modifications*, CAL. DEP'T WATER RES.: SUSTAINABLE GROUNDWATER MGMT. (last updated Oct. 28, 2016).
[50] CAL. WATER CODE § 350 (West 2016).
[51] *Best Management Practices*, CAL. DEP'T WATER RES., SUSTAINABLE GROUNDWATER MGMT. (last updated Dec. 27, 2016).
[52] H.B. 16-1005, 70th Gen. Assemb., 2nd Reg. Sess. (Colo. 2016).
[53] H.B. 16-1019, 70th Gen. Assemb., 2d Reg. Sess. (Colo. 2016) (amending COLO. REV. STAT. § 23-31-313).
[54] H.B. 16-1109, 70th Gen. Assemb., 2d Reg. Sess. (Colo. 2016) (adding COLO. REV. STAT. § 37-92-310).
[55] H.B. 16-1228, 70th Gen. Assemb., 2d Reg. Sess. (Colo. 2016) (adding COLO. REV. STAT. §§ 37-60-133, 37-80-123, 37-92-305(4)(c) and (19), 37-92-308).

C.R.S. section 23-31-313(6)(b)(I)[56] was amended and C.R.S. sections 23-31-313(6)(a)(IV) and 2-3-1203[57] were added to provide additional methods to manage Colorado's forests to protect water supply conditions. Conditions include requiring the Colorado State Forest Service to work with the Colorado Water Conservation Board to compile and summarize findings from existing studies to quantify and document the relationship between forest management and the State Water Plan adopted under C.R.S. section 37-60-106(1)(u) in protecting and managing water resources in the state. A report summarizing these findings must be submitted to the General Assembly by July 1, 2017.

C.R.S. sections 37-60-115(11) and 39-29-109[58] were added to provide for the preparation of a study to identify water storage possibilities in the South Platte River Basin, including construction of a reservoir and aquifer recharge. The measure responds to the Colorado Water Plan's stated goal of attaining an additional 400,000 acre feet or water storage in Colorado by 2050.

C.R.S. sections 37-46-102(5), 37-46-112(1), 37-46-113(1), 37-46-114(1) were amended and 37-92-114.5[59] was added to create an alternative mechanism for creating a sub-district of the Colorado River Water Conservation District.

C.R.S. section 24-20-114[60] created a position in the Governor's office that coordinates permitting of water projects. The Director of Water Project Permitting assists in the coordination of permitting by federal, state, and local governments of raw water diversion, storage or delivery projects, including associated hydroelectric facilities and both consumptive and non-consumptive uses of water and water projects that are eligible.

2. Judicial

In *Upper Eagle Regional Water Authority v. Wolfe*,[61] the Colorado Supreme Court held that the owner of a portfolio of water rights could choose which in-priority conditional water rights it desires to divert first and make absolute. The portfolio included two conditional water rights decreed and available for diversion at the same structure, for the same place of use, and for the same beneficial uses, with different priorities. However, the Court found that if the water rights owner elects to make the junior conditional water right absolute first, the owner is not entitled to later divert and use its more senior conditional water right absent a showing that it needs the senior right in addition to the junior right, which the Court reasoned was consistent with its decision in *Upper Yampa Water Conservancy District v. Wolfe*.[62]

In *County of Boulder in Boulder County v. Boulder & Weld County Ditch Co.*,[63] the Colorado Supreme Court evaluated whether the Applicant had carried its burden of proving historic consumptive use by presenting an accurate historic consumptive use analysis for the purpose of its application to change its water rights from irrigation use. The Supreme Court agreed with the Water Court that the Applicant failed to carry its

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[56]H.B. 16-1255, 70th Gen. Assemb., 2d Reg. Sess. (Colo. 2016) (amending COLO. REV. STAT. § 23-31-313(b)(1) and (b)(9) and adding COLO. REV. STAT. §§ 23-31-313(6)(a)(IV)).
[57]*Id.*
[58]H.B. 16-1256, 70th Gen. Assemb., 2d Reg. Sess. (Colo. 2016) (adding COLO. REV. STAT. §§ 37-60-115(11) and 39-29-109).
[59]S.B. 16-145, 70th Gen. Assemb., 2d Reg. Sess. (Colo. 2016) (adding COLO. REV. STAT. §§ 37-46-102(5), 37-46-112(1), 37-46-113(1), 37-46-114(1) and amending COLO. REV. STAT. 37-92-114.5).
[60]S.B. 16-200, 70th Gen. Assemb., 2d Reg. Sess. (Colo. 2016) (adding COLO. REV. STAT. § 24-20-114).
[61]371 P.3d 681, 687 (Colo. 2016).
[62]255 P.3d 1108, 1114 (Colo. 2011).
[63]367 P.3d 1179 (Colo. 2016), *reh'g denied* (Apr. 11, 2016).

burden because it did not demonstrate accurate quantification of the average amount of water historically used or acres irrigated.

In *Indian Mountain Corp. v. Indian Mountain Metropolitan District*,[64] the Colorado Court of Appeals evaluated a metropolitan water district's responsibilities when the successor of an original developer of a subdivision held legal title to the water rights and augmentation plan that benefitted the subdivision. The court of appeals found that the district was in compliance with its service plan because it was not required by its service plan to acquire or operate the augmentation plan, and the district's failure to do so was not a material modification of its service plan under the Special District Act.

3. Administrative

The Procedural Rules that govern how the State Engineer processes rule-making and adjudicatory hearings[65] were updated and section 402-5.1.1.16 was repealed.

The Rules and Regulations for Water Well Construction, Pump Installation, Cistern Installation, and Monitoring and Observation Hole/Well Construction[66] were updated, including the addition of construction procedures for wells constructed in confined aquifers.

E. Idaho

1. Legislative

Senate Bill 1278[67] amended Idaho Code section 42-201 to state that an "entity operating a canal or conduit for irrigation or other beneficial use[s]…." is not required "to obtain an additional water right" to generate hydropower in the same canal or conduit, using the same water, under certain conditions. The bill declares such "incidental hydropower use" to be "junior to and fully subordinated to all existing and future uses" and "nonconsumptive."[68]

Three Senate Concurrent Resolutions were adopted addressing declining ground water levels in Idaho. Senate Concurrent Resolution 136[69] sets forth measures necessary to address the declining ground water levels in the Eastern Snake Plain Aquifer [ESPA].The resolution established an ESPA "managed recharge goal of 250,000 acre-feet on an average annual basis" and directed development of the capacity necessary to achieve the ESPA recharge goal on or before December 31, 2024. Senate Concurrent Resolution 137[70] requests the Idaho Water Resource Board to identify and implement stabilization and sustainability projects to stabilize and enhance ground water supplies that have been declining throughout Idaho. Senate Concurrent Resolution 138[71] expresses legislative support for the June 30, 2015 Settlement Agreement "between participating surface water members of the Surface Water Coalition and participating members of the Idaho Ground Water Appropriators, Inc…." The Settlement Agreement will resolve the multiple water delivery calls that have led to protracted litigation and economic uncertainty for all water

[64]921 P.2d 65 (Colo. App. 1996), *rev'd and remanded*, 2016 Colo. App. LEXIS 1170 (Aug. 2016).
[65]2 COLO. CODE REGS. § 402-5 (2016).
[66]2 COLO. CODE REGS. § 402-2 (2016).
[67]S.B. 1278, 63rd Leg., 2d Reg. Sess. (Idaho 2016).
[68]*Id.*
[69]S.C.R. 136, 63rd Leg., 2d Reg. Sess. (Idaho 2016).
[70]S.C.R. 137, 63rd Leg., 2d Reg. Sess. (Idaho 2016).
[71]S.C.R. 138, 63rd Leg., 2d Reg. Sess. (Idaho 2016).

users in the Eastern Snake River Aquifer.[72] The resolution recognizes that the State supports the goal of the Settlement Agreement to stabilize and reverse the trend of declining ESPA water levels.[73]

2. Judicial

The Idaho Supreme Court decided four cases related to the conjunctive management delivery call filed with the Idaho Department of Water Resources (Department) by Rangen, Inc., against junior-priority ground water users within the ESPA area of common ground water supply.

In the first case, *Rangen, Inc. v. Idaho Department of Water Resources*,[74] the Director of the Department issued an order interpreting water right decrees issued to Rangen in the Snake River Basin Adjudication (SRBA). The Director concluded that Rangen's water right decrees are unambiguous and that Rangen is entitled to water only from a single source and point of diversion. The Court affirmed, finding that "[a]ny interpretation of Rangen's [water right] decrees that is inconsistent with their plain language would necessarily impact the certainty and finality of the SRBA judgments…." and must be rejected for not being timely asserted in the SRBA.[75]

In the second case, *Idaho Ground Water Ass'n v. Idaho Department of Water Resources*,[76] the Court addressed appeals filed by the Idaho Ground Water Appropriators, Inc. (IGWA) and City of Pocatello from the district court's decision regarding the Director's order curtailing ground water pumping in response to Rangen's delivery call. The Court reversed the district court's ruling that the Director abused his discretion by implementing a trim line limiting curtailment to ground water pumping west of the Great Rift, a volcanic rift zone bisecting the ESPA.

In the third case, *Rangen, Inc. v. Idaho Department of Water Resources*,[77] Rangen appealed the district court's decision regarding the Director's conditional approval of a mitigation plan. The Court affirmed the district court's determinations that the Director did not abuse his discretion by deferring consideration of potential injury to other water users to a transfer proceeding and that IGWA's mitigation plan provided sufficient contingency provisions.

In the fourth case, *North Snake Ground Water District v. Idaho Department of Water Resources*.,[78] the court affirmed the district court's decision setting aside the Director's order denying an application for permit filed by several water districts to appropriate water from a point of diversion on Rangen's property to deliver mitigation water to Rangen. The Court affirmed the district court's order setting aside the Director's conclusions that the water districts' application was not filed in good faith and not in the local public interest. The Court also affirmed the district court's decision upholding the Director's determination that mitigation is a valid beneficial use.

On September 1, 2016, the district court issued two decisions related to the refill issues raised by *In re SRBA, Case No. 39576, Subcase 00-91017*[79] and an order issued by

[72] *Id.*
[73] *Id.*
[74] 367 P.3d 193 (Idaho 2016).
[75] *Id.* at 201.
[76] 369 P.3d 897 (Idaho 2016), *reh'g denied* (May 9, 2016).
[77] 371 P.3d 305 (Idaho 2016).
[78] 376 P.3d 722 (Idaho 2016).
[79] 336 P.3d 792, 794 (Idaho 2014).

the Director regarding water rights accounting.[80] In its first decision, the district court affirmed the Director's findings and conclusions regarding the two fundamental principles used in water right storage accounting.[81] The first principle is that all natural flow entering a reservoir that is available in priority is accrued to the reservoir water rights. The second principle is that, when the amount of natural flow that has entered the reservoir in priority equals the quantity element of the reservoir water right, the right is deemed satisfied or filled. The district court reversed and remanded back to the Director determinations related to "unaccounted for storage," the term used in water right accounting to describe water physically stored in the reservoir system that is in excess of licensed and decreed water rights. The district court held that the Director's method of accruing water to unaccounted for storage is contrary to Idaho Code section 42-201. The district court went on to state that the United States and the irrigators have a right to the water identified as unaccounted for storage and that the Director erred in failing to recognize the interest.

In its second decision, the district court addressed five late claims filed in the SRBA for reservoir refill water rights.[82] Certain irrigation entities filed motions for summary judgment asserting that the late claims were not necessary because the water use claimed under the late claims is already memorialized under the existing decreed reservoir water rights, challenging the Director's water right accounting process. The Special Master entered an order agreeing with the irrigation entities, but the district court determined it lacked jurisdiction to rule on the propriety of the Director's accounting methodology. The district court recommitted the case to the Special Master for further proceedings on whether the historical use of unaccounted for storage supports establishment of beneficial use claims.

3. Administrative

On November 2, 2016, the Director issued an order[83] designating and delineating the boundary of the ESPA Ground Water Management Area pursuant to Idaho Code section 42-233b. Given "continuing declines in ESPA storage and spring discharges" and that "[f]uture conditions including climate change and water user practices are unknown," the Director concluded that designating the ESPA Ground Water Management Area "is consistent with, if not required by, the Director's duties under the Ground Water Act."[84] Multiple requests for reconsideration and a request for hearing regarding the Director's order were filed with the Department, and are currently pending.

[80]Amended Final Order, In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63 (Idaho Dep't of Water Res. Oct. 20, 2015).
[81]Order, In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63, No. CV-WA-2015-21376 (4th Jud. Dist. Idaho Sept. 1, 2016).
[82]Memorandum Decision and Order on Challenge and Order of Recommitment to Special Master, *In re* SRBA, No. 39576, Subcase Nos. 63-33732 et al. (5th Jud. Dist. Idaho Sept. 1, 2016).
[83]Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area, In the Matter of Designating the Eastern Snake Plain Aquifer Ground Water Management Area, (Idaho Dep't of Water Res. Nov. 2, 2016).
[84]*Id*. at 19-20.

F. Kansas

1. Legislative

Kansas Statute Annotated section 82a-732 was amended to increase the permissible statutory penalty for failing to file an annual water use report from $250 to $1,000, as well as permitting the Chief Engineer to enter an order suspending the right to divert water until the water use report has been filed.[85]

2. Administrative

The Chief Engineer made minor amendments to several administrative regulations, including amendments to regulations further limiting the quantity of water that could be diverted from the High Plains and Equus Beds aquifers in three groundwater management districts;[86] adding an alternative method for calculating the amount of water deposited in a multiyear flex account within the Big Bend Groundwater Management District No 5;[87] and amending permitting requirements for the storage and recovery of water in an aquifer.[88]

G. Montana

1. Legislative

In *In re Crow Water Compact*,[89] the Montana Supreme Court outlined the standard of review for objections to a water compact when the objector is not a party to the compact. First, the court must determine whether the compact was the product of good faith, arms-length negotiations. If it was, the compact is presumptively valid and the objectors must show their interests are materially injured by operation of the compact.

In *Curry v. Pondera County Canal & Reservoir Co.*,[90] the Montana Supreme Court ruled water rights developed by a Carey Land Act company for the purpose of sale or rental are not limited by the stockholders' actual historical water use. The Court held Pondera put water to beneficial use by providing water for sale and issuing shares of stock up to the maximum acreage approved by the Board. A water right for sale cannot be lost based upon the acts of third-party shareholders, but can be lost by nonuse or abandonment measured by the acts of the company. The Court found the Birch Creek Flats were either not included within Pondera's project or Pondera's lack of issuance of stock to water users on the Flats prior to 1973 equates to nonuse in the area, and thus this area must be removed from Pondera's service area.

In *Clark Fork Coalition v. Tubbs*,[91] the Montana Supreme Court held the rule defining a combined appropriation as a physical connection between groundwater developments is inconsistent with the Montana Water Use Act which has the purpose of protecting senior water rights from encroachment by prospective junior appropriators.

In *Teton Co-op Canal Co. v. Teton Coop Reservoir Co.*,[92] the Montana Supreme Court ruled the canal company's senior water rights did not include a reservoir. The Court

[85] KAN. STAT. ANN. § 82a-732 (2016).
[86] 35 Kan. Reg. 199 (Mar. 10, 2016); 35 Kan. Reg. 385 (Apr. 28, 2016).
[87] 35 Kan. Reg. 200 (Mar. 10, 2016).
[88] 35 Kan. Reg. 313 (Apr. 14, 2016).
[89] 364 P.3d 584 (Mont. 2015).
[90] 370 P.3d 440 (Mont. 2016).
[91] 380 P.3d 771 (Mont. 2016).
[92] 365 P.3d 422 (Mont. 2016).

also ruled that the canal company did not exercise reasonable diligence to develop its reservoir until the mid-1930s.

In *Eldorado Coop Canal Co. v. Lower Teton Joint Objectors*,[93] the Montana Supreme Court upheld the Water Court's imposition of a volume limit on Eldorado's water rights based on Eldorado's statement of claim. The Supreme Court also reiterated the standard of review applicable to water judge's review of a water master's decision.

In *Eldorado Coop Canal Co, v. Hoge*,[94] the Montana Supreme Court ruled a water commissioner appointed to administer rights under a 1908 decree also could enforce the Water Court's modified temporary preliminary decree imposing a volume limit on Eldorado's diversions.

In *Kelly v. Teton Prairie LLC*,[95] the Montana Supreme Court held a senior water appropriator may make calls to selective junior appropriators and is not required to call the most junior user and work up the priority list. The Court also held a senior water right holder does not have to wait until the river is dry to make a call for instream stock water. The Court determined a call for water is futile only if the amount of water necessary to meet an appropriation will not reach a senior's point of diversion due to carriage loss.

In *Fellows v. Saylor*,[96] the Montana Supreme Court allowed a district court, when presiding on a water distribution dispute, to certify to the water court the adjudication of the water rights and to request that the water court determine which water rights are at issue in the dispute.

In *Granite County Board of Commissioners v. McDonald*,[97] the Montana Supreme Court confirmed that a downstream appropriator has no rights to water stored behind an upstream dam as long as the dam operator releases the natural inflow into the stream below the dam. The Court also ruled that the principles of judicial estoppel do not apply to changes in position relating to matters of law and the principles of collateral estoppel do not prevent the interpretation of a prior decree.

2. Administrative

The Montana Department of Natural Resources and Conservation adopted new rules[98] regarding the Rye Creek Stream Depletion Zone.

H. Nebraska

1. Legislative

Nebraska's unique one chamber legislature, the Unicameral, adopted several bills relating to water resources. The most significant legislation adopted in many years was LB 10380,[99] which amended several statutes regarding a specific type of transfer and change of use. The bill amended Neb. Rev. Stat. section 46-290[100] to allow the transfer/change of use of hydroelectric water rights to "instream-basin-management" rights. This new type of right will stretch upstream from the prior point of the hydropower plant. Because the legislation also preserves the "manufacturing" preference specified in the state constitution,

[93]369 P.3d 1034 (Mont. 2016).
[94]373 P.3d 836 (Mont 2016).
[95]376 P.3d 143 (Mont 2016).
[96]367 P.3d 732 (Mont. 2016).
[97]383 P.2d 740 (Mont. 2016).
[98]MONT. ADMIN. R. 36.12.2205 (2016).
[99]L.B. 1038, 104th Leg., 2d Reg. Sess. (Neb. 2016).
[100]NEB. REV. STAT. § 46-290 (2016).

the right can be subrogated or condemned by higher preference uses, such as irrigation and domestic uses.

Also adopted were LB 956[101] and LB 957,[102] which created a new fund with $13.7 million to provide assistance in renovating levees protecting the Offutt Air Force Base south of Omaha and building others to remove land from the flood plain so that it may be developed by private entities and to enhance protection to roads, bridges and other infrastructure. The latter bill also authorizes the Natural Resources Commission to allocate for no more than one additional project up to $18 million in excess of what is appropriated to the Water Sustainability Fund.

2. Judicial

In *Lingenfelter v. Lower Elkhorn Natural Resources District*,[103] an irrigator was ordered by the natural resources district (NRD) to cease irrigating with groundwater because the acres irrigated had not been certified pursuant to the NRD rules. The court stated that NRDs are not "agencies", as contemplated by the state administrative procedure act and thus it did not apply to NRD's. The review of the NRDs rules and actions was pursuant to a more limited standard. The Nebraska Supreme Court upheld the challenged decision of the NRD and its rules.

I. Nevada

1. Judicial

In *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Seventh Judicial District Court of Nevada*,[104] the Corporation of the Presiding Bishop (Corporation) challenged the Southern Nevada Water Authority's (SNWA) 1989 water permit applications, arguing the State Engineer could not subject SNWA's applications to incremental development and monitoring under Nevada Revised Statute (NRS) 533.3705(1). The Court found that because SNWA's water use was not approved by the State Engineer until after the statute took effect, the State Engineer could apply pumping restrictions and there was no improper retroactive statutory application. In *Bentley v. State Engineer*[105] the Bentleys challenged the district court's imposition of a rotation schedule in a water rights adjudication, under NRS 533.075, which states a rotation schedule may be imposed where all water users agree to the schedule. The Nevada Supreme Court noted NRS 533.075 does not limit the district court's power to impose an involuntary rotation schedule once its jurisdiction is invoked, and found the district court could properly impose a rotation schedule.

In *Jackson v. Groenendyke*[106] Jackson challenged the district court's confirmation of the State Engineer's finding that Groenendyke's Green Acres properties held a vested water right to the waters of Spring A. The Nevada Supreme Court restated the principle that vested water rights are established when there is a diversion of water to a beneficial use prior to the enactment of the water code. Here, the Court affirmed that Green Acres properties held a vested right because water from Spring A flowed to the property through a pipe, a diversion, and water was put to beneficial use irrigating the properties.

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[101]L.B. 956, 104th Leg., 2d Reg. Sess. (Neb. 2016).
[102]L.B. 957, 104th Leg., 2d Reg. Sess. (Neb. 2016).
[103]N.W.2d 892 (Neb. 2016).
[104]366 P.3d 1117 (Nev. 2016).
[105]Nos. 64773 et al., 2016 WL 3856572 (Nev. July 14, 2016).
[106]369 P.3d 362 (Nev. 2016).

2. Legislative

The Nevada Legislative Commission's Subcommittee to Study Water released their Summary of Recommendations ahead of Nevada's 29th legislative session in 2017. One request transmitted to the legislature proposes allowing the State Engineer to limit withdrawals from new domestic wells in over-appropriated basins. The Subcommittee's position statement acknowledged the connectivity between surface water and groundwater and the need for the State Engineer to conjunctively manage both resources.[107]

3. Administrative

The State Engineer issued Order # 1276 Curtailing New Appropriations of Groundwater within the Buena Vista Valley Hydrographic Basin. The Order provided for curtailment of new groundwater appropriations because the basin is already over appropriated. The State Engineer will deny any new groundwater application unless it meets an exception under NRS chapters 533 and 534.[108] Similarly, State Engineer's Order # 1270 curtails groundwater appropriations within the Mason Valley Hydrographic Basin in Lyon and Mineral Counties, Nevada;[109] State Engineer's Order # 1271 curtails groundwater appropriations in the Smith Valley Hydrographic Basin in Douglas and Lyon Counties, Nevada;[110] and State Engineer's Order # 1269 curtails groundwater appropriations in the Desert Valley Hydrographic Basin located in Humboldt County, Nevada.[111]

The State Engineer's Order # 1275 designated certain areas within Esmeralda County as the Clayton Valley Hydrographic Basin under NRS 534.030, which creates a groundwater basin that will be further administered by the State Engineer.[112] State Engineer's Order # 1274 designated the Alkali Spring Valley Hydrographic Basin within Esmeralda and Nye Counties.[113]

J. New Mexico

In *Santa Fe Water Res. Alliance, L.L.C. v D'Antonio*,[114] the court of appeals found that a district court can award costs against the State Engineer of New Mexico when the

[107]NEV. LEGISLATIVE COMM'NS SUBCOMM. TO STUDY WATER, SUMMARY OF RECOMMENDATIONS (Aug. 26, 2016).

[108]STATE ENGINEER'S ORDER NO. 1276, CURTAILING NEW APPROPRIATIONS OF GROUNDWATER WITHIN THE BUENA VISTA VALLEY HYDROGRAPHIC BASIN (May 23, 2016).

[109]STATE ENGINEER'S ORDER NO. 1270, FURTHER CURTAILMENT OF GROUNDWATER APPROPRIATIONS WITHIN THE MASON VALLEY HYDROGRAPHIC BASIN, LYON COUNTY AND MINERAL COUNTY, NEVADA (Dec. 29, 2015).

[110]STATE ENGINEER'S ORDER NO. 1271, FURTHER CURTAILMENT OF GROUNDWATER APPROPRIATIONS WITHIN THE SMITH VALLEY HYDROGRAPHIC BASIN, DOUGLAS COUNTY AND LYON COUNTY, NEVADA (Dec. 29, 2015).

[111]STATE ENGINEER'S ORDER NO. 1269, CURTAILING NEW APPROPRIATIONS OF GROUNDWATER WITHIN THE DESERT VALLEY HYDROGRAPHIC BASIN (Dec. 2, 2015).

[112]STATE ENGINEER'S ORDER NO. 1275, DESIGNATING AND DESCRIBING THE CLAYTON VALLEY HYDROGRAPHIC BASIN WITHIN ESMERALDA COUNTY, NEVADA (Mar. 7, 2016).

[113]STATE ENGINEER'S ORDER NO. 1274, DESIGNATING AND DESCRIBING THE ALKALI SPRING VALLEY HYDROGRAPHIC BASIN WITHIN ESMERALDA AND NYE COUNTIES, NEVADA (Mar. 7, 2016).

[114]2016-NMCA-035, 369 P.3d 12 (N.M. Ct. App. 2015), *cert. denied*, No. S-1-SC-35777 (N.M. Apr. 14, 2016).

engineer loses an appeal of his administrative decision. The court said the Engineer's "threat to seek cost awards against the 'farmers with small holdings, acequia [members], and concerned citizens' in other cases depending on the outcome of the case, seems retaliatory."[115]

In *State Engineer v. Diamond K Bar Ranch, L.L.C.*,[116] the Supreme Court held that the State Engineer of New Mexico has authority over water diverted in a Colorado ditch for use in New Mexico. The ranch argued that because the water is diverted in Colorado into a community ditch and flows into New Mexico through the ditch, instead of through a "natural" stream, the engineer has no authority over the use of the water. The Court rejected those arguments, as well as the argument that the ditch is exempt from permitting requirements because it was constructed in the 1880s.

The New Mexico Court of Appeals found in *Christopher v. Owens*[117] that parties to a contract have the power to split 50-50 the potential for future water development at a spring. The court ruled that although no permitted or declared water rights existed in the springs in question, the parties could indeed agree to split the *opportunity* to develop water later.[118]

K. North Dakota

1. Judicial

For the past several years, North Dakota has been litigating various issues related to mineral title under navigable waterways. The district court granted the state's motion for summary judgment in *Wilkinson v. Board of University & School Lands*,[119] confirming the state's title to the minerals at issue. Additionally, the court held that to the extent the plaintiffs are aggrieved by specific ordinary high watermark delineations, they must exhaust their administrative remedies through the State Engineer before making a claim in district court.[120] This question and the state's ownership interests are on appeal before the North Dakota Supreme Court.[121]

L. Oklahoma

1. Judicial

A tribal water rights settlement agreement (Settlement) has been reached[122] in the case of *Chickasaw Nation and Choctaw Nation of Oklahoma v. Mary Fallin, ex rel. State of Oklahoma*.[123] The Oklahoma congressional delegation is currently working to secure appropriate legislation, one of the conditions precedent of the Settlement.[124]

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[115] *Id.* at 22.
[116] 2016-NMSC-036, 385 P.3d 626 (N.M. 2016).
[117] 2016-NMCA-099, 385 P.3d 633 (N.M. Ct. App. 2016).
[118] 2016-NMCA-099, ¶ 25-26, 385 P.3d at 638.
[119] Amended Complaint, Wilkinson v. Bd. of Univ. & Sch. Lands, No. 53-2012-CV-00038 (N.D. Dist. Ct. July 1, 2014).
[120] Order, No. 53-2012-CV-00038 (N.D. Dist. Ct. May 18, 2016).
[121] Wilkinson v. Bd. of Univ. & Sch. Lands, No. 20160199 (N.D. Sup. Ct. May 27, 2016).
[122] Order, Chickasaw Nation v. Fallin, No. CIV-11-927-W (W.D. Okla. Aug. 10, 2016).
[123] First Amended Complaint, No. CIV-11-927-W, 2011 WL 12875315 (W.D. Okla. Nov. 10, 2011).
[124] *See* Water Development Resources Act of 2016, S. 2848, 114th Cong., 2d Sess. § 8002 (2016).

When finalized, the Settlement will eliminate the need for the United States District Court of Western Oklahoma to adjudicate and determine tribal and non-tribal stream water rights throughout an area that spans approximately twenty-two counties in south-central and southeastern Oklahoma (the Settlement Area). Under the terms of the Settlement, the Choctaw and Chickasaw Nations will participate in technical evaluations of future water right allocation proposals within the Settlement Area. The Settlement protects current water rights throughout the region, including state-issued permits as well as explicitly identified and quantified uses of water by the Chickasaw and Choctaw Nations which had not previously been recognized by the state.

The Oklahoma Water Resources Board will continue to administer water rights in the Settlement Area. The Settlement also addresses the water supply needs of Oklahoma City, allowing the 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.[125] The Settlement further resolves the State of Oklahoma's outstanding debt to the United States associated with Sardis Lake

Existing rights to stream water or groundwater will not be affected by the Settlement. The Settlement provides for a commission to evaluate the impacts of future proposals for out-of-state water use or diversion. Should the Oklahoma Legislature ever approve such a proposal, the Settlement ensures that proceeds would be devoted to meeting water and wastewater infrastructure needs throughout the State, particularly in the Settlement Area.

2. Legislative

The Oklahoma Legislature enacted Senate Bill 1219,[126] which authorized the storage of stream water in underground aquifers for later recovery. Pursuant to the new statute, any aquifer storage and recovery (ASR) activities must be authorized by a site-specific aquifer storage and recovery plan approved as part of an ASR permit issued by the Oklahoma Water Resources Board. Water stored and later utilized by the holder of an ASR permit is in addition to any groundwater withdrawals already authorized under existing groundwater permits or domestic use authorized by statute.

Those seeking to divert stream water for the purpose of aquifer storage and recovery will still be required to obtain a stream water permit from the OWRB and must have legal access to the water stored in the aquifer. The applicant must also receive authorization from Oklahoma Department of Environmental Quality.

M. Oregon

1. Legislative

The Oregon Legislature passed House Bill ("HB") 4113 which established a task force to evaluate and recommend tools to prepare for or deal with drought emergencies, including methods to minimize the impact on agricultural and municipal interests, fish, and wildlife.[127]

SB 1529 amended Oregon Revised Statute (ORS) 94.630 to prohibit enforcement of a planned community's regulations imposing irrigation requirements on a home owner when: 1) the Governor declares a drought exists or is likely, 2) the Water Resources

[125] Settlement Agreement, Chickasaw Nation v. Fallin, No. CIV-11-927-W, at 43-60 (Aug. 2016).
[126] S.B. 1219, 2016 Reg. Sess. (Okla. 2016).
[127] H.B. 4113, 78th Leg. Assemb., 2016 Reg. Sess. (Or. 2016).

Commission finds a drought exists or is likely, or, 3) an ordinance requiring curtailment of water use is adopted by a governing body within which the planned community is located.[128]

2. Judicial

No significant state developments were reported for 2016.

3. Administrative

The Governor issued Executive Order 16-04 designating segments of the Chetco River, the Molalla River, and lands adjacent to both as Oregon State Scenic Waterways subject to ORS 390.805 to 390.925. This is the first designation of new Oregon State Scenic Waterways since 1988.[129]

The Oregon Water Resources Department (OWRD) amended OAR 690-509-0000 and 690-509-0100 to reserve water for future economic development in the Burnt River Areas of the Powder Basin. The amended rules extend reservations of water to set aside a quantity of water for storage to meet future needs for an additional twenty years and change reporting requirements.[130]

OWRD also adopted new rules revising the Malheur Lake Basin Program, OAR Chapter 690, Division 512. The rules address data indicating groundwater levels are declining in areas of the Greater Harney Valley Groundwater Area of Concern (GHVGAC) and establish the GHVGAC in part of the Malheur Lake Basin. The rules will not limit exempt uses, but will require groundwater appropriations to demonstrate groundwater availability for future groundwater applications.[131]

On April 6, 2016 Oregon, federal agency parties, and other parties signed the Klamath Power and Facilities Agreement (Agreement)[132] to replace the expired Klamath Basin Restoration Agreement (KBRA) because Congress did not pass authorizing legislation for the KBRA and its large financial outlay that was contemplated. The federal agency parties still will require Congressional authorization to fully participate in this Agreement; however, the Agreement acknowledges the parties' continued work to implement the Klamath settlement process. The replacement Agreement anticipates PacifiCorp's transfer of the Keno Facility and Link River Dam to the United States for continued operation with programs for reintroduction of salmon and other species and habitat restoration in the Upper Klamath Basin. The amended Klamath Hydroelectric Settlement Agreement,[133] which is incorporated into the Agreement, establishes the parties' process for removal of approximately four dams in the Klamath River Basin by 2020.

N. South Dakota

No significant state developments were reported for South Dakota in 2016.

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[128]S.B. 1529, 78th Leg. Assemb., 2016 Reg. Sess. (Or. 2016).
[129]Office of the Gov., State of Or., Exec. Order No. 16-04 (Jan. 25, 2016).
[130]OR. ADMIN. R. §§ 690-509-0000, 690-509-0100 (2016).
[131]OR. ADMIN. R. §§ 690-512-0010, 690-512-0020, 690-512-0090 (2016).
[132]2016 KLAMATH POWER AND FACILITIES AGREEMENT (Apr. 6, 2016).
[133]KLAMATH HYDROELECTRIC SETTLEMENT AGREEMENT (Feb. 18, 2010) (amended Apr. 6, 2016).

O. Texas

1. Legislative

In 2016, the Senate Committee on Agriculture, Water & Rural Affairs was charged "in the interim" with studying issues involving the ownership, production, and transfer of surface and groundwater in Texas, and improving the process of developing and executing the State Water Plan. After holding hearings and receiving testimony, the committee issued a report. The report discusses, inter alia, the following issues: the use of outdated data in surface water availability models; inter-basin transfers; groundwater conservation districts and their perceived flaws; private property rights and regulatory takings claims involving groundwater regulation; and whether oil and gas law should apply to groundwater. The committee recommended that the Legislature monitor: (1) the performance of groundwater conservation districts and make any necessary changes to improve their performance; and (2) the judicial application of oil and gas law to groundwater law and to, if necessary and appropriate, codify those judicial applications.[134]

The committee also held a hearing and received testimony on improving the process of developing and executing the State Water Plan.[135] The committee recommended that the Legislature: (1) consider providing certain regional water planning groups the option to reauthorize or update their regional water plan once every ten years, as opposed to every five years; and (2) modify that Water Code, so that "modeled available groundwater" is not required to operate as a hard cap that prevents viable water management strategies from being included in regional water plans.

2. Judicial

In *Coyote Lake Ranch, LLC v. City of Lubbock,*[136] the Texas Supreme Court held, in a case of first impression, that the common-law "accommodation doctrine" applied to the relationship between the owner of a severed groundwater estate and the surface estate. The City of Lubbock was therefore required to exercise its implied right to use the surface estate in its efforts to produce groundwater with due regard for landowners' right to use the surface, absent an agreement to the contrary. Here, for the first time, the Texas Supreme Court reasons that a severed groundwater estate is, like the mineral estate, "dominant"—i.e., it is benefitted by an implied right to the reasonable use of the surface.

P. Utah

1. Legislative

H.B. 222[137] amends the water rights forfeiture statute. Previously, Utah Code Ann. section 73-1-4(2)(b)(iv) stated that approval of a nonuse application does not protect a water right that is already subject to forfeiture. This bill expands on that language and states that the rule also applies if one or more or successive overlapping nonuse applications are approved. Additionally, the bill states that the approval of one or more nonuse applications do not constitute beneficial use of water for the purpose of calculating when a judicial forfeiture action must be commenced under the statute.

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[134]INTERIM REPORT TO THE 85TH LEGISLATURE, SENATE COMM. ON AGRIC., WATER, AND RURAL AFFAIRS, SENATE OF TEX. (2016).
[135]*Id.* at 47.
[136]498 S.W.3d 53 (Tex. 2016).
[137]H.B. 222, 62d Leg., Gen. Sess. (Utah 2016).

H.J.R. 4,[138] a joint resolution of the Utah State Legislature, urges Utah's federal congressional delegation to support Utah water users in securing title transfer of reclamation water projects from the United States Congress. The Strawberry Valley Project, Moon Lake Project, Emery County Project, Sanpete Project, and Provo River Project were specifically named in the resolution.

S.B. 23[139] adds new requirements to the definition of a "protected purchaser" of a share of stock issued by a land company or a water company (water stock). A qualified protected purchaser takes the water stock free of any adverse claim.

S.B. 28[140] requires a retail water provider (one servicing more than 500 customers) to establish a rate structure for culinary water that uses "block units" of water, and provides for increased rates charged for increased water use from one block to the next. The bill also requires customers to be notified at least annually of block unit rates and the customer's billing cycle, as well as to include individual customer water usage in the billing notices.

S.B. 75[141] makes technical changes to the general adjudication statute as well as slightly redefines the adjudication process. Among other things, the bill explains that failure to file a Statement of Water User's Claim will constitute a default and judgment may be entered declaring the claimant has no right to use the water. The bill adds that in addition to the Court's existing power to grant time extensions for filing Statements of Water User's Claims, the State Engineer will also hereafter have the authority to grant one thirty-day extension to claimants who file a written request for a time extension. One major change in S.B. 75 is the enactment of section 73-4-9.5, which details new procedures concerning the treatment of unclaimed water rights. Deleted from the old law is the provision allowing claimants who only receive notice by publication to request and be granted up to an additional six months' after the date of publication to file a Statement of Water User's Claim—these individuals must now protect their rights during the listing of unclaimed rights.

S.B. 251[142] is a companion Bill to S.B. 80,[143] Infrastructure Funding Amendments. It allows money to be taken from the Water Infrastructure Restricted Account to study the rules, criteria, targets, processes and plans for the development of water projects on the Colorado River and the Bear River and establishes new procedures for funding state projects on those rivers. The Division of Water Resources and Board of Water Resources will work with the State Water Development Commission to review a number of items including the collection of accurate water data, creating new conservation targets, and reviewing proposed constructions plans and loan repayment models for the proposed water projects. They were required to report to the Natural Resources, Agriculture, and Environment Interim Committee and the Legislative Management Committee no later than October 30, 2016, and to continue to provide regular updates to the Legislative Management Committee.

S.C.R. 1,[144] a concurrent resolution of the Utah State Legislature, notes that Utah is the second most arid state in the country, and that Utah citizens must do all they can to conserve water resources. The Legislature encourages public water suppliers to implement metering on water systems.

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[138]H.J.R. 4, 62d Leg., Gen. Sess. (Utah 2016).
[139]S.B. 23, 62d Leg., Gen. Sess. (Utah 2016).
[140]S.B. 28, 62d Leg., Gen. Sess. (Utah 2016).
[141]S.B. 75, 62d Leg., Gen. Sess. (Utah 2016).
[142]S.B. 251, 62nd Leg., Gen. Sess. (Utah 2016).
[143]S.B. 80, 62nd Leg., Gen. Sess. (Utah 2016).
[144]S.C.R. 1, 62nd Leg., Gen. Sess. (Utah 2016).

2. Judicial

In *HEAL Utah v. Kane County Water Conservancy District*,[145] the Utah Court of Appeals affirmed the district court's approval of two applications requesting a change to the points of diversion and nature of use of water. Discussing the standard of review, the Court of Appeals cited Utah Code Ann. section 73-3-8 to explain that the applicant must demonstrate that (1) there is unappropriated water in the proposed area, (2) the proposed use will not impair existing rights or interfere with the more beneficial use of the water, (3) the proposed plan is economically feasible and not detrimental to the public welfare. Importantly, the Court explained that the burden of persuasion lies with the applicant, and that it is a "reason to believe" standard, which is a fairly low burden.

In *Utah Alunite Corp. v. Jones*,[146] the Utah Court of Appeals concluded that two entities had not exhausted their administrative remedies because they failed to protest water applications before appealing, and could not seek appellate review based on their "aggrieved person" status alone. The court clarified the difference under the Utah Administrative Procedures Act between an "aggrieved person" and an "aggrieved party," noting that only aggrieved parties have standing for judicial review, and that an "aggrieved person" may become an "aggrieved party" by exhausting their administrative remedies.

In *Clearwater Farms L.L.C. v. Giles*,[147] the Utah Court of Appeals gave clarification to the scope of Utah Code Ann. section 73-1-15, which makes it unlawful to obstruct canals or other watercourses and imposes penalties for such obstruction. The court found that refusal to cooperate (calling the sheriff, posting "No Trespassing" signs, and initiating legal proceedings requesting a temporary restraining order) did not meet the level of obstruction prohibited by section 73-1-15. Rather, the law requires "some type of … physical barrier that is actually placed in the ditch and that is in contact with the water thereby changing its flow."[148]

In *Brasher v. Christensen*,[149] the Utah Court of Appeals answered the question of whether a Water Use Authorization (WUA) form provided by the Huntington-Cleveland Irrigation Company constituted an enforceable contract to lease water shares. The facts of the case, in short, were that Plaintiff (Brasher) and Defendant (Christensen) negotiated for Brasher's lease of Christensen's water shares for the irrigation of Brasher's alfalfa crops and associated grazing of his cattle. At the time of the litigation, the parties disagreed whether there was actually any meeting of the minds as to a lease of the water shares, with Brasher arguing that a filled-out WUA form constituted a binding contract. The court concluded that the WUA was not an enforceable contract, as it was just a form used to instruct a third party to deliver water to one of the parties for a specified period of time. Importantly, the form expressly conditions its enforceability upon there being a separate lease or agreement by the parties.

3. Administrative

Utah Administrative Rule R655-3 was repealed in its entirety and a newly worded rule promulgated in its place, effective October 11, 2016.[150] The rule makes changes and updates to the procedures regarding submitting a Report of Water Right Conveyance to update ownership records with the Utah Division of Water Rights. Examples that use to be part of the rule have been omitted and are now included in a training manual instead.

[145]2016 UT App 153, 378 P.3d 1246 (Utah Ct. App. 2016).
[146]2016 UT App 11, 366 P.3d 901 (Utah Ct. App. 2016).
[147]2016 UT App 126, 379 P.3d 1 (Utah Ct. App. 2016).
[148]2016 UT App 126, ¶ 32, 379 P.3d at 11.
[149]2016 UT App 100, 374 P.3d 40 (Utah Ct. App. 2016).
[150]UTAH ADMIN. CODE. r. 655-3-1 to 655-3-7 (2016).

The new rule contains an expanded list of definitions, establishes when maps are required and sets forth standards for those maps, and clarifies the use of a deed addendum to update title instead of using a Report of Water Right Conveyance, as is now authorized by statute.

Utah Administrative Rule R655-17 was newly promulgated, effective October 11, 2016, regarding water use data reporting and verification.[151] This rule what water use data a person must report to the Utah Division of Water Rights and how the Division shall validate the data submitted.

Q. Washington

1. Judicial

Two state court decisions explored the interface between state land use and water resources laws, particularly as they pertain to the regulation of so-called "permit-exempt" wells for groundwater withdrawals in areas governed by instream flow rules adopted by the Washington State Department of Ecology (Department).

First, in *Whatcom County v. Hirst (Hirst)*,[152] the Washington State 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. In a six-three decision, the Supreme Court reversed the court of appeals and concluded that the GMA places an independent responsibility on counties to ensure water availability. While the Court agreed that the governing instream flow rule does not prohibit permit-exempt wells, the Court rejected the County's exclusive reliance on the Department's interpretation of its instream flow rule, holding that the County's inquiry should not end there. Instead, 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. Thus, even though the Department does not engage in pre-approval impairment analysis for permit-exempt withdrawals, the Court concluded that the GMA assigns that task to local governments. Because evidence demonstrated that instream flows are not met year-round in the basin at issue, the Court concluded that the County must assess whether any proposed permit-exempt well will impede instream flows set by rule. The outcome of this case likely will force local governments to heighten their scrutiny of water availability and impacts during their review of building permit and subdivision applications.

Second, in *Fox v. Skagit County*,[153] the court of appeals rejected a property owner's writ of mandamus seeking to compel the County to issue a building permit. The County withheld approval because the permit application relied on an exempt well in an area subject to an instream flow rule that prohibits all future appropriations, including permit-exempt wells. The court affirmed the trial court's decision and rejected the owner's several constitutional and statutory challenges, including the owner's novel argument that the statutory permit exemption for domestic groundwater withdrawals preserved an owner's riparian or correlative water rights. The court rejected the argument indicating that the statutory exemption only excused those appropriations from the permitting process, not from the prior appropriation doctrine in its entirety.

Finally, in addition to the two appellate cases addressing the interface between state land use and water resources laws, the court of appeals also rejected a challenge to Ecology's issuance of a water right permit. In *Center for Environmental Law and Policy v. Washington Department of Ecology*,[154] the court of appeals upheld the Department's

[151]UTAH ADMIN. CODE. r. 655-17-1 to 655-17-5 (2016).
[152]381 P.3d 1 (Wash. 2016).
[153]372 P.3d 784 (Wash. Ct. App. 2016).
[154]383 P.3d 608 (Wash. Ct. App. 2016).

issuance of a water right permit for a new powerhouse on an existing public utility district's (PUD) hydroelectric project. In its Report of Examination approving the water right permit, the Department imposed a condition requiring the project to maintain the flows identified in the Departments previous section 401 Water Quality Certification process, and indicated that the permit could be revised to adhere to any revisions made pursuant to the monitoring program. The court rejected Petitioners argument that the Department lacked the authority to issue permits conditioned upon compliance with future studies.

The court rejected the argument and specifically relied on added conditions imposed by the Pollution Control Hearings Board (PCHB) in the administrative appeal hearing below indicating that the permit may not be perfected and the Department may not issue a certificate prior to the completion of the study and any necessary revisions to the permit. The Court also rejected Petitioners' claims that the PCHB erred by failing to subject the permit to compliance with the instream flow rule. The Department and the PCHB relied on a portion of the rule that expressly exempts hydroelectric projects, such as the PUD's, that are consumptive for only a portion of the stream's length. Petitioners argued that there is only one statutory exception from compliance with minimum instream flows identified in RCW 90.54.020(3)(a), for situations in which overriding considerations of public interest (OCPI) shall be served. They argued that the PCHB erred by failing to invoke that standard when justifying the decision to excuse the permit from compliance with instream flows, suggesting that a use qualifying for the regulatory exemption must also satisfy the statutory exemption. In rejecting Petitioners' arguments, the court observed that the Petitioners had not challenged the validity of the underlying regulatory exemption. The court held that the Department did not need to invoke the statutory exemption, and could properly rely on the plain language of the regulatory exemption.

R. Wyoming

1. Legislative

During its 2016 session, the Wyoming State Legislature passed two Omnibus water bills—a water planning bill[155] and a bill relating to water development projects approved for final construction.[156] The planning bill authorizes, among other things, more than $5 million for specified reconnaissance and feasibility studies for water development projects in seventeen Wyoming counties, as well as statewide research. The construction bill identifies new Level III development construction projects and rehabilitation projects, subject to general conditions specified in the bill. Some $20.3 million was appropriated for the new Level III development construction and rehabilitation projects.

Additionally, the Legislature[157] modified the political party affiliation requirements on specified boards and commissions to provide that not more than 75% of the Wyoming water development commission shall be of the same political party. Previously, the statute required that not more than five of the ten members of the water development commission be of the same political party.

2. Judicial

In re the General Adjudication of all Rights to Use Water in the Big Horn River System,[158] which began in 1977, involves the ongoing general adjudication of water rights

[155]2016 Wyo. Sess. Laws 235.
[156]2016 Wyo. Sess. Laws 278.
[157]2016 Wyo. Sess. Laws 492 (modifying, among other statutes, WYO. STAT. ANN. § 41-2-117).
[158]2015 WY 104, 355 P.3d 1222 (Wyo. 2015).

in the river system. In the final phase of the general adjudication, the Wyoming Board of Control recommended elimination of certain unused and unadjudicated water rights under Farmer's Canal Permit 854, including the rights to irrigate Tract 109, owned by Frank E. Mohr. Notably, Tract 109 had been irrigated under Permit 3712E (the Perkins Ditch Enlargement) since at least 1922. As part of his application for that permit, Mohr's predecessor acknowledged that water under the Farmer's Canal Permit had not been put to beneficial use on Tract 109 and relinquished his right to water under that permit. The Special Master and the district court determined that the relinquishment of the water right under the Farmer's Canal Permit was final. Mohr appealed. The Wyoming Supreme Court affirmed the district court's decision and the Special Master's Report and Recommendation, which recommended elimination of Tract 109 from the Farmer's Canal Permit.

In *Pennaco Energy, Inc. v. Sorenson*,[159] the Wyoming Supreme Court affirmed its prior determination in *Pennaco Energy Inc. v. KD Company, L.L.C.*[160] that an oil and gas producer remains liable under surface damage and use agreements for reclamation and repair of reservoirs, water wells and other water facilities absent an exculpatory clause in the agreement or incorporation of an exculpatory clause in the oil and gas lease into the surface use agreement, as it must be clear that the parties intended servitudes to be created so the producer would be able to relieve itself of those obligations. Alternatively, the producer may obtain a novation from a lessor at the time of assignment of the obligations.

3. Administrative

The State Engineer issued a Memorandum in support of recent efforts by the State Board of Examining Water Well Drilling Contractors & Water Well Pump Installation Contractors (Licensing Board) to require licensed water well drilling contractors to timely submit completed U.W. 6 Forms.[161] The Memorandum notes that Wyoming Statutes section 41-3-935(a) requires submission of the form, with or without pump information, within thirty days of completions. Compliance with this law has not been consistent in recent years, but has markedly improved through efforts of the Licensing Board.

The Ground Water Administrator issued a Memorandum notifying the Ground Water Division of the State Engineer's Office that identification of lands intended for effluent application is no longer required for permitting purposes.[162] Enlargement permits are not required to authorize effluent application to additional lands if there is no increase in water production yield or volume. Further, with respect to feedlots or animal feeding operations with waste lagoons, "reservoir supply" is only considered a beneficial use if fresh water is supplied from the well to a permitted reservoir facility.

S. Eastern States

1. The Southeast's water wars continued with battles in Florida-Georgia and Mississippi-Tennessee

In *Florida v. Georgia*,[163] seeking an "equitable apportionment" of the waters of the Apalachicola-Chattahoochee-Flint River Basin, Florida claimed Georgia's water use has

[159]2016 WY 34, 371 P.3d 120 (Wyo. 2016).
[160]2015 WY 152, 363 P.3d 18 (Wyo. 2015).
[161]Memorandum from Patrick T. Tyrrell, Wyo. State Eng'r, to Lynn Ritter, State Bd. of Examining (Sept. 9, 2016).
[162]Memorandum from Lisa Lindemann, Adm'r, Ground Water Div., to Ground Water Div. (Jan. 14, 2016).
[163]Complaint, Florida v. Georgia, 135 S. Ct. 1769 (2014).

led to the economic and ecological detriment of the downstream Apalachicola River basin, resulting in the collapse of the Apalachicola Bay's oyster fishery. Georgia denies any harm, asserting its water use will have only a minor impact blames the fishery's collapse on environmental factors and mismanagement by Florida. Florida seeks a reliable flow of water and a cap on water use in metro Atlanta and in southwest Georgia for farming.

The parties agreed to mediation in January. By March, progress had been so limited that Special Master Ralph Lancaster denied requests for the extension of discovery deadlines, suggesting that the parties were "spinning [their] wheels."[164] The parties did not appoint a mediator until April 1.[165] Disputes over witnesses also arose. In February, Lancaster determined that Georgia could not depose Florida's Commissioner of Agriculture and Consumer Services, who Georgia maintained had firsthand knowledge of the oyster fishery failure.[166] Further issues over the disclosure and deposing of expert witnesses arose in May.[167] In June the trial date was set for October 31,[168] and Amicus Briefs were filed in October.[169] Special Master Lancaster suggested during the trial he may pursue a resolution of the case that would revive the three-state commission (including Florida, Georgia, and Alabama) to regulate the contested water.[170]

In *Mississippi v. Tennessee*,[171] the Supreme Court granted Mississippi leave to file a complaint against Tennessee, the City of Memphis, and Memphis Light, Gas & Water Division (MLGW) for wrongfully converting groundwater from the interstate Sparta-Memphis Aquifer, which Mississippi contends has lowered its water tables. Unlike *Florida v. Georgia*, Mississippi does not seek an equitable apportionment of the aquifer, nor did it allege that the aquifer is an interstate resource. This prompted Special Master Eugene E. Siler, Jr., in response to motions to dismiss filed by Tennessee, Memphis and MLGW, and Mississippi's Motion to Exclude, to say dismissal might be warranted.[172] He also concluded that an evidentiary hearing on whether the aquifer is an interstate resource is warranted, given the complicated nature of this type of water dispute, substantial impact of the outcome, and fact that the Federal Rules of Civil Procedure are not mandatory in cases where the Supreme Court has original jurisdiction.

2. New York addresses the State's Water Resources Law's impact on zoning.

In *Smoke v. Planning Board*,[173] the owners of land in a rural residential district in the Town of Greig filed a special permit application to install an underground pipeline to transport water from their property to a "load out" facility where it would be collected and stored for bulk sale. The Greig Town Planning Board initially refused to consider the application. The owners petitioned, and the Supreme Court ordered the Planning Board to consider the application on the merits. The Board then granted a special permit, but with

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[164]Transcript of Teleconference before Special Master, Florida v. Georgia, 135 S. Ct. 1769 (Mar. 8, 2016).
[165]Florida Progress Report, Florida v. Georgia, 135 S. Ct. 1769 (Apr. 1, 2016).
[166]Case Management Order No. 15, Florida v. Georgia, 135 S. Ct. 1769 (Jan. 20, 2016).
[167]Status Report of Georgia, Florida v. Georgia, 135 S. Ct. 1769 (May 6, 2016).
[168]Case Management Order No. 19, Florida v. Georgia, 135 S. Ct. 1769 (June 20, 2016).
[169]Order on Motions for Leave to File Amicus Briefs, Florida v. Georgia, 135 S. Ct. 1769 (Sept. 21, 2016).
[170]Gary Hawkins, *Revived 'compact' could be court's answer to Georgia-Florida water war*, GA.-FLA. WATER CASE BLOG (Nov. 5, 2016).
[171]135 S. Ct. 2916 (2015).
[172]Memorandum of Decision on Tennessee's Motion to Dismiss, Memphis and Memphis Light, Gas & Water Division's Motion to Dismiss, and Mississippi's Motion to Exclude, 135 S. Ct. 2916 (Aug. 12, 2016).
[173]31 N.Y.S. 3d 707 (N.Y. Sup. Ct. 2016).

several conditions. In a second petition, the owners sought, inter alia, to strike one condition from the special permit and to declare that the Board lacked the authority to regulate the use of water resources or to require additional approval for water extraction. The court concluded that while the State's Water Resources Law[174] preempts local laws that attempt to regulate withdrawals of groundwater, within its territorial limits, it does not preempt local zoning laws concerning land use. Therefore, the Board did not act illegally or arbitrarily, or abuse its discretion in imposing the challenged condition on the special permit. It is consistent with the purposes of zoning to impose conditions and safeguards in conjunction with a grant of a special permit in order to protect the surrounding area from a particular land use. Here, the separation of business from nonbusiness uses was considered an appropriate line of demarcation in delimiting permitted uses for zoning purposes. Because the petitioners failed to obtain permission to use their residential property for a commercial venture, the court properly denied the relief requested.

T. Great Lakes States

No significant developments were reported in 2016.

[174]N.Y. ENVTL. CONSERV. LAW §§ 15-0101 to 15-3111 (McKinney 2016).

Chapter 24 • ALTERNATIVE DISPUTE RESOLUTION
2016 Annual Report[1]

Alternative dispute resolution (ADR) helped resolve a range of environmental disputes in 2016, particularly for land use, water, and endangered species issues. Much of the demand for environmental ADR stems, in part, from a desire to avoid the costs of litigation, particularly among state, federal, and other governmental entities with limited budgets. There also appears to be a growing awareness that ADR processes are often better suited than courts in some situations to craft the broadly supported outcomes needed for increasingly limited resources. In turn, these trends are prompting judges and policymakers to require ADR in a number of environmental law contexts. The results of the 2016 election may also create uncertainty regarding the implementation and interpretation of some federal environmental laws, which could in turn incentivize the use of ADR processes.

I. ADR Procedural and Process Developments

As ADR expands as a substitute to the traditional judicial system, courts and legislators continue to play a role in determining the boundaries of professional ethics and responsibility, and in facilitating and encouraging the use of ADR.

A. Role of Courts in Mediation and Arbitration; Vulnerabilities in Contingent Agreements

Courts have played an important role in directing parties to mediation to resolve complex resource disputes where litigation has failed to resolve the underlying issues. In *U.S. v. City of Detroit*,[2] the Environmental Protection Agency (EPA) filed suit against Detroit and Detroit Water and Sewerage Department for non-compliance with its National Pollutant Discharge Elimination System (NPDES) permit. In 2011, after thirty-five years without adequate resolution, the court ordered the parties into mediation to address the root causes of the noncompliance, including the defendant's underlying staffing constraints and other resource needs.

The courts' broad discretion to define the parameters of court-approved mediation processes has included determining reasonable timeframes for mediation before resuming trial activities. In *In Re E.I. DuPont De Nemours*,[3] DuPont agreed to globally mediate a citizen action alleging contaminated drinking water but proceeded with Bellwether trials, depositions, and other procedures without commencing mediation or global settlement talks. Eventually DuPont indicated it no longer wished to settle globally, after a day of mediation. The court held there was no abuse of discretion in scheduling the trial dates in November 2016 and January 2017, contrary to DuPont's claim it had inadequate time to prepare for trial following the mediation.

Courts also continue to define the contours for domestic enforceability of international arbitration awards and mediated agreements. In *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*,[4] Venezuela revoked Gold Reserve's right to mine after the company allegedly broke mining and environmental regulations. The International Centre for Settlement of Investment Disputes, a World Bank-funded arbitration institution, issued an award in France for over "$700 million in damages to Gold Reserve", a Canadian

[1]Nathan Bracken, Ryan Golten, and Kayla Kelly-Slatten authored this chapter. This chapter provides a sampling of key or other notable ADR cases and events from late 2015 through 2016.
[2]No. 77-71100, 2015 WL 8780545 (E.D. Mich. Dec. 15, 2015).
[3]No. 2:13-md-2433, 2016 WL 4577656 (S.D. Ohio Aug. 30, 2016).
[4]146 F. Supp. 3d 112 (D.D.C. 2015).

company. Gold Reserve then sought to enforce its award in the U.S. under the Convention on the Recognition and Enforcement of Foreign Arbitration Awards (the New York Convention), which the Federal Arbitration Act (FAA) incorporates into federal law. Venezuela's sought to set the award aside on due process and public policy grounds, but the court held the award was enforceable because of the deference federal courts grant to arbitration awards under the FAA and the narrow exceptions in which domestic courts may refuse to enforce international awards under the New York Convention.[5]

Last year also highlighted the perils of including contingencies in mediated agreements. In *Rose v. Interstate Oil Co.*,[6] Rose filed a civil suit after gasoline leaked from an underground storage container into Rose's property. The parties mediated the dispute and settled. Under the parties' terms, the agreement would become binding after both Rose and the property mortgagee signed. The mortgagee failed to sign and Interstate Oil Co. filed to enforce. The court refused to enforce the agreement, holding that a genuine issue of material fact existed as to whether the elements that would bind the mediation agreement were met. The court remanded to allow parties to present evidence about why the mortgagee had not signed the agreement.[7]

B. ADR Malpractice Considerations

ADR malpractice served as the focus of a number of 2016 court decisions. In *Castillo v. Arrieta*, the Court of Appeals of New Mexico held that a malpractice claim against a lawyer fell under the fee agreement's arbitration clause.[8] Nevertheless, the court found that neither side had shown that the client had given (or not given) informed consent as to the meaning of the clause. Thus, the court remanded the case to determine the clause's enforceability.[9]

Third party impartiality is another concern during arbitration and mediation. In *Rosenhaus v. Jackson*, the Central District Court of California held that a failure to disclose income from one of the parties participating in arbitration showed a bias on behalf of the arbitrator.[10] Due to the arbitrator's lack of impartiality, the California Court vacated the arbitral award.[11]

To avoid situations that may encourage arbitrator bias, some states have amended their judicial codes to limit the roles sitting judges may play in arbitrations and mediations. For example, Florida prohibits senior judges from serving as a voluntary judge in cases in which they are presiding or have acted as a mediator. Now, the rule extends to prohibit a senior judge from serving as voluntary judges in cases where the senior judge was an arbitrator.[12]

C. Statutory and Regulatory Encouragement of ADR Processes

As more parties turn to ADR for environmental disputes, Congress has passed or is considering laws to encourage or require ADR methods in certain situations, often in the early stages. For instance, in 2016, President Obama signed the Indian Trust Asset Reform Act to increase tribal management of resources the federal government holds in trust for tribes. Title II directs the Secretary of the Interior to implement a demonstration project

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[5] *Id.* at 119-120, 127-133.
[6] No. 2141045, 2016 WL 1719921 (Ala. Civ. App. Apr. 19, 2016).
[7] *Id.*
[8] 368 P.3d 1249, 1254 (N.M. Ct. App. 2016).
[9] *Id.* at 1258.
[10] No. CV-14-3154-MWF, 2016 WL 4592180, at *7 (C.D. Cal. Feb. 26, 2016).
[11] *Id.* at *8-9.
[12] *In re* Amendments to the Code of Judicial Conduct, 194 So. 3d 1015 (Fla. 2016).

that will allow tribes to develop trust asset management plans. Once the Secretary approves these plans, tribes will regulate forestland management and surface leasing on their reservations without further Secretarial approval. In developing plans, tribes must create non-binding arbitration or mediation procedures to resolve disputes between tribes and the federal government over the plan.[13]

Similarly, President Obama signed the FOIA Improvement Act of 2016, which makes changes to the procedures the federal government uses in processing Freedom of Information Act (FOIA) requests. Given the large role that federal agencies play in natural resource management, the changes will necessarily affect how environmental attorneys obtain information from the federal government. Under Section 2, parties seeking information from a federal agency will have the right to request dispute resolution services. Section 3 also requires federal agency regulations to include dispute resolution procedures to facilitate the exercise of this right.[14]

In addition, Congress introduced but did not pass legislation (S. 293/H.R. 585) to require courts to refer certain types of citizen suits filed under the Endangered Species Act (ESA) to mediation or to a magistrate judge to facilitate settlement discussions. Congress also introduced the Emergency Wildfire and Forest Management Act of 2016 to create a pilot arbitration program within the United State Forest Service that would designate certain types of natural resource projects for ADR to replace a judicial review.[15]

II. ADR CASE STUDIES

Across the country, parties have employed a range of ADR methods to resolve a variety of environmental disputes. A few, illustrative examples of these efforts are highlighted below.

A. Water Issues

ADR processes continue to play a key in role in resolving water disputes, particularly Indian water rights. In August, following years of mediation and negotiations, the Chickasaw and Choctaw Nations reached a settlement with Oklahoma and Oklahoma City to resolve long-standing questions and related litigation over water rights and regulatory authority within the Nations' historic treaty boundaries in Oklahoma.[16] Under the settlement, Oklahoma will continue to manage the State's water supplies. However, the Nations will participate in technical evaluations of significant future water right allocation proposals within the settlement areas.[17] Similarly, in September, the Kickappo Tribe reached a settlement with Kansas and the United States that recognizes the Tribe's senior water rights in the Delaware River Basin. The settlement resolves a decade-old lawsuit and requires the parties to enter into a memorandum of agreement to administer the Tribe's water rights and junior state-issued water rights.[18] Notably, Congress approved the Chickasaw/Choctaw settlement in the waning hours of the 114th Congress as part of the

[13]Indian Trust Reform Act, Pub. L. No. 114-178, 130 Stat 432 (2016).
[14]FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat 538.
[15]S. 3058, 114th Cong. (2015-2016).
[16]Press Release, Choctaw Nation, Momentous Water Rights Agreement Reached by the Chickasaw Nation, Choctaw Nation, State of Oklahoma and City of Oklahoma City (Aug. 11, 2016).
[17]*Id.*; Tim Talley, *Tribes, Oklahoma Reach Deal on Water Rights Dispute*, ASSOCIATED PRESS (Aug. 11, 2016).
[18]Press Release, Native Am. Rights Fund, NARF Helps Kickapoo Tribe of Kansas Draft Water Settlement Agreement (Sept. 9, 2016).

Water Infrastructure Improvements for the Nation Act,[19] along with two other Indian water rights settlements that have been awaiting Congressional approval for years – the Blackfeet settlement in Montana and the Pechanga settlement in California. The act also approved provisions regarding the implementation of the San Luis Rey settlement in California.

The need to obtain Congressional approval for settlements involving federal responsibilities has also impacted discussions over the removal of four dams to satisfy Indian water rights and environmental needs in the Klamath River Basin in California and Oregon. Although California, Oregon, tribes, agricultural water users, and the federal government reached a series of agreements to resolve these issues, Congress failed to approve one of the agreements last year due to concerns about the agreement's dam removal provisions.[20] This triggered a sunset clause that jeopardized the agreements. To overcome this obstacle, the parties signed two new agreements in April. The first agreement will remove the dams through an administrative process with the Federal Energy Regulatory Commission that will not require Congressional approval. The second agreement between state and federal officials and irrigators is intended to help irrigators avoid anticipated financial and regulatory impacts once the dams are removed.[21]

Outside of the world of Indian water rights, Colorado, Kansas, and Nebraska have been involved in litigation and arbitration for the last fifteen years over water allocation under the Republican River Compact, and in August agreed to align their compliance activities under the Compact to avoid further litigation and improve interstate cooperation.[22]

In Missouri, a multi-party collaborative framework working to address water quality concerns in the Hinkson Creek Watershed completed its fifth anniversary. After initial litigation over a Total Maximum Daily Load for the Watershed, the City of Columbia, Boone County, the University of Missouri, the Missouri Department of Natural Resources, and the EPA created a long-term Collaborative Adaptive Management (CAM) framework in 2011 to address rural and urban challenges to the Creek's water quality. Facilitated by an EPA mediator, CAM uses ADR and collaborative approaches within a science-based adaptive management framework. It features a three-part collaborative structure with a community-based Stakeholder Committee, an Action Team, and a Science Team. The multi-tiered structure, created by legal agreement, uses flexible approaches to adaptively manage the watershed within a transparent, place-based context. Most recently, the Stakeholder Committee, comprised of a wide variety of interests including development, agriculture, NGOs, local businesses, education, and interested citizens, advanced all recommendations from 2012-2016 to the implementing parties by unanimous consent.[23]

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[19]Pub. L. No. 114-322, 130 Stat 1628 (2016).

[20]Xiaoxin Shi, Nathan Bracken & Lara B. Fowler, *Chapter 24 – Alternative Dispute Resolution*, A.B.A. ENV'T, ENERGY AND RESOURCE L. THE YEAR IN REV. 2015, 294, 299 (2015).

[21]Press Release, U.S. Dep't of the Interior, Two New Klamath Basin Agreements Carve Out Path for Dam Removal and Provide Key Benefits to Irrigators (Apr. 6, 2016).

[22]Press Release, Kansas Dep't of Ag., Historic Agreements Reached at 56th RRCA Annual Meeting Held on August 24, 2016 (Aug. 24, 2016); Press Release, Colo. Govenor's Office, Colorado, Kansas and Nebraska Reach Consensus on Republican River Compact (Aug. 26, 2016).

[23]Shawn Grindstaff, EPA Region 7, authored this paragraph. Shawn mediated that agreement and received permission from the parties to author this paragraph based on his personal experiences.

B. Land Issues

Agreements involving land use disputes highlight the use of collaborative processes to resolve stakeholder concerns related to urban growth. In June, a landmark agreement among neighborhood groups and Spokane County, Oregon resolved several years-long lawsuits regarding urban growth boundaries, undeveloped land, and utility services.[24] The agreement reached among county commissioners, state agencies, neighborhood associations, and a planning advocacy group took eighteen months to craft and resolved four separate lawsuits. The agreement also outlined future processes for addressing resident concerns related to urban growth.

Likewise, in California, environmental justice groups and state agencies used mediation to resolve an administrative civil rights complaint filed with EPA. The complaint objected to how Spanish-speaking residents in Kettleman City were treated in the permitting process for a hazardous waste landfill. The complaint focused on environmental reviews not being translated into Spanish, denial of translation requests, and lack of translators at key public meetings. Working with an EPA mediator, the parties created an agreement that calls for a statewide commitment to public participation and language access when permits are sought for hazardous waste sites, as well as a community health assessment, environmental monitoring, and an asthma intervention program.[25]

Successful ADR outcomes that rely on external contingencies, such as Congressional approval or funding, continue to face significant hurdles. In Montana, after years of deadlock among loggers, conservationists, recreationalists and the U.S. Forest Service, a stakeholder coalition worked for ten years to address the competing interests of wilderness and habitat preservation, timber production, and non-motorized and motorized recreation. The process created alternative forest plan guidelines to increase timber sales while adding wilderness and recreation to the plan. Highlighting the successes of collaborative, stakeholder-based approaches to managing public lands, an approach now codified in the 2012 National Forest Management Planning Rule, the agreement now faces the daunting task of receiving Congressional approval.[26]

C. Endangered Species Act Issues

Over the past year, ADR has resolved various ESA issues. In Oregon, court-ordered mediation helped resolve an ongoing water allocation dispute in the Deschutes River Basin.[27] The dispute arose over the implementation of a 2008 habitat conservation plan (HCP) to manage wildlife in the Basin, including the endangered Spotted Frog. In December 2015, the Center for Biological Diversity and WaterWatch of Oregon filed lawsuits claiming that the government agencies and irrigation districts were not collaborating in good faith. A federal judge, however, ordered mediation between farmers and environmentalists to decide the amount of water released to protect both irrigation and wildlife. As of October, five irrigation districts in Central Oregon will ensure that the Deschutes River flows at least 100 feet/second between September and March. The agreement still requires approval by state and federal governments.[28]

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[24]Kip Hill, *Spokane County, Neighborhood Groups Sign Sweeping Settlement in Land-Use Disputes*, THE SPOKESMAN-REV. (June 20, 2016).
[25]Lewis Griswold, *Environmentalists, State Settle Differences Over Hazardous Waste Site*, FRESNO BEE (Sept. 5, 2016).
[26]Tristan Scott, *Family Trees*, FLATHEAD BEACON (Oct. 19, 2016).
[27]Kelsey R. Kennedy, *Spotted Frogs in the Spotlight*, SCI. LINE (July 25, 2016).
[28]Taylor Anderson, *Groups Reach Agreement in Spotted Frog Lawsuit*, THE BULL. (Oct. 29, 2016).

In Massachusetts, local, state, and federal governments, along with twenty stakeholder groups used facilitated meetings to form an HCP for the threatened piping plover.[29] The HCP covers the entire coastal region of Massachusetts and up to 300 yards inland.[30] The US Fish & Wildlife Service (USFWS) approved the plan in July 2016 to: 1) develop and implement a framework to help maintain "a viable, robust population of the piping plover in Massachusetts"; 2) increase community awareness and conservation while increasing beach access and recreation; and 3) comply with endangered species requirements.[31] The HCP also helped acquire an incidental take permit from the USFWS under the ESA and Migratory Bird Act for goal-oriented projects.[32]

A similar situation is surfacing in California. In 2011, a gray wolf traveled from Oregon into California; then, in 2015, a pack established itself in Shasta County, California. Since then, federal and state agencies, as well as environmentalists, farmers, ranchers, and recreationists have come together to devise a management plan. The California Department of Fish and Wildlife released a draft of the plan[33] and stakeholder meetings were held in early 2016.[34]

III. The Impact Of The 2016 Elections on Environmental ADR

The full impact of the 2016 election on environmental ADR will not be fully understood until after the new Congress and Administration are sworn in and key Cabinet and leadership posts are filled. Nevertheless, President-elect Trump and Congressional Republicans have expressed a desire to revise or rescind many of the environmental and other regulations implemented during the Obama Administration.[35] Although the details of these efforts are undefined, the regulatory and legal framework for some federal environmental laws will likely change or become more uncertain, which could incentivize the use of ADR processes.

This is particularly true for the Obama Administration's "Waters of the United States" or "Clean Water Rule," which seeks to clarify those waters that are subject to Clean Water Act (CWA) jurisdiction. The Obama Administration finalized the rule in 2015 to clarify jurisdictional confusion created by recent Supreme Court decisions, but critics have filed numerous lawsuits to stop the rule over concerns that it improperly expands CWA jurisdiction.[36] The rule has been stayed pending the result of the litigation, and Republicans have vowed to revoke it.[37] Although it remains to be seen how Republicans would revoke or replace the rule, it is likely that the scope of CWA jurisdiction will be subject to some uncertainty, which could prompt some parties to utilize ADR process to resolve disputes involving CWA jurisdiction.

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[29] Jonathan Regosin, Mass. Div. of Fisheries & Wildlife & Paola Bernazzani, ICF Int'l, Massachusetts Division of Fisheries & Wildlife (DFW) Habitat Conservation Plan for Piping Plover (June 2016).

[30] *Id.* at 1-6.

[31] *Id.* at 1-1.

[32] U.S. Fish and Wildlife Serv., Incidental Take Permit (July 8, 2016).

[33] Final Conservation Plan for Gray Wolves in California, Cal. Dep't of Fish and Wildlife (2016).

[34] Tim Hearden, *Officials, Advocates Promote Coexistence of Wolves, Livestock*, Cap. Press (Feb. 2, 2016).

[35] Marianne Lavelle, *Here are 9 Obama Environmental Regulations in Trump's Crosshairs*, Inside Climate News (Nov. 22, 2016).

[36] Tiffany Stecker, *WOTUS Ultimately Doomed? What Happens Next*, E&E News (Nov. 16, 2016).

[37] Timothy Cama, *House Votes to Overturn Obama Water Rule*, The Hill (Jan. 13, 2016).

Chapter 25 • CLIMATE CHANGE, SUSTAINABLE DEVELOPMENT, AND ECOSYSTEMS
2016 Annual Report[1]

2016 followed 2015 as another momentous year of new environmental protections regarding climate change, sustainable development, and ecosystems, particularly on the international level. Nations took great strides in committing to climate measures outside the scope of the Paris Agreement – in particular, establishing new regimes under the Montreal Protocol to phase down hydrofluorocarbons, and under the International Civil Aviation Organization (ICAO) to curb greenhouse gas (GHG) emissions from international aviation. The Obama administration continued to promulgate new climate regulations (i.e. methane, mobile sources), although its signature Clean Power Plan (CPP) was stayed by the Supreme Court pending litigation. The fate of the CPP, other regulations, and even United States participation in the Paris Agreement remain uncertain under the Trump administration. Even with the CPP stayed, several U.S. states remain on the forefront of efforts to combat climate change and adapt to its effects, while others – including the new EPA Administrator Scott Pruitt – have led the opposition to the Obama administration's regulatory efforts. Nations took significant steps to protect the world's ecosystems, establishing the two largest protected areas ever around Hawaii and Antarctica's Ross Sea, in addition to many smaller ones. While it is unclear how much of President Obama's environmental legacy will be undone by President Trump's administration, 2016 marked a resounding conclusion to one of the most environmentally-protective administrations in United States history.

I. CLIMATE CHANGE

A. Mitigation

1. International Activities

a. United Nations Framework Convention on Climate Change (UNFCCC)

At the Twenty-First Session of the Conference of the Parties (COP) to the UNFCCC, held in December 2015 in France, parties adopted the Paris Agreement,[2] aimed at limiting the increase in global average temperatures to well below 2°C above pre-

[1]This report was compiled, reviewed, and edited by: Andrew Schatz (Conservation International), Jill H. Van Noord (Holland & Hart, LLP), and Stephen Smithson (Snell & Wilmer LLP), and prepared by Committee Chairs: Emily Fisher (Edison Electric Institute) and Stephen Smithson. The following authors contributed: Vicki Arroyo (Georgetown Climate Center); Annie Bennett (Georgetown Climate Center); L. Margaret Barry (Arnold & Porter Kaye Scholer LLP); William Blackburn (William Blackburn Consulting, Ltd.); Wil Burns (American University); Melissa Deas (Georgetown Climate Center); Shannon Martin Dilley (California Air Resources Board); Ira Feldman (Greentrack); Emily Fisher; Michael Gerrard (Columbia Law School); Matthew Goetz (Georgetown Climate Center); Allie Goldstein (Conservation International); Brett Grosko (U.S. Department of Justice); Hampden Macbeth (Georgetown Climate Center); Matthew Sanders (Jeffer Mangels Butler & Mitchell LLP); Andrew Schatz; Alicia Thesing (Stanford Environmental Law Clinic); Jill H. Van Noord; Romany Webb (Columbia Law School); and George Wyeth (U.S. Environmental Protection Agency).

[2]U.N. Framework Convention on Climate Change (UNFCCC), 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) [hereinafter COP21 Decision].

industrial levels. The conditions for entry into force of the Paris Agreement were met on October 5, 2016, with its approval by more than fifty-five countries accounting for 55% of global greenhouse gas (GHG) emissions.[3] The Agreement entered into force thirty days later on November 4, 2016.

The First Session of the Meeting of the Parties to the Paris Agreement (CMA1) was held in conjunction with the Twenty-Second Session of the COP (COP22) from November 7 to 18, 2016, in Marrakech, Morocco. Discussions at CMA1 / COP22 focused on implementing the Paris Agreement, with parties agreeing to accelerate completion of the work program therefor.[4] Parties agreed that the work program should be completed "as soon as possible" and, at the latest, by the Twenty-Fourth Session of the COP in December 2018.[5] A joint meeting of the COP and CMA will be held at the Twenty-Third Session of the COP in November 2017 to review progress under the work program.[6]

The work program specifies various climate finance activities, including establishing processes so developed countries can meet their commitments under the Paris Agreement to provide financing to assist developing countries with climate mitigation and adaptation.[7] The Paris Agreement set a target for developed countries to collectively mobilize at least US$100 billion per year from 2020. A roadmap for achieving this target was agreed to in August 2016 by the European Commission and thirty-eight individual countries. These and other countries made various pledges with respect to financing in the lead up to, and at, COP22.[8] However, these pledges are not enforceable, and political developments in the United States suggest that countries may cancel their financial pledges and indeed their participation in international climate agreements with few legal (as opposed to diplomatic) consequences. It remains to be seen whether Donald Trump will follow through on his campaign promises to withdraw the United States from the Paris Agreement and halt funding to UN climate programs.[9]

COP22 welcomed the progress made by the Green Climate Fund (GCF) in the last year, including its approval of US$1.17 billion for twenty-seven projects in thirty-nine countries.[10] The COP identified a number of focus areas for the GCF over the next year, including simplifying its project application and approval procedures, addressing measures that are delaying implementation of projects, promoting private sector involvement in least-developed and small island developing states, and finalizing its work on funding for forests.[11] The GCF will report on progress in these areas at the next COP in 2017.[12]

The next COP will be held at the headquarters of the UNFCCC Secretariat in Bonn, Germany from November 6 to 17, 2017.[13] CMA1 will be reconvened at that time.

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[3]UNFCCC, Paris Agreement Entry Into Force, UN Doc. C.N.735.2016.TREATIES-XXVII.7.d (Oct. 5, 2016).

[4]UNFCCC, Conference of the Parties on its Twenty-Second Session, Preparations for Entry into Force of the Paris Agreement, Decision -/CP.22, UN Doc. FCCC/CP/2016/L.12 (Nov. 18, 2016) [hereinafter COP22 Decision].

[5]*Id.* at cl. II.12.

[6]*Id.* at cl. II.11.

[7]COP21 Decision, *supra* note 2, at annex art. 9.

[8]For a list of all pledges, see *List of Recent Climate Funding Announcements*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (last visited Nov. 28, 2016).

[9]Alister Doyle, *Trump Win Threatens Climate Funds for Poor, A Key to Paris Accord*, REUTERS (Nov. 12, 2016).

[10]UNFCCC, Conference of the Parties on its Twenty-Second Session, Guidance to the Green Climate Fund, Draft Decision -/CP.22, U.N. Doc. FCCC/CP/2016/L.5, cl. 2(a), (Nov. 16, 2016).

[11]*Id.* at cl. 4, 7, 10, 11.

[12]*Id.* at cl. 16.

[13]*Calendar*, U.N. Framework Convention on Climate Change (last visited Nov. 28, 2016).

b. Montreal Protocol and Hydrofluorocarbons (HFCs)

The global community took one of the biggest steps ever to combat climate change under the auspices of the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol). Following seven years of negotiations, on October 15, 2016, at the Twenty-Eighth Meeting of the Parties (MOP28) in Kigali, Rwanda, 197 countries adopted the Kigali Amendment to the Montreal Protocol to regulate global consumption of hydrofluorocarbons (HFCs) – a powerful GHG chemical used primarily in air conditioning and refrigeration that has fifty-three to 14,800 times the global warming potential of carbon dioxide (CO_2). [14] The amendment adds HFCs to the list of substances controlled under the Montreal Protocol and establishes a legally binding plan for nearly all countries to reduce their HFC consumption to 15-20% of baseline levels by mid-century.[15] The Kigali Amendment is expected to avoid seventy to eighty billion tons of CO_2-equivalent emissions by 2050 and 0.5 degree Celsius of global warming by the end of the 21st Century.[16]

Under the Kigali Amendment, Parties to the Montreal Protocol are required to freeze and gradually phase-down their consumption of HFCs.[17] It establishes four different timetables for developed and developing countries. The vast majority of developed countries will reduce their HFC consumption by 10% by 2019 and 85% by 2036, relative to production and consumption levels in 2011-2013.[18] Most developing countries, including China, Brazil, South Africa, and Argentina, will follow with a freeze of HFC consumption in 2024 and then reduce by 80% by 2045, relative to 2020-2022 levels.[19] A group of the world's hottest countries – India, Pakistan, and eight Persian Gulf States – will reduce HFC consumption starting with a freeze in 2028 and reaching 85% reductions in 2047.[20] The amendment contains trade restrictions with non-Parties and a funding mechanism. Developed nations committed to provide additional funds to the Protocol's Multilateral Fund (MLF) to help developing countries achieve their commitments and to support energy efficiency improvements.

The Kigali Agreement is scheduled to enter into force January 1, 2019, provided at least twenty Parties to the Montreal Protocol ratify the amendment.[21] HFC trade restrictions with non-Parties go into effect in 2030 as long as seventy Parties ratify the amendment.

c. Aviation & Shipping

The United Nations' International Civil Aviation Organization (ICAO) took the world's first step to curb GHG emissions from international aviation, which accounts for two percent of global emissions. On October 6, 2016, in Montreal, Canada, at ICAO's 39th Assembly, representatives from 191 countries, industry, and civil society agreed to maintain GHG emissions from international aviation (excluding domestic flights) at 2020

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[14] Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, Kigali, Oct. 15, 2016, United Nations, C.N.872.2016.TREATIES-XXVII.2.f (Adoption of amendment).

[15] *Id.*

[16] ENVTL. INVESTIGATION AGENCY, KIGALI AMENDMENT TO THE MONTREAL PROTOCOL: A CRUCIAL STEP IN THE FIGHT AGAINST CATASTROPHIC CLIMATE CHANGE (Nov. 2016).

[17] *Id.* at 1.

[18] *Id.* at 2.

[19] *Id.*

[20] *Id.*

[21] U.N. ENVTL. PROGRAMME, FREQUENTLY ASKED QUESTIONS RELATING TO THE KIGALI AMENDMENT TO THE MONTREAL PROTOCOL (Nov. 24, 2016).

levels and improve average fuel efficiency by 2% per year from 2021 to 2050.[22]

Recognizing that improved technology, operational improvements, and the use of sustainable alternative fuels alone will be insufficient to meet these goals, ICAO adopted Resolution A39-3, creating a Global Market-Based Measure (GMBM), known as the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA), which will allow airlines to offset their emissions with carbon credits or equivalent reductions.[23] The GMBM will begin in January 2021, with voluntary participation by all countries from 2021-2026 and mandatory participation for almost all countries from 2027-2035 (excluding Least Developed Countries, Small Island Developing States, Landlocked Developing Countries and States with low levels of international aviation activity).[24] As of October 12, 2016, sixty-six countries, representing 86.5% of international aviation activity are expected to voluntarily participate, including the United States and China.[25] In the next few years, technical bodies under ICAO will decide what types of activities (i.e. project, sectoral, REDD+) will be eligible as offsets under CORSIA.

At its 70th session meeting in October, 2016, the Marine Environment Protection Committee (MEPC) of the International Maritime Organization (IMO) took two separate actions to address GHG emissions from international shipping. First, the MEPC adopted recordkeeping and reporting requirements for fuel oil consumption. The mandatory regulations require that ships of 5,000 gross tonnage and above will collect consumption data for each type of fuel used, which will assist IMO in making decisions to address GHGs in the future.[26] Second, "MEPC also approved a roadmap (2017 through to 2023) for developing a 'Comprehensive IMO strategy on reduction of GHG emissions from ships', which foresees an initial GHG strategy to be adopted in 2018."[27]

d. Carbon Pricing Programs

Carbon pricing programs – including cap-and-trade systems and carbon taxes – now cover twelve percent of global emissions, and nearly half of the national plans submitted to the UNFCCC reference carbon pricing.[28]

Canadian Prime Minister Justin Trudeau announced on October 3 that all jurisdictions in Canada must implement carbon pricing by 2018, starting at a minimum of CA$10 per tonne (for jurisdictions that choose to implement a price-based system) or targeting at least a 30% reduction in emissions (for those that choose to implement cap-and-trade).[29] The policy builds on programs already in place in four Canadian provinces: British Columbia's CA$30/tonne tax on fuels (in place since 2008)[30]; Alberta's CA$20/tonne tax on fuels (upcoming in 2017)[31]; and Québec and Ontario's cap-and-trade

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[22]Int'l Civil Aviation Org. [ICAO], *Resolutions adopted at the 39th session of the assembly*, at A39-2 (provisional ed. Oct. 6, 2016).
[23]*Id.* at A39-3.
[24]*Id.*; *see also* *Historic Agreement Reached to Mitigate International Aviation Emissions*, ICAO (Oct. 6, 2016).
[25]*Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA)*, ICAO (last visited Nov. 29, 2016).
[26]*New Requirements for International Shipping as U.N. Body Continues to Address Greenhouse Gas Emissions*, ICAO (Oct. 28, 2016).
[27]*Id.*
[28]The World Bank, *Carbon Pricing: Building on the Momentum of the Paris Agreement* (Apr. 15, 2016).
[29]*Pan-Canadian Approach to Pricing Carbon Pollution*, GOV'T OF CAN. (Oct. 3, 2016).
[30]*How the Carbon Tax Works*, B.C. MINISTRY OF FIN. (last visited Dec. 21, 2016).
[31]*Carbon Levy and Rebates*, ALTA. GOV'T (last visited Dec. 21, 2016).

programs (Québec's launched in 2013 and linked with California's in 2014[32]; Ontario's will launch and join the linkage in 2017[33]).

Key economies in Latin America are preparing for carbon pricing: Chile's US$5/tonne carbon tax on power plants is set to begin in 2018[34] and Mexico recently launched a cap-and-trade simulation in anticipation of a national program.[35] Meanwhile, China's nationwide cap-and-trade program, designed to peak China's emissions by 2030 and originally anticipated to go into effect on January 1, 2017,[36] is held up with the State Council.[37] South Africa's carbon tax (of Rand 120/tonne) has also been delayed.

As parties to the UNFCCC iron out the rules for transferring international "mitigation outcomes," it remains to be seen how domestic initiatives – especially linked ones such as California-Québec-Ontario – will function under the Paris Agreement. Some countries are beginning to cooperate through informal carbon market "clubs" that anticipate harmonized markets and emissions units eligible in multiple jurisdictions.[38]

e. International Climate Change Litigation

In November 2015, a Peruvian farmer and mountain guide, Saùl Luciano Lliuya, filed a climate change suit against the German utility RWE (the largest CO_2 emitter in Europe) at the Regional Court in Essen, Germany. The plaintiff argued RWE's emissions threaten his family, his property, and his home city of Huaraz because climate change is melting glaciers and could cause flooding. [39] On December 15, 2016, the Regional Court dismissed the suit for lack of "legal causality," even if there is "scientific causality." [40]

In *VZW Klimaatzaak v. Kingdom of Belgium*, an organization of concerned citizens sued the federal and regional governments of Belgium in the Court of First Instance in Brussels for contributing to climate change, arguing the government's failure to reduce emissions is a violation of human rights laws. The lawsuit seeks to force the government to reduce GHG emissions 40% below 1990 levels by 2020 and 87.5% below 1990 levels by 2050.[41]

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[32] *A Brief Look at the Québec Cap-and-Trade System for Emissions Allowances*, QUE. GOV'T (last visited Dec. 21, 2016).

[33] *Ontario's Cap and Trade Program - Regulatory Overview of O. Reg. 144/16 and O. Reg 143/16*, LEHDER (July 1, 2016).

[34] *ETS Detailed Information: Chile*, INT'L CARBON ACTION P'SHIP (last updated Sept. 26, 2016).

[35] Natalie Schachar, *Mexico Announces Launch of Cap-and-Trade Pilot Program*, REUTERS (Aug. 15, 2016).

[36] INT'L EMISSIONS TRADING ASS'N, CHINA: AN EMISSIONS TRADING CASE STUDY (Sept. 2016).

[37] Stian Reklev, *China's ETS law likely pushed to next year, State Council plans show*, CARBON PULSE (Apr. 14, 2016).

[38] JEFF SWARTZ, INT'L EMISSIONS TRADING ASS'N ET AL., CHINA'S NATIONAL EMISSIONS TRADING SYSTEM: IMPLICATIONS FOR CARBON MARKETS AND TRADE, Issue Paper No. 6 (Mar. 2016).

[39] Stefan Küper, *Saùl Versus RWE – The Case of Huaraz*, GERMANWATCH (Dec. 15, 2016).

[40] Stefan Küper, *Regional Court dismisses climate lawsuit against RWE-Claimant likely to appeal*, GERMANWATCH (Dec. 15, 2016).

[41] Jennifer Klein, *July 2015 Update to Climate Litigation Charts*, CLIMATE L. BLOG, SABIN CTR. FOR CLIMATE CHANGE L. (July 7, 2015).

2. National Activities

a. United States Environmental Protection Agency

i. Clean Power Plan – CAA section 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 CO_2 emissions from existing fossil-based electric generating units (EGUs).[42] The CPP was immediately challenged in the D.C. Circuit Court of Appeals.[43] In *West Virginia v. EPA*, petitioners challenged both the EPA's authority to issue the rule under the CAA, as well as the Agency's technical assessments. In particular, petitioners, which included twenty-seven states, argued that the EPA's reliance on shifting generation from higher emitting to lower emitting generators would fundamentally transform the electricity industry without a clear statement of Congressional intent to provide the Agency with such authority, in violation of the *UARG* doctrine.[44] Some petitioners also raised constitutional claims, asserting that the CPP violated the Tenth Amendment's reservation of certain powers to the states. Petitioners briefed the case before the D.C. Circuit, which held oral argument on September 27, 2016.[45] The en banc court, which devoted nearly seven hours to argument, probed whether the CPP would transform the electricity sector or whether it confirmed market trends toward cleaner generation. A decision is expected in the first quarter of 2017. However, it is possible that the incoming Trump EPA could seek a remand of the CPP to reconsider the regulations before a decision is issued. Any such remand is discretionary.

Petitioners also sought a stay of the CPP in the D.C. Circuit, which was rejected by a three-judge panel on January 21, 2016.[46] Petitioners then sought review of the denial of the stay by the Supreme Court, which issued a 5-4 stay on February 9, 2016.[47] In the order granting the stay, the Supreme Court explicitly noted that the stay applied during the pendency of the litigation, including any review by the Court.[48] As a result, states were not required to submit initial compliance plans on September 6, 2016, as required by the CPP.

ii. New Source Performance Standards for Electric Generating Units – CAA section 111(b)

On the same day it issued the CPP, the EPA finalized regulations addressing CO_2 emissions from new and modified fossil-based EGUs under CAA section 111(b).[49] Among other things, the regulations established emissions limits for new coal-based EGUs predicated on the use of partial carbon capture and storage (CCS).[50] Like the CPP, the

[42]Carbon 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).
[43]Petition for Review, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Oct. 23, 2015).
[44]*See* Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427 (2014).
[45]Order, West Virginia v. EPA, No. 15-1363 (D.C. Cir. May 16, 2016).
[46]Order, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Jan. 21, 2016).
[47]Order 15A773, West Virginia v. EPA, No. 15-1363 (U.S. Feb. 9, 2016).
[48]*Id.*
[49]Standards 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).
[50]*Id.* at 64,536. The EPA noted that "utility boilers have multiple technology pathways available to comply with the actual emission standard." *Id.*

111(b) regulations were immediately challenged in the D.C. Circuit.[51]

In *North Dakota v. EPA*, petitioners challenged the EPA's determination that CCS has been adequately demonstrated such that it can be the basis for achievable standards for new coal-based EGUs, among other things. Briefing is ongoing, and final briefs are due on February 6, 2017. As with *West Virginia*, it is possible that the incoming Trump EPA could seek a remand of the section 111(b) regulations for reconsideration.

iii. Methane

The EPA took several actions in 2016 to address methane emissions from the oil and gas industry. On June 3, 2016, the EPA finalized amendments to New Source Performance Standards (NSPS) at subpart OOOO and adopted new standards at subpart OOOOa.[52] The NSPS updates the 2012 subpart OOOO rule to add, among other things, requirements for new, modified, or reconstructed sources in the oil and gas industry to reduce emissions of GHGs, specifically methane, in addition to volatile organic compounds.[53] The NSPS also expands the emission sources in the oil and natural gas subcategory subject to the rule as well as the scope of the requirements for Leak Detection and Repair (LDAR).[54]

In November, the EPA issued an Information Collection Request (ICR) to existing oil and natural gas sources.[55] The EPA aims to collect information on existing oil and gas sources "to develop nationally applicable regulations to reduce methane, and, as appropriate, emissions of other . . . oil and gas sources."[56] The EPA gave sixty days to respond to the "operator survey" (Part 1) and 180 days to respond to the more detailed "facility survey" (Part 2).[57]

The Bureau of Land Management (BLM) also finalized rules to address methane emissions from the oil and gas industry. In the rule published November 18, 2016, the BLM issued regulations to reduce waste of natural gas from venting, flaring, and leaks during oil and natural gas production activities on onshore federal and Indian lands.[58] The rule prohibits venting of gas, except in limited circumstances, such as during an emergency or when flaring is not available.[59] It also limits flaring by requiring operators to capture the gas for sale or for use.[60] Finally, the rule addresses leaks through LDAR requirements.[61] The rule is facing a challenge in the United States District Court for the District of

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[51]Petition for Review of Final Action, North Dakota v. EPA, No. 15-1381 (D.C. Cir. Oct. 27, 2015) (challenging the section 111(b) regulations).

[52]Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, 81 Fed. Reg. 35,824 (June 3, 2016).

[53]*Id.* at 35,825.

[54]*Id.* at 35,827.

[55]*See* ENVTL. PROT AGENCY, EPA'S ACTIONS TO REDUCE METHANE EMISSIONS FROM THE OIL AND NATURAL GAS INDUSTRY: FINAL INFORMATION COLLECTION REQUEST FOR EXISTING SOURCES (2016) [hereinafter FINAL INFORMATION COLLECTION].

[56]ENVTL. PROT. AGENCY, INFORMATION COLLECTION REQUEST SUPPORTING STATEMENT, EPA ICR NO. 2548.01: INFORMATION COLLECTION EFFORT FOR OIL AND GAS FACILITIES 3 (2016).

[57]FINAL INFORMATION COLLECTION, *supra* note 55, at 2.

[58]Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 83,008 (Nov. 18, 2016).

[59]*Id.* at 83,011.

[60]*Id.*

[61]*Id.*

Wyoming.[62] Given the lateness of the rule, it may be overturned by a new Congress under the Congressional Review Act.

iv. Mobile Source Standards

On July 25, 2016, the EPA finalized a determination that GHG emissions from certain types of aircraft engines contribute to climate change and endanger human health and the environment under CAA section 231(a).[63] The engines implicated by the findings are primarily used on large commercial jets. The EPA did not issue emissions standards for aircraft engines as part of this action. However, the final endangerment and contribution findings for aircraft engine GHG emissions are a first step that the EPA must take prior to adopting domestic GHG engine standards. The EPA stated that any future standards would be at least as stringent as those recently adopted by ICAO.[64]

In 2012, the EPA and the National Highway Traffic Safety Administration (NHTSA) established a coordinated program to address GHG emissions from light-duty vehicles. This program included both corporate average fuel economy (CAFE) standards and GHG emissions standards for model years (MY) 2017-2025.[65] The EPA and the NHTSA are obligated to conduct a mid-term evaluation in order to establish final standards for MY 2022-2025.[66] In July 2016, they began this evaluation by issuing for comment a draft Technical Assessment Report.[67] In November, the EPA sought comment on its proposed determination that the original MY 2022-2025 GHG emissions standards were appropriate.[68]

In August 2011, the EPA and the NHSTA issued CAFE and GHG emissions standards for medium- and heavy-duty trucks for MY 2014-2018.[69] Building on these "Phase I" standards, in August 2016, the EPA and the NHTSA jointly finalized "Phase 2" standards for medium- and heavy-duty vehicles through MY 2027. The vehicle and engine performance standards would cover MY 2018-2027 for certain trailers and MY 2021-2027 for semi-trucks, large pickup trucks, vans, and all buses and work trucks.[70]

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[62]W. Energy All. v. Sec'y of the U.S. Dep't of the Interior, No. 16-280 (D. Wyo. Nov. 15, 2016).

[63]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. 54,422 (Aug. 15, 2016) (to be codified at 40 C.F.R. pts. 87 and 1068).

[64]*Id.* at 54,434.

[65]2017 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 49 C.F.R. pts. 523, 531, 533, and 536-37).

[66]*Id.* at 62,652.

[67]Notice of Availability of Midterm Evaluation Draft Technical Assessment Report for Model Year 2022-2025 Light Duty Vehicle GHG Emissions and CAFE Standards, 81 Fed. Reg. 49,217 (July 27, 2016).

[68]Proposed Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards Under the Midterm Evaluation, 81 Fed. Reg. 87,927 (Dec. 6, 2016).

[69]Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles, 76 Fed. Reg. 57,106 (Sept. 15, 2011) (codified at 40 C.F.R. pts. 86-86, 600, 1033, 1036-37, 1039, 1065-66, 1068 and 49 C.F.R. pts. 523, 534-35).

[70]Greenhouse 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 and 49 C.F.R. 523, 534-35, 538).

v. Prevention of Significant Deterioration

On October 3, 2016, the EPA proposed revisions[71] to amend existing Prevention of Significant Deterioration (PSD) and Title V regulations addressing GHG emissions in response to the Supreme Court's decision in *UARG v. EPA*.[72] In *UARG*, the Court found that the EPA could not require sources that do not trigger CAA PSD or Title V permitting requirements, because of their potential to emit criteria pollutants above certain thresholds, to obtain these permits solely because of their GHG emissions. The Supreme Court found that only sources that required a PSD and Title V permit anyway could be required to include GHG limits in these permits.[73] Under the proposed regulations, sources that trigger PSD permitting would not be required to undergo a GHG Best Available Control Technology review, which would result in enforceable GHG emissions limits, unless they had the potential to emit at least 75,000 tons per year CO_2e.[74]

b. Litigation

In an action seeking to compel federal action to reduce carbon dioxide emissions, the United States District Court for the District of Oregon denied motions to dismiss due process and public trust claims against the United States and federal officials and agencies. The plaintiffs—young people who alleged that excessive carbon emissions were threatening their future, a non-profit group, and "Future Generations" represented by a climate scientist—alleged that the defendants had known for decades of the dangers of carbon dioxide pollution and had nonetheless taken actions that increased emissions. After holding that the action did not raise a nonjusticiable political question and that the plaintiffs had adequately alleged standing, the court found that the plaintiffs had asserted a fundamental right "to a climate system capable of sustaining human life" and that the plaintiffs' allegations regarding the defendants' role in creating the climate crisis were sufficient to state a "danger-creation" due process claim.[75]

Federal courts affirmed federal agencies' consideration of climate change in their decision-making under federal statutes. Under the Endangered Species Act (ESA), two opinions by the Ninth Circuit Court of Appeals reversed district court decisions that undid protections for species and habitat grounded in adverse climate change impacts.[76] Several district courts' decisions found that agencies had not sufficiently taken climate change into account in ESA decision-making.[77] Addressing the United States Department of Energy's

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[71]Revisions 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).

[72]Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427 (2014).

[73]*Id.* at 2442.

[74]81 Fed. Reg. at 68,113.

[75]Juliana v. United States, 2016 WL 6661146, at *15 (D. Or. Nov. 10, 2016).

[76]Alaska Oil & Gas Ass'n v. Jewell, 815 F.3d 544 (9th Cir. 2016) (upholding designation of polar bear critical habitat, finding that Fish and Wildlife Service properly took future climate change into account), *petition for cert. filed*, Nos. 16-596, 16-610 (U.S. Nov. 4, 2016); Alaska Oil & Gas Ass'n v. Pritzker, 840 F.3d 671 (9th Cir. 2016) (upholding listing of Beringia distinct population segment of the Pacific bearded seal subspecies as threatened, finding that National Marine Fisheries Service acted reasonably based on best available scientific and commercial data when it relied on projections of loss of sea ice through the end of century as basis for listing decision).

[77]Defs. of Wildlife v. Jewell, 176 F. Supp. 3d 975 (D. Mont. 2016) (withdrawal of listing proposal unlawfully ignored best available science by dismissing threat posed by climate

(DOE's) authority to consider environmental benefits when setting efficiency standards, the Seventh Circuit upheld DOE's analysis of the benefits of standards for commercial refrigeration equipment based on the Social Cost of Carbon.[78]

State authority to investigate corporate climate change financial disclosures—Exxon Mobil Corporation's (Exxon), in particular—became an issue in 2016. Massachusetts joined New York and the United States Virgin Islands in investigating Exxon's climate change disclosures. The Massachusetts investigation is based on state laws concerning unfair or deceptive acts or practices in trade or commerce. The Virgin Islands investigation was based on the territory's Criminally Influenced and Corrupt Organizations Act. Exxon filed an action in federal court in Texas to bar Massachusetts from pursuing its investigation and later added the New York attorney general as a defendant.[79] Exxon also sued the Virgin Islands attorney general in Texas, but ultimately dismissed the action after the attorney general withdrew its subpoena.[80] In the Massachusetts action, the federal court in October sua sponte ordered jurisdictional discovery based on its concerns that the Massachusetts attorney general had commenced the investigation in bad faith.[81]

The partial settlement of the United States and California's Clean Air Act enforcement suit against Volkswagen required a $2 billion investment over ten years in the promotion of the use of zero emission vehicles (ZEVs) and ZEV technology.[82]

c. Executive Action

i. Mid-Century Strategy for Deep Decarbonization

In keeping with previously stated carbon emission reduction commitments, including the United States' Intended Nationally Determined Contribution to the Paris Agreement, the Obama Administration presented in early November a mid-century strategy (MCS) that envisions economy-wide net GHG emissions reductions of 80% or more below 2005 levels by 2050.[83] According to the report, the MCS "charts a path that is achievable, consistent with the long-term goals of the Paris Agreement, and an acceleration of existing market trends."[84] The MCS would require a shift to clean energy sources and ambitious reductions across the economy.

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change); Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 184 F. Supp. 3d 861 (D. Or. 2016) (biological opinion did not adequately assess climate change effects); Wild Fish Conservancy v. Irving, No. 2:14-CV-0306-SMJ, 2016 WL 6892082 (E.D. Wash. Nov. 22, 2016) (biological opinion did not adequately consider climate change effects).

[78] Zero Zone, Inc. v. U.S. Dep't of Energy, 832 F.3d 654 (7th Cir. 2016).

[79] Plaintiff's Motion for Preliminary Injunction, Exxon Mobil Corp. v. Healey, No. 4:16-CV-469-A (N.D. Tex. June 15, 2016).

[80] Joint Stipulation of Dismissal, Exxon Mobil Corp. v. Walker, No. 4:16-CV-00364-K (N.D. Tex. June 29, 2016).

[81] Exxon Mobil Corp. v. Healey, No. 4:16-CV-469-K, 2016 WL 6091249 (N.D. Tex. Oct. 13, 2016).

[82] *In re* Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods., No. 16-cv-295, 2016 WL 6442227, at *2 (N.D. Cal. Oct. 25, 2016).

[83] THE WHITE HOUSE, U.S. MID-CENTURY STRATEGY FOR DEEP DECARBONIZATION 6 (Nov. 2016).

[84] *Id.* at 6.

3. Regional and Multi-Jurisdiction Activities

a. Western Climate Initiative

The Canadian province of Ontario launched its economy-wide GHG emissions cap-and-trade program on July 1, 2016. Ontario intends to link its program with similar programs in California and Quebec through the Western Climate Initiative (WCI), a multi-jurisdictional GHG emissions trading collaboration.[85] The Ontario program's first compliance period will begin in January 2017, and the first allowance auction is scheduled for March 2017.[86]

b. The Regional Greenhouse Gas Initiative (RGGI)

The cap-and-trade program covering carbon emissions from the power sector in nine New England and Mid-Atlantic states is conducting a 2016 Program Review.[87] The Program Review is a comprehensive and periodic review to consider program successes, impacts, and design elements.[88] The 2016 Program Review is soliciting stakeholder input on program design elements, including setting emission budget levels beyond 2020.[89]

c. Governors' Accord for a New Energy Future

On February 16, 2016, Governors from seventeen states signed the Governors' Accord for a New Energy Future.[90] The states embraced a shared vision of an energy future that involves expanding energy efficiency and clean energy sources to cost-effectively strengthen the states' economic productivity, reduce air pollution, and meet energy needs. The states committed to work together to diversify energy generation, expand clean energy sources, and encourage clean transportation options.[91]

d. Pacific North American Climate Leadership Agreement

On June 1, 2016, the governors of Oregon, California and Washington, the premier of British Columbia, and the mayors of major west-coast cities signed the Pacific North American Climate Leadership Agreement.[92] The jurisdictions agreed to collaborate on building efficiency benchmarking and disclosure, creation of a comprehensive electric vehicle charging network, and accelerating deployment of distributed renewable energy,

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[85] *Cap and Trade: Program Overview*, MINISTRY OF THE ENV'T AND CLIMATE CHANGE (last visited Nov. 22, 2016). California and Québec conduct joint allowance auctions administered by WCI. (*Auction Information*, CAL. AIR RES. BD. (last visited Nov. 22, 2016)).

[86] *Cap and Trade: Program Overview*, *supra* note 85.

[87] *Program Design*, REG'L GREENHOUSE GAS INITIATIVE (RGGI) (last visited Nov. 14, 2016).

[88] *2016 Program Review*, RGGI (last visited Nov. 14, 2016).

[89] RGGI, KEY ITEMS FOR 2016 PROGRAM REVIEW STAKEHOLDER DISCUSSIONS: PROGRAM ELEMENTS EPA CLEAN POWER PLAN 1 (2015).

[90] The 17 states are California, Connecticut, Delaware, Hawaii, Iowa, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington. (GOVERNORS' ACCORD FOR A NEW ENERGY FUTURE (2016)).

[91] *Id.*

[92] PAC. COAST COLLABORATIVE, PACIFIC NORTH AMERICA CLIMATE LEADERSHIP AGREEMENT (2016).

among other issues.[93] The three states and British Columbia—which had previously formed the Pacific Coast Collaborative—also adopted a new Climate Leadership Action Plan, committing to collectively support the international Paris Agreement and Under2MOU, promote carbon pricing, address ocean acidification, create a robust market for low-carbon fuels, and accelerate the transition to zero-emission vehicles.[94]

4. State Activities

a. California

On September 8, 2016, Governor Edmund G. Brown signed legislation that sets a binding 2030 GHG emissions reduction target of forty percent below 1990 levels.[95] The legislation, Senate Bill (SB) 32, authorizes the California Air Resources Board (CARB) to adopt rules and regulations to achieve the new 2030 target.[96] In 2016, CARB proposed amendments to its existing economy-wide cap-and-trade program that would extend the program to 2030 in line with the SB 32 target.[97] A companion piece of legislation to SB 32, AB 197, requires CARB to consider the social costs of GHGs and prioritize direct emissions reductions at large stationary sources and mobile sources in order to protect the "most impacted and disadvantaged communities."[98] In December 2016, CARB recommended using the cap-and-trade-program as the primary mechanism to achieve the target.[99]

California also enacted legislation to address short-lived climate pollutants, SB 1383. The law requires CARB to approve and begin implementing a comprehensive strategy by January 1, 2018, to reduce emissions from these pollutants.[100] The strategy must achieve emissions reductions of "methane by 40 percent, HFC gases by 40 percent, and anthropogenic black carbon by 50 percent below 2013 levels by 2030."[101] In April, CARB released a Proposed Short-Lived Climate Pollutant Reduction Strategy,[102] and in May the agency proposed regulations for methane emissions from both new and existing onshore and offshore oil and gas sources.[103] The proposed rule is projected to reduce

[93] *Id.*
[94] *Id.*
[95] SB-32 § 2, 2016 Reg. Sess. (Cal. 2016). Governor Brown had previously established the state's 2030 GHG emission reduction goal by executive order. (Cal. Exec. Order No. B-30-15 (2015)).
[96] SB-32 § 2.
[97] Cal. Office of Administrative Law, California Regulatory Notice Register, No. 32-Z (Aug. 2, 2016). California's cap-and-trade program is the subject of an ongoing legal challenge in state appellate court. Plaintiffs claim that the proceeds raised from auctioning the program's emissions allowances constitute a tax and are therefore impermissible under California law, which requires any state tax to be approved by a legislative supermajority. (Cal. Chamber of Commerce v. State Air Res. Bd., No. C075930 (Cal. Ct. App. Oct. 17, 2014)).
[98] A.B. 197 § 5, 2016 Gen. Assemb., Reg. Sess. (Cal. 2016).
[99] CAL. AIR RES. BD., 2030 TARGET SCOPING PLAN UPDATE (Dec. 2, 2016).
[100] S.B. 1383 § 2, 2016 Reg. Sess. (Cal. 2016).
[101] *Id.*
[102] CAL. AIR RES. BD., PROPOSED SHORT-LIVED CLIMATE POLLUTANT REDUCTION STRATEGY (Apr. 11, 2016).
[103] CAL. OFFICE OF ADMIN. LAW, CALIFORNIA REGULATORY NOTICE REGISTER, No. 23-Z (June 3, 2016).

methane emissions from the oil and natural gas sector 40-45% by 2025.[104]

b. Illinois

On December 8, 2016, Illinois Governor Bruce Rauner signed the Future Energy Jobs Bill, which authorizes ratepayer funding to support financially struggling nuclear facilities and expands the state's clean energy and energy efficiency programs.[105] The legislation provides $2.4 billion in subsidies over the next decade to keep the Clinton and Quad Cities nuclear plants operating.[106] It also requires Illinois utilities Commonwealth Edison and Ameren to reduce electricity usage in their service areas by 21.5% and 16% by 2030.[107] Additionally, the Future Energy Jobs Bill fixes problems in the state's renewable portfolio standard that prevented investments in new renewable energy projects.[108]

c. Maryland

Maryland Governor Larry Hogan signed the Greenhouse Gas Emissions Reduction Act of 2016 into law in March 2016, requiring Maryland to reduce economy-wide GHG emissions 40% below 2006 levels by 2030.[109] The 2016 legislation also reauthorizes the state's near-term, 2020 requirement to reduce GHG emissions 25% below 2006 levels. The Act, which received bipartisan support, puts into law recommendations of the Maryland Commission on Climate Change.[110]

d. Massachusetts

On August 8, 2016, Governor Charles Baker signed omnibus energy diversification legislation that requires electricity distribution companies in the state to conduct competitive solicitations for 9.45 million megawatt hours of clean energy generation by December 31, 2022,[111] and also requires distribution companies to conduct competitive solicitations for 1,600 megawatts of aggregate nameplate offshore wind energy capacity by no later than June 30, 2027.[112]

On September 16, 2016, Governor Baker issued an executive order requiring the Massachusetts Department of Environmental Protection (MassDEP) by August 11, 2017, to issue regulations necessary to ensure the state meets its 2020 emissions target to reduce GHG emissions by 25% below 1990 levels.[113] The executive order was issued in response to the Massachusetts Supreme Judicial Court decision, *Kain v. Massachusetts Department of Environmental Protection*, which ordered MassDEP to take added measures to implement the state's 2008 Global Warming Solutions Act. The Court held the Act requires

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[104]CAL. AIR RES. BD., STAFF REPORT: INITIAL STATEMENT OF REASONS ES-1 (May 31, 2016).
[105]S.B. 2814, 2016 Reg. Sess. (Ill. 2016); John O'Connor, *Illinois Gov. Rauner Signs Bill Sparing 2 Nuclear Plants*, ST. LOUIS POST-DISPATCH (Dec. 7, 2016).
[106]S.B. 2814 § 1-75(d-5), 2016 Reg. Sess. (Ill. 2016).
[107]*Id.* § 8-103B.
[108]*Id.* § 1-75(c)(1).
[109]S.B. 323, 2016 Reg. Sess. (Md. 2016). The legislation will automatically sunset in 2023 unless reauthorized by the General Assembly. *Id.*
[110]MD. COMM'N ON CLIMATE CHANGE, 2015 MARYLAND COMMISSION ON CLIMATE CHANGE REPORT (Dec. 2015).
[111]H. 4568, § 83D(b), 2016 Gen. Assemb. (Mass. 2016).
[112]*Id.*
[113]Mass. Exec. Order No. 569: Establishing an Integrated Climate Change Strategy for the Commonwealth 1-2 (Sept. 16, 2016).

decreasing volumetric limits on GHG emissions and the state's existing regulations do not satisfy the statutory requirement.[114]

e. Nevada

Governor Brian Sandoval issued Nevada's Strategic Planning Framework, which identified broad state-wide goals and values.[115] The Framework included three objectives intended to help the state achieve its goal of becoming the nation's leading producer and consumer of clean and renewable energy: complete a highway system for electric vehicles that serves the entire state by 2020; significantly reduce the percentage of imported fossil fuels over the next ten years; and reduce carbon emissions to a level at or below accepted federal standards.

f. New Hampshire

Governor Margaret Hassan issued Executive Order 2016-03, which expanded the state's "lead-by-example" initiative.[116] It set updated goals of reducing fossil fuel use at state-owned facilities 30% by 2020 and 50% by 2030 and reducing GHG emissions from the state passenger vehicle fleet 30% by 2030.[117] Governor Hassan also signed legislation that doubles the cap on net metering projects to 100 megawatts, with 80% of the increase allocated to smaller projects of less than 100 kilowatts.[118] Additionally, the New Hampshire Public Utilities Commission established an Energy Efficiency Resource Standard in 2016.[119]

g. New York

On August 1, 2016, the New York Public Service Commission adopted a Clean Energy Standard that requires 50% of the state's electricity to be generated from renewable sources by 2030.[120] The renewable energy requirement is consistent with the goal established in the 2015 New York State Energy Plan and a key strategy towards meeting the state's goal of reducing GHG emissions 40% below 1990 levels by 2030.[121] The Clean Energy Standard also creates a zero emissions credit program for existing nuclear facilities in the state to preserve existing nuclear generation as a "bridge to the clean energy future."[122]

h. Oregon

On March 8, 2016, Oregon Governor Kate Brown signed SB 1547. The law extends the state renewable portfolio standard beginning with a 27% renewable power requirement

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[114]Kain v. Dep't of Envtl. Prot., 49 N.E.3d 1124 (Mass. 2016).
[115]OFFICE OF THE GOVERNOR, NEV.'S STRATEGIC PLANNING FRAMEWORK 2016-2020 (2016).
[116]N.H. Exec. Order No. 2016-03 (May 2016).
[117]*Id.* at 14.
[118]H.B. 1116, 2016 Leg., 164th Sess. (N.H. 2016).
[119]N.H. Pub. Utils. Comm'n, Order 25,932, Energy Efficiency Resource Standard (Aug. 2, 2016).
[120]Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard, 15-E-0302 2 (N.Y. Pub. Serv. Comm'n Aug. 1, 2016).
[121]*Id.*
[122]*Id.* at 1.

in 2025 and increasing to 50% in 2040.[123] The law also requires the state's investor-owned electric utilities—Portland General Electric and PacifiCorp—to phase out coal generation from the state's electricity supply for retail customers by 2030, including power imported from out of state.[124] Finally, SB 1547 requires electric utilities to submit plans to the Oregon Public Utilities Commission to increase transportation electrification.[125]

i. Pennsylvania

Plaintiffs in Pennsylvania state court unsuccessfully asserted that the Environmental Rights Amendment of the Pennsylvania Constitution compelled the state to develop and implement a comprehensive plan to regulate GHGs.[126]

j. Vermont

Vermont's 2016 Comprehensive Energy Plan establishes energy and GHG reduction goals to help Vermont achieve a clean energy future.[127] These include reducing total energy consumption per capita by more than one third by 2050 and meeting 90% of the state's energy needs from renewable sources by 2050.[128]

k. Virginia

In July 2016, Governor Terence McAuliffe issued an executive order directing the Secretary of Natural Resources to convene a working group to recommend steps to reduce carbon emissions from Virginia's power plants.[129] The work group will provide the Governor with recommendations for action under existing state authority by May 31, 2017, including the possible establishment of regulations for the reduction of carbon pollution from existing power plants.[130]

l. Washington

In September 2016, the Washington Department of Ecology enacted the state Clean Air Rule, a regulatory program requiring economy-wide GHG emission reductions that came into effect in October 2016.[131] Beginning in 2017, covered sources that emit more than 100,000 metric tons of GHGs will be required to reduce emissions 1.7% annually or offset those emissions.[132] The GHG threshold will be lowered every three years until 2035 to bring more emitters into the program.[133] Covered entities may earn tradable credits for over compliance, and offset programs are also allowed.[134]

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[123]S.B. 1547 § 5, 2016 Leg., 78th Sess. (Or. 2016).
[124]*Id.* § 1.
[125]*Id.* § 20.
[126]Funk v. Wolf, 144 A.3d 228 (Pa. Commw. Ct. 2016).
[127]VT. DEP'T OF PUB. SERV. COMPREHENSIVE ENERGY PLAN 2016 at 1 (2016).
[128]*Id.* at 4.
[129]Va. Exec. Order No. 57 pt. 1 (2016).
[130]*Id.* pt. 2.
[131]Press Release, Wash. Dep't of Ecology, Washington Adopts First-of-its-Kind Rule to Combat Climate Change (Sept. 15, 2016).
[132]WASH. ADMIN. CODE §§ 173-442-030(3), 173-442-060(1)(b)(i), and 173-442-100(1) (2016).
[133]WASH. ADMIN. CODE § 173-442-030(3) (2016).
[134]WASH. ADMIN. CODE § 173-442-110(1)-(2) (2016).

B. Adaptation

1. International Activities

Adoption of the Paris Agreement accelerated the need for practical approaches in support of climate adaptation and to scale up action in strengthening climate resilience. Significantly, the Paris Agreement acknowledged that adaptation, which had lagged behind mitigation in attention and resources, would now be addressed on a par with mitigation. Of the submitted INDC's, 121 countries (86% of those who submitted INDCs) included an adaptation component in their plans. Since adaptation in INDCs was optional, the fact that most countries did so reflects the growing importance that nations are placing on adaptation as part of their climate action response.[135]

At COP-22 in Marrakech, the Parties focused on creating a "rulebook" for implementation of the Paris Agreement, including its adaptation provisions.[136] Although both formal and informal discussions occurred on key adaptation issues – for example, the need for Parties to report on adaptation under the rubric "adaptation communication" – no consensus guidelines emerged. Instead, in the instant example, the UNFCCC Secretariat was tasked create a note, to be followed by comments from the Parties, the preparation of a synthesis document, and the convening of a workshop in May 2017.[137] In parallel, the UNFCCC Adaptation Committee began considering how developing country adaptation efforts will be recognized, and how to regularly assess the adequacy and effectiveness of adaptation efforts and support.[138]

Loss and damage, which post-Paris is viewed by many as a topic separate from adaptation, progressed in Marrakech with agreement on a five-year workplan for the executive committee of the Warsaw International Mechanism (WIM) on loss and damage and agreement for subsequent periodic reviews of the WIM.[139] Climate-induced migration, understood as an extreme adaptation measure, was discussed on the margins at Marrakech as a follow-up to the Hugo Conference in Liege, Belgium, which focused on migration, displacement and human rights issues during the week preceding the COP.[140]

The International Organization for Standardization (ISO) has undertaken efforts to advance a set of voluntary international standards for adaptation. Working group meetings on the subject were held in 2016 in Yogyakarta, Indonesia and in Seoul, South Korea. The ISO standards for adaptation, beginning with a high-level framework standard, will include a suite of standards covering vulnerability assessment, planning, implementation and monitoring and evaluation. Recognizing that the framework established with the Paris Agreement requires more detailed elaboration for implementation purposes, these international voluntary standards will be context-specific and are being developed in coordination with UNFCCC.[141]

Climate adaptation finance has emerged as an urgent and complex topic. Adaptation finance pathways include existing mechanisms such as the Green Climate Fund

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[135]Kathleen Mogelgaard & Heather McGray, *With New Climate Plans, Adaptation Is No Longer an Overlooked Issue*, WRI BLOG (Nov. 24, 2015).

[136]IISD, SUMMARY OF THE MARRAKECH CLIMATE CHANGE CONFERENCE, VOL. 12 NO. 698, EARTH NEGOTIATIONS BULLETIN 36 (Nov. 21, 2016).

[137]*Id.* at 21.

[138]CTR. FOR CLIMATE AND ENERGY SOLUTIONS, OUTCOMES OF THE UN CLIMATE CHANGE CONFERENCE IN MARRAKECH (Nov. 2016).

[139]IISD, *supra* note 136, at 37.

[140]*See, e.g.*, COSMIN CORENDA THE HUGO CONFERENCE, HUMAN RIGHTS, EQUITY AND OTHER LEGAL ASPECTS OF CLIMATE CHANGE AND MIGRATION (Nov. 2016).

[141]Int'l Org. for Standardization [ISO], *Draft Strategic Plan*, ISO/TC 207/SC7 (Aug. 2015).

and the multilateral development banks (MDBs), and now the increasing engagement of private sector financial community, including insurers, lenders and other investors. For example, the Global Adaptation & Resilience Working Group (GARI) brings together private investors and other stakeholders focusing on how to practically invest in the face of climate adaptation and resilience needs.[142] The European Investment Bank (EIB) is developing standards to promote a low-carbon and climate resilient economy in its investments, eventually harmonizing the standards with other international financial institutions in support of the Paris Agreement.[143] A working group of MDBs prepared a note summarizing its findings in order to help practitioners assess climate change risks and vulnerabilities and integrate adaptation measures into project planning, design and implementation.[144] The recognition that public sector funds will be insufficient for the challenge of adaptation has fueled interest in blended finance, including public-private partnerships (PPPs).[145]

2. National Activities

In 2016, new federal policies emphasized climate change implications for national security. In January, the Department of Defense issued a directive establishing the Department's policy relating to climate change adaptation and assigning responsibilities for incorporating adaptation into operations and planning efforts.[146] In September, President Obama issued a memorandum directing twenty agencies with national security-related missions to consider climate change impacts in planning and policies.[147]

In December 2016, President Obama issued an executive order establishing the Northern Bering Sea Climate Resilience Area, which aims to protect the sensitive ocean ecosystem and creates a task force to coordinate federal resilience activities, including a study by the Coast Guard on the impact of increased shipping through the Bering Strait.[148]

Under rules finalized by the Federal Highway Administration in May and October respectively, state transportation agencies will be required to incorporate resilience considerations in long-range planning and develop risk-based asset management plans that consider future climate and extreme weather risks.[149] Final guidance issued in August by the Council on Environmental Quality (CEQ) also sets out a framework for federal agencies to consider the effects of climate change on proposed actions and associated

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[142]GLOB. ADAPTATION & RESILIENCE WORKING GRP. (GARI), BRIDGING THE ADAPTATION GAP: APPROACHES TO MEASUREMENT OF PHYSICAL CLIMATE RISK AND EXAMPLES OF INVESTMENT IN CLIMATE ADAPTATION AND RESILIENCE (Nov. 2016).

[143]*See, e.g.*, *EIB Standards on Climate Action: Update on Climate Finance Tracking and Carbon Footprinting*, EUROPEAN INV. BANK (Dec. 13, 2016).

[144]EUROPEAN FIN. INSTS. WORKING GRP. ON ADAPTATION TO CLIMATE CHANGE, INTEGRATING CLIMATE CHANGE INFORMATION AND ADAPTATION IN PROJECT DEVELOPMENT: EMERGING EXPERIENCE FROM PRACTITIONERS (May 2016).

[145]Ira Feldman, *Partnerships and Partnerships: A brief guide to the evolving PPP Landscape*, 45 Int'l L. News (2016).

[146]U.S. DEP'T OF DEFENSE, DOD DIRECTIVE 4715.21, CLIMATE CHANGE ADAPTATION AND RESILIENCE (Jan. 14, 2016).

[147]Presidential Memorandum on Climate Change and National Security, 2016 DAILY COMP. PRES. DOC. 621 (Sept. 21, 2016).

[148]Exec. Order 13754, 81 Fed. Reg. 90,669 (Dec. 9, 2016).

[149]Statewide and Nonmetropolitan Transportation Planning; Metropolitan Transportation Planning, 81 Fed. Reg. 34,050 (May 27, 2016) (codified at 23 C.F.R. pts. 450 and 771; 49 C.F.R. pt. 613) (final rule); Asset Management Plans and Periodic Evaluations of Facilities Repeatedly Requiring Repair and Reconstruction Due to Emergency Events, 81 Fed. Reg. 73,196 (Oct. 24, 2016) (codified at 23 C.F.R. pts. 515 and 667) (final rule).

environmental impacts when conducting reviews under the National Environmental Policy Act.[150] In January 2016, the Department of Housing and Urban Development (HUD) announced the winners of the $1 billion National Disaster Resilience Competition, awarding funding for climate resilience initiatives to eight states and five local jurisdictions.[151]

Federal agencies also acted to implement Executive Order 13690, the Federal Flood Risk Management Standard, which was issued in January 2015.[152] The Federal Emergency Management Agency (FEMA) and HUD issued proposed rules in August and October 2016, respectively, that would increase the vertical flood elevation and hazard area used in siting, design, and construction of federal or federally-funded projects.[153] In December 2016, HUD also issued a final rule that would require jurisdictions to consider climate change and natural hazard resilience in their Consolidated Plan processes,[154] which help inform housing and community development investments utilizing HUD's formula block grant programs.[155]

3. State Activities

In 2016, states took steps to improve adaptation planning, promote resilience in state infrastructure and land conservation, and support local communities.

New Hampshire passed legislation in May requiring an update of the state's coastal flood risk projections – including sea-level rise and storm surge – every five years starting in July 2019.[156] The state also passed a bill in June requiring state agencies to audit laws, regulations, and policies relating to coastal regions and make recommendations that would better enable the state to prepare for future flood risks.[157] In Massachusetts, under Executive Order 569 issued in September, the state commits to developing a Climate Adaptation Plan that will be updated every five years.[158]

In September, California passed bills relating to resilient infrastructure investments and planning and investing in disadvantaged communities. A.B. 2800[159] requires state agencies to consider climate change impacts in state infrastructure decision-making through June 2020; the bill also creates a Climate-Safe Infrastructure Working Group to develop recommendations on how to integrate climate change projections into the

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[150]Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, 81 Fed. Reg. 51,866 (Aug. 1, 2016).

[151]*HUD Awards $1 Billion Through National Disaster Resilience Competition*, HUD EXCH. (Jan. 29, 2016).

[152]Exec. Order No. 13,690, 80 Fed. Reg. 6425 (Jan. 30, 2015).

[153]Updates to Floodplain Management and Protection of Wetlands Regulations To Implement Executive Order 13,690 and the Federal Flood Risk Management Standard, 81 Fed. Reg. 57,402 (Aug. 22, 2016) (to be codified at 44 C.F.R. pt. 9); 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 (Oct. 28, 2016) (to be codified at 24 C.F.R. pts. 50, 55, 58, and 200).

[154]Modernizing HUD's Consolidated Planning Process to Narrow the Digital Divide and Increase Resilience to Natural Hazards, 81 Fed. Reg. 90,997 (Dec. 16, 2016) (to be codified at 24 C.F.R. pt. 91).

[155]*See Consolidated Plan Process, Grant Programs, and Related HUD Programs*, HUD EXCH. (last visited Nov. 1, 2016).

[156]S.B. 374, 2016 Reg. Sess. (N.H. 2016).

[157]S.B. 452, 2016 Reg. Sess. (N.H. 2016).

[158]Mass. Exec. Order No. 569: Establishing an Integrated Climate Change Strategy for the Commonwealth, 1-2 (Sept.16, 2016).

[159]A.B. 2800, 2015-2016 Sess. (Cal. 2016).

engineering of state infrastructure. A.B. 2722[160] created the Transformative Climate Communities Program, which will award grants for planning and projects that reduce emissions and benefit disadvantaged communities.

Maryland and Delaware took actions to improve the effectiveness of land conservation and restoration. Maryland passed a bill to remove barriers to mitigation banking for non-tidal wetlands disturbed by development.[161] Delaware amended its Land Protection Act to encourage permanent protection of certain lands, including land that would allow natural systems to adapt to climate change.[162]

New York increased support for local communities, creating a new Climate Smart Communities program to award grants for projects that will increase resilience or help reduce emissions.[163] The state also launched an online Climate Change Clearinghouse to provide a single source of climate science and information for decision-makers.[164]

4. Local/Regional Activities

Local jurisdictions continue to innovate in preparing for climate change, and in funding resilient investments. In May, voters in the nine-county San Francisco Bay Area approved a $12 parcel tax that will fund wetlands restoration and help adapt to sea-level rise through nature-based flood protection.[165] In June, New York City updated its Local Waterfront Revitalization Program, requiring development and redevelopment projects to consider and mitigate climate change and sea-level rise risks.[166] The City is also working with FEMA to update floodplain maps, including maps accounting for sea-level rise and storm surge to inform planning and building.[167] In September, D.C. Water issued an environmental impact bond to fund green infrastructure improvements that can help mitigate flooding from heavy rainfall events,[168] and in November, Washington, D.C. released Climate Ready D.C., the District's plan for adapting to climate change impacts.[169]

II. SUSTAINABLE DEVELOPMENT

A. International Activities

1. United Nations Initiatives

The United Nations Statistical Commission approved 230 indicators to measure

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[160]A.B. 2722, 2015-2016 Sess. (Cal. 2016).
[161]H.B. 797, 2016 Sess. (Md. 2016).
[162]House Substitute 1 for H.B. 262, 148th Gen. Assemb., Reg. Sess. (Del. 2016).
[163]Press Release, Governor Andrew M. Cuomo, State of N.Y., Governor Cuomo Announces $11 Million in Climate Smart Community Grants Available to Municipalities (Apr. 18, 2016).
[164]Press Release, N.Y. State Energy Res. and Dev. Auth., NYSERDA Launches One-Stop Climate Change Science Clearinghouse Website with Tools to Help Communities Prepare for Extreme Weather (May 6, 2016).
[165]*Parcel Tax Information*, S.F. BAY RESTORATION AUTH. (last visited Nov. 2, 2016).
[166]N.Y. STATE DEP'T OF STATE, THE NEW YORK CITY WATERFRONT REVITALIZATION PROGRAM (June 2016).
[167]Press Release, Fed. Emergency Mgmt. Agency, Mayor De Blasio and FEMA Announce Plan to Revise NYC's Flood Maps (Oct. 17, 2016).
[168]Press Release, Pamela Mooring, D.C. Water & Sewer Auth., DC Water, Goldman Sachs and Calvert Foundation pioneer environmental impact bond; $25 million bond sale to fund initial DC Water green infrastructure project (Sept. 29, 2016).
[169]DISTRICT OF COLUMBIA, CLIMATE READY DC (2016).

progress on the seventeen new global sustainable development goals for 2015-2030, set by the UN last year. The new goals and indicators address a wide array of topics, including poverty, education, gender equality, climate change, sustainable cities and consumption, and access to justice.[170]

Moody's, S&P, and other credit rating institutions joined over 100 major investors in signing a statement of the UN-supported Principles of Responsible Investment (PRI) calling on credit firms, debt underwriters, and investors to conduct robust analyses of environmental, social and governance factors that could affect investment risk.[171]

2. CSR/Sustainability Initiatives by Foreign Governments and Stock Exchanges

The European Union (EU) collected public comments on its proposed non-binding guidance on reporting sustainability information and other non-financial data by certain large companies.[172]

Following the example set by the Dodd-Frank law in the United States, the EU Commission, Parliament and Council agreed to issue a conflict minerals requirement, mandating due diligence for importers of conflict minerals from all conflict-affected and high-risk areas (not just central Africa, as covered by 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 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.[173]

Stock exchanges in Australia, Mexico, Morocco, Spain, Singapore, Botswana, Namibia, Tanzania, Dubai, Seychelles, Belarus, Nairobi, and Qatar, Luxembourg, Sweden, Norway, Denmark, Iceland, Latvia, Jordan, Lithuania, Estonia, and Kazakhstan joined the UN's Sustainable Stock Exchanges (SSE) initiative, bringing to sixty the number of exchanges around the world, including the United States' Nasdaq and NYSE, committing to promote long term sustainable investment and improved environmental, social and corporate governance (ESG) disclosure and performance among companies listed on their exchanges (through dialogue with investors, companies and regulators).[174]

3. Non-governmental Voluntary Initiatives

The Global Reporting Initiative (GRI) converted its G4 Sustainability Reporting Guidelines to a standard that includes three "universal" standards (Foundation, General Disclosures, and Management Approach) and thirty-five economic, social, and environmental "topic-specific" standards. The transition to standards was done to improve the quality and comparability of sustainability reporting, make it easier for GRI to update its standards and for countries and stock exchanges to incorporate the GRI provisions in their financial reporting rules.[175]

The Sustainability Accounting Standards Board (SASB), chaired by former New York Mayor Michael Bloomberg, is a nonprofit organization formed in 2011 to develop

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[170]G.A. Res. 70/1, ¶ 18 (Sept. 25, 2015).

[171]*Now is the Time to Act on ESG in Credit Ratings*, PRINCIPLES FOR RESPONSIBLE INV. (last visited Feb. 25, 2017).

[172]Council Directive 2014/95/EU (Oct. 22, 2014).

[173]Dynda A. Thomas & Christina Economides, *The New EU Conflict Minerals Regulation — Is It Something To Be Thankful For?*, CONFLICT MINERAL COMPLIANCE, NEWS & ANALYSIS (Nov. 23, 2016).

[174]*The Sustainable Stock Exchange initiative welcomes its 60th partner exchange*, SUSTAINABLE STOCK EXCHS. INITIATIVE (SSEI) (Sept. 16, 2016).

[175]*GRI Standards*, GRI (last visited Mar. 4, 2017).

sustainability accounting standards to be used by publicly listed corporations for disclosing material sustainability issues in financial reports. In 2016, SASB issued reporting guidelines for Infrastructure (utilities, waste management companies, construction and engineering firms, and real estate owners, developers and managers).[176]

The International Standards Organization (ISO) has completed the second draft of ISO 20400, *Sustainable procurement – Guidance*, which offers guidance on how organizations can integrate sustainability into their procurement processes. Final publication is expected in 2017.[177]

B. National Activities

Federal agencies began implementing Executive Order 13693, on "Planning for Federal Sustainability in the Next Decade," which was issued in 2015. Among other things, the Order directed federal agencies to take a variety of steps to reduce GHG emissions, improve water use efficiency and stormwater management, and pursue sustainable acquisition and procurement. The CEQ now maintains a scorecard for major federal suppliers, indicating whether they have set GHG reduction goals, disclose their emissions, and disclose information on their exposure to risks from climate change.[178]

1. Securities and Exchange Commission Rules

In April, the Securities Exchange Commission published a "concept release proposal" seeking input on modernizing reporting requirements under Regulation S-K.[179] Among the topics addressed in the proposal was "Public Policy and Sustainability Matters." The Commission requested input on what sustainability information might be material or relevant to a company's business and financial condition, and might constitute a matter of value to investors and shareholders making corporate voting decisions.

2. Business Initiatives

In 2016, United States investors filed 370 corporate shareholder resolutions on environmental and social issues—primarily on climate change and corporate political activity–down from a record 433 filed the year before. Environmental and sustainable governance resolutions together represented 40% of all resolutions.[180]

C. State and Local Activities

Ohio, Michigan, Georgia, Kentucky, Iowa, Oklahoma, and Alaska are drafting legislation authorizing "benefit corporations," which allow companies to go beyond the fiduciary duty of maximizing value for stockholders to address social, environmental and employee benefit. Currently thirty states and the District of Columbia have such laws.[181]

The City of Chicago began installation of up to 500 sensors in public locations, which will track and report a variety of environmental and social indicators ranging from

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[176] *Infrastructure Standards Download*, SUSTAINABILITY ACCOUNTING STANDARDS BD. (last visited Mar. 4, 2017).
[177] ISO/PRF 20400, INT'L ORG. FOR STANDARDIZATION (last visited Mar. 4, 2017).
[178] COUNCIL FOR ENVTL. QUALITY, FEDERAL SUPPLIER GREENHOUSE GAS MANAGEMENT SCORECARD (2016).
[179] Business 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, 229-30, 232, 239-40, and 249).
[180] *2016 Report*, PROXYPREVIEW (last visited Mar. 4, 2017).
[181] *State by State Status of Legislation*, THE BENEFIT CORP. (last visited Mar. 4, 2017).

temperature and humidity to traffic congestion and noise and pollution levels. Described as a "Fitbit for the city," the program will generate data that can be used by individuals to track their environmental exposures and by the city to respond to changing conditions. It might be used, for example, to identify, measure, and address peak congestion points.[182]

III. ECOSYSTEMS

A. International Activities

1. Convention on Biological Diversity

The 196 Parties to the Convention on Biological Diversity (CBD)[183] convened from December 4-17, 2016 in Cancun, Mexico for the Thirteenth Meeting of the Conference of the Parties (COP13). The Parties noted that virtually all member States had incorporated the biodiversity targets established at COP10 for 2011-2020 (the so-called Aichi Biodiversity Targets) in their respective national biodiversity strategies and action plans.[184] However, they also concluded (as did a new study by Conservation International[185]) that only a minority had established plans that were sufficiently ambitious to comport with its goals, while many 2015 targets – such as minimizing stressors contributing to coral reef degradation and ocean acidification and universal adoption of updated national biodiversity strategy and action plans – had not been achieved.[186] As noted in Sections III.A.4 and B.1. *infra*, 2016 saw Parties and the United States make significant contributions to 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. The Parties also recognized new ecologically or biologically significant areas (EBSAs) designed to ensure protection of areas of special importance in open-ocean waters and deep-sea habitats.[187] Recognizing the important nexus between climate change and biodiversity, the Parties passed a resolution advocating the need to incorporate an ecosystem approach into climate policymaking.[188] The Parties also sought to continue COP12's efforts to mobilize financial resources (doubling biodiversity-related funding to developing countries), while noting a lack of information reporting on countries' financial needs.[189] They also established a detailed three-year action plan to build capacity for the implementation of the Convention and its protocols, including provisions for specific Aichi Biodiversity Targets.[190]

It is lamentable that biodiversity continues to decline despite the CBD's express goal to arrest such declines.[191] However, COP13 was laudable for continuing to develop a systematic approach to measure and effectively implement programs.

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[182]Aamer Madhani, *Chicago begins building 'fitness tracker' to check its vitals*, USA TODAY (Aug. 29, 2016).

[183]The United States is not a Party to the Convention on Biological Diversity. (*List of Parties*, CONVENTION ON BIOLOGICAL DIVERSITY (last visited Feb. 24, 2017)).

[184]Convention on Biological Diversity [CBD], Decision XIII/1, ¶ 2 (Dec. 12, 2016).

[185]CONSERVATION INT'L ET AL., CONVENTION ON BIOLOGICAL DIVERSITY: PROGRESS REPORT TOWARDS THE AICHI BIODIVERSITY TARGETS 1-8 (2016).

[186]CBD, Decision XIII/1, *supra* note 184, at ¶ 2.

[187]CBD, Decision XIII/12, ¶ 2 (Dec. 17, 2016).

[188]CBD, Decision XIII/4, ¶ 1-2 (Dec. 10, 2016).

[189]CBD, Decision XIII/20, ¶ 3-4 (Dec. 15, 2016).

[190]CBD, Decision XIII/23, Annex (Dec. 16, 2016).

[191]*Global Biodiversity Outlook,* CBD (last visited Feb. 24, 2017); Gerardo Ceballos et al., *Accelerated Modern Human-Induced Species Loss: Entering the Sixth Mass Extinction*, 1 SCI. ADVANCES (2015).

2. IUCN World Conservation Congress

In September, the International Union for the Conservation of Nature (IUCN) held its quadrennial World Conservation Congress in Hawaii. The theme of this year's Congress, "Planet at the Crossroads," encouraged debate on how to meet the immediate needs of human civilization while considering the long-term impacts doing so may have on the planet's capacity to support life. IUCN's 1,300 members – including governments, international, private, and non-profit organizations – adopted over 121 resolutions, recommendations, and decisions, including a four-year program that sets priorities for the global conservation community.[192] Notably, the Congress adopted The Hawaii Commitments, which seek to, among other things, promote nature-based solutions to combat and adapt to climate change, conserve biodiversity, support sustainable livelihoods, and provide ecosystem services to enhance human health and well-being.

3. Antarctica Marine Reserve (Ross Sea)

After years of negotiations, in October, twenty-four nations and the European Union reached an agreement to establish the Ross Sea Region Marine Protected Area (MPA) in Antarctica's Ross Sea, the world's largest marine sanctuary.[193] The agreement, which will come into force December 2017, occurred at a meeting of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) in Hobart, Australia. At 600,000 square miles, the sanctuary is reported to cover an area twice the size of Texas. Seventy-two percent of the sanctuary will be a "no-take" zone, which forbids all fishing, while other sections will permit some harvesting of fish and krill for scientific research. Located well south of New Zealand, the region contains nutrient-rich waters, largely untouched by humans, and is home to 16,000 species, including plankton, krill, fish, seals, penguins, and whales.[194] A key focus of the Ross Sea Region MPA will be improving collaborative marine research by CCAMLR members.[195]

4. Protected Area Conservation

2016 saw a myriad of international and country-level initiatives to conserve the global commons, including oceans, freshwater, and terrestrial protected areas.

At the third Our Ocean conference, held September 15-16 in Washington, D.C., more than 20 countries and charitable organizations announced over 136 new marine conservation initiatives valued at $5.24 billion, in addition to commitments to protect approximately 4 million square kilometers (1.5 million square miles) of ocean.[196] To date, the three Our Ocean conferences have spawned commitments worth $9.2 billion and covering 3.8 million square miles of ocean – an area the size of the United States. Participant commitments focused on marine protected areas, sustainable fisheries, marine

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[192]Anan Ahmed, *Planet at the Crossroads: Insights from IUCN's World Conservation Congress*, THE WILSON CTR. (Dec. 12, 2016).

[193]*CCAMLR to create world's largest Marine Protected Area*, (CCAMLR) (last visited Dec. 6, 2016).

[194]Brian Howard, *World's Largest Marine Reserve Created Off Antarctica*, NAT'L GEOGRAPHIC (Oct. 27, 2016).

[195]CCAMLR, CONSERVATION MEASURE 91-05 (2016): ROSS SEA REGION MARINE PROTECTED AREA (2016).

[196]*Our Ocean 2016 Commitments*, U.S. DEP'T OF STATE (last visited Sept. 16, 2016) (source is no longer available on the internet); *Our Ocean, Commitments* (last visited March 6, 2017).

pollution, and climate-related ocean impacts. Notable commitments include: the Seychelles' plan to create a 400,000 square kilometer marine protected area (30% of its EEZ) by 2020 through a $27 million debt swap agreement; the United Kingdom's designation of a sustainable use marine protected area covering all of St. Helena's 445,000 square kilometer maritime zone; France's expansion of the marine reserve in the French Southern Lands in the Indian Ocean by 550,000 square kilometers; and the Federate States of Micronesia's expansion of its marine protected area by 184,948 square kilometers prohibiting commercial fishing within twenty-four nautical miles around each of its islands.[197] Prior to the conference, the presidents of Costa Rica, Colombia, and Ecuador announced the expansion of three UNESCO World Heritage Sites – the Cocos, Malpelo, and Galápagos Islands – further restricting fishing, seeking to save declining shark species (amongst others), and bringing the marine reserves to 83,600 square miles.[198] These efforts complement the three nations' 2003 commitment with Panama to conserve the 750,000 square mile Eastern Tropical Pacific Seascape ocean wildlife corridor.

On solid ground, the Canadian province of British Colombia reached a historic agreement with environmentalists, the logging industry, and First Nations communities to protect the Great Bear Rainforest – the largest coastal temperate rainforest in the world.[199] After twenty years of negotiations, the parties agreed to conserve 85% of the forest as protected with the other 15% subject to the "most stringent" logging standards in North America. Farther south, Peru and Bolivia signed a $500 million deal to restore and preserve Lake Titicaca, the largest freshwater lake in South America.[200]

5. U.S.-Canada Arctic Oil & Gas Development Restrictions

Only one month before leaving office, President Obama declared "the vast majority of U.S. waters in the Chukchi and Beaufort Seas north of Alaska as indefinitely off limits to offshore oil and gas leasing."[201] The designation would ban drilling in about 98 percent of federally-owned Arctic waters, constituting 115 million acres.[202] President Obama also announced similar measures to ban drilling in 3.8 million acres of the Atlantic Ocean surrounding coral canyons stretching from Norfolk, Virginia to the Canadian border. President Obama relied on a rarely used provision of the 1953 Outer Continental Shelf Lands Act, which gives the President the authority to "'withdraw from disposition any of the unleased lands of the Outer Continental Shelf'", and arguably cannot be reversed by a future Trump administration.[203] At a joint statement, Prime Minster Trudeau announced Canada will also designate "all Arctic Canadian waters as indefinitely off limits to future offshore Arctic oil and gas licensing, to be reviewed every five years through a climate and marine science-based life-cycle assessment."[204]

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[197] *Our Ocean, Commitments*, *supra* note 196.

[198] Jane Braxton Little, *Three Nations Create Giant Reserves for Ocean Life*, NAT'L GEOGRAPHIC (Sept. 9, 2016).

[199] Justine Hunter, *Final Agreement Reached to Protect B.C.'s Great Bear Rainforest*, THE GLOBE AND MAIL (Feb. 1, 2016).

[200] Suman Varandani, *Lake Titicaca Cleanup: Bolivia, Peru Sign $500M Deal To Improve Lake's Biodiversity Through 2025*, INT'L BUS. TIMES (Jan. 8, 2016).

[201] Press Release, The White House, United States-Canada Joint Arctic Leaders' Statement (Dec. 20, 2016).

[202] Coral Davenport, *Obama Bans Drilling in Parts of the Atlantic and the Arctic*, THE N.Y. TIMES (Dec. 20, 2016).

[203] *Id.*

[204] United States-Canada Joint Arctic Leaders' Statement, *supra* note 201.

B. State and National Activities

1. Protected Area Conservation

On August 26, President Obama expanded the Papahānaumokuākea Marine National Monument (PMNM) off the northwest coast of the Hawaiian Islands, creating the world's largest marine protected area (until the Ross Sea Region MPA two months later).[205] The expansion nearly quadrupled the PMNM's size from about 140,000 to 582,578 square miles. The PMNM was recognized as a UNESCO World Heritage Site in 2010 and is home to coral reefs, deep sea marine habitats, and 7,000 marine species.[206]

President Obama also used his authority under the 1906 Antiquities Act to create the Northeast Canyons and Seamounts Marine National Monument (NCSMNM), the first marine national monument in the Atlantic Ocean.[207] The NCSMNM is divided into two territories covering 4,900 square miles – together about the size of Connecticut – and lies 100 to 200 miles southeast of Cape Cod, stretching along the edge of the United States Exclusive Economic Zone and the continental shelf.[208] The monument covers a series of deep sea canyons, extinct undersea volcanoes, and biodiversity hotspots.[209] Commercial resource extraction (i.e. fishing and mineral extraction) are prohibited in both the PMNM and NCSMNM – although red crab and lobster fisheries will have seven years before being required to exit the NCSMNM area.[210] Recreational fishing and scientific research are allowed by permit in both areas.

On December 28, President Obama added to his conservation legacy, creating new national monuments in Utah and Nevada, over the objection of development interests.[211] In southeastern Utah, Obama created the 1.35-million acre Bears Ears National Monument, which will be co-managed with five Native American tribes. In the southeastern Nevada desert, the President declared the 300,000 acre Gold Butte National Monument. In total President Obama has set aside nearly 555 million acres of land and (mostly) water under the Antiquities Act – more than all other Presidents combined.[212]

2. Mitigating Impacts on Natural Resources

In 2015, the White House adopted a memorandum requiring all natural resource management agencies to adopt consistent policies for avoiding and minimizing impacts to natural resources.[213] In 2016, the Fish & Wildlife Service and Forest Service made

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[205] Press Release, The White House, Fact Sheet: President Obama to Create the World's Largest Marine Protected Area (Aug. 26, 2016).
[206] *Id.*
[207] Press Release, The White House, FACT SHEET: President Obama to Continue Global Leadership in Combatting Climate Change and Protecting Our Ocean by Creating the First Marine National Monument in the Atlantic Ocean (Sept. 15, 2016) [hereinafter NCSMNM Fact Sheet].
[208] Cynthia Barnett, *Obama Creates Connecticut-Size Ocean Park, First in Atlantic*, NAT'L GEOGRAPHIC (Sept. 15, 2016).
[209] NCSMNM Fact Sheet, *supra* note 207.
[210] *Id.*
[211] Juliet Eilperin & Brady Dennis, *With New Monuments In Nevada, Utah, Obama Adds To His Environmental Legacy*, WASH. POST (Dec. 28, 2016).
[212] *Id.*
[213] Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment, 2015 DAILY COMP. PRES. DOC. 780 (Nov. 3, 2015).

substantial progress in developing new mitigation policies,[214] while other agencies still have much work to do.[215] The new policies promise to alter permitting obligations, timelines, and procedures,[216] but it is unclear whether they will be finalized—or even rescinded—under the incoming administration.

3. Clean Water Rule

In June 2015, the EPA and the Army Corps of Engineers adopted the Clean Water Rule: Definition of "Waters of the United States,"[217] to clarify the jurisdictional limits of the Clean Water Act. It is estimated to place roughly 3% more waterways under federal jurisdiction.[218] Since its release, the Clean Water Rule has been mired in litigation, winding its way to the Sixth Circuit Court of Appeals where the rule was stayed pending a judicial review. [219] Meanwhile, a petition pending in the United States Supreme Court raises the issue of whether the Sixth Circuit, as opposed to the federal district courts, has jurisdiction over the case.[220] The Clean Water Rule may be vulnerable on yet another front: President Trump has pledged to repeal it.[221]

4. Landscape-Level Planning

In 2016, the United States Bureau of Land Management (BLM) began overhauling how it develops and adopts resource management plans and policies, utilizing a more integrative, collaborative, and flexible planning scheme called "Planning 2.0." One specific goal is to "improve the BLM's ability to address landscape-scale resource issues and use landscape-level management approaches to more efficiently and effectively manage the public lands."[222] BLM released a proposed rule in February 2016.[223]

BLM's new planning effort is part of a larger shift by the Department of Interior towards landscape-level and ecosystem-based management. Multiple agencies within the Department made progress in developing new "landscape-scale" mitigation policies.[224]

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[214]*See, e.g.*, Endangered and Threatened Wildlife and Plants; Endangered Species Act Compensatory Mitigation Policy, 81 Fed. Reg. at 61,032 (Sept. 2, 2016); *Forest Service Mitigation Policy*, U.S. FOREST SERV. (Apr. 1, 2016).

[215]*See, e.g.*, Memorandum from Neil G. Kornze, Dir. Bureau of Land Mgmt. on Interim Policy, Regional Mitigation Manual Section - 1794 to State Dirs., Bureau of Land Mgmt. (June 13, 2013).

[216]Thomas C. Jensen, Sandra A. Snodgrass & Bailey Schreiber, *The Presidential Memorandum and Interior Department Policy on Mitigation: Their Content and Implications*, HOLLAND & HART (Nov. 9, 2015).

[217]Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) (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).

[218]Brent Kendall & Amy Harder, *U.S. Appeals Court Blocks EPA Water Rule Nationwide*, WALL ST. J. (Oct. 9, 2015, 4:34 PM) (subscription).

[219]*In re* EPA, 803 F.3d 804, 806 (6th Cir. 2015).

[220]Writ of Certiorari at i, Nat'l Assoc. of Mfrs. v. Dep't. of Def., No. 16-299 (Sept. 7, 2016).

[221]Todd Shields, *Trump Bodes Well for Farms and Coal Mines; Trade Deals in Peril*, BLOOMBERG L.P. (Nov. 9, 2016).

[222]BUREAU OF LAND MGMT., FACT SHEET: BLM'S PROPOSED PLANNING RULE (2016).

[223]Resource Management Planning, 81 Fed. Reg. 9674 (Feb. 25, 2016) (to be codified at 43 C.F.R. pt. 1600).

[224]Joel Clement & Tomer Hasson, *Landscape-Scale Management and Mitigation at the Department of the Interior*, PUB. LAND AND RES. COMM. NEWSLETTER, (A.B.A. SECTION OF ENV'T, ENERGY & RES.) (Feb. 2016); *see also* Endangered and Threatened Wildlife and

The United States Fish & Wildlife Service and other agencies continued to implement the 2015 Greater Sage-Grouse Conservation Strategy through new resource management policies, habitat conservation agreements, and better data collection efforts.[225] And BLM and the State of California finalized the Desert Renewable Energy Conservation Plan (DRECP), a regional land use management plan designed to guide large-scale renewable energy development in the California desert for the foreseeable future.[226] However, the emphasis on landscape-level and ecosystem-based planning—and on the accompanying bent towards conservation, rather than development, under President Obama—seems likely to change under the incoming administration.

5. Klamath Dam Removal

While the largest dam removal project in United States history—the removal of four dams along the Klamath River in Oregon and California—remains a proposal, it saw significant progress in 2016. In April, the Departments of Commerce and Interior, the states of Oregon and California, PacifiCorp (the dams' owner), and other stakeholders signed two agreements to remove the dams and restore the Klamath Basin.[227] The agreements supersede earlier deals that had required, but failed to secure, congressional authorization and funding, and rely instead on the Federal Energy Regulatory Commission (FERC) for decommissioning approval and on nonfederal funding for removal costs.[228] In September, the Klamath River Renewal Corporation, the nonprofit to which PacifiCorp will transfer the dams for removal, filed transfer and decommissioning applications with the FERC. If the FERC approves the applications, dam removal will begin in 2020.[229]

Plants; Designation of Critical Habitat for Kentucky Arrow Darter, 80 Fed. Reg. 61,030, 61,033 (Oct. 8, 2015) (to be codified At 50 C.F.R. pt. 17) (discussing importance of focus on landscape-level mitigation).

[225]Press Release, Bureau of Land Mgmt., BLM Issues Guidance for Implementing Greater Sage-Grouse Plans (Sept. 1, 2016); *BLM and Joint Venture Adopt Partnership, $5 Million Agreement*, INTERMOUNTAIN W. JOINT VENTURE (July 25, 2016); U.S. DEP'T OF THE INTERIOR ET AL., GREATER SAGE-GROUSE CONSERVATION & THE SAGEBRUSH ECOSYSTEM 14-15 (2016).

[226]*What is DRECP?*, DESERT RENEWABLE ENERGY CONSERVATION PLAN (last visited Feb. 25, 2017).

[227]Press Release, U.S. Dep't of the Interior, Two New Klamath Basin Agreements Carve out Path for Dam Removal and Provide Key Benefits to Irrigators (Apr. 6, 2016).

[228]Will Houston, *Klamath River dam removal deal signed by top federal, state officials*, SAN JOSE MERCURY NEWS (Apr. 7, 2016) (updated Aug. 11, 2016).

[229]Press Release, Klamath River Renewal Corp., The Klamath River Renewal Corporation Begins Implementation of Klamath Hydroelectric Settlement Agreement (Sept. 23, 2016).

Chapter 26 • CONSTITUTIONAL LAW
2016 Annual Report[1]

In 2016, 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, the Eleventh Amendment, and state constitutional law.

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 2016, the United States Supreme Court issued two standing decisions that, although not specifically in environmental cases, speak to important issues of statutorily granted standing and intervenor standing. In *Spokeo, Inc. v. Robins*,[2] the Court decided whether an individual, Robins, had standing to sue a consumer reporting agency, Spokeo, Inc., under the Fair Credit Reporting Act of 1970 (FCRA). The FCRA provides a private cause of action to consumers against any credit reporting agency that willfully fails to follow reasonable procedures to ensure accuracy in its reports. Robins alleged that Spokeo created a profile of him that included inaccurate information. The district court dismissed Robins' complaint for failure to properly plead injury in fact. The Ninth Circuit reversed, concluding Robins had alleged a violation of his statutory rights that were individualized due to his interest in the handling of his personal information.

The Supreme Court reversed, concluding that the Ninth Circuit had conflated the two injury in fact requirements, concreteness and particularization, and had only properly addressed the latter. The high court stated that concreteness requires an injury that is real and not abstract, and ultimately a plaintiff cannot satisfy concreteness by alleging a bare procedural violation. Instead, the plaintiff must also allege at least a degree of risk of harm sufficient to meet the concreteness requirement. The Court remanded for a determination of whether Robins had adequately alleged both injury in fact requirements.

In *Wittman v. Personhuballah*, the Supreme Court decided whether three intervenor members of Congress had standing to appeal the district court's decision that a redistricting plan constituted an unconstitutional racial gerrymander. The district court held in favor of voters who claimed that the Commonwealth of Virginia's redistricting plan for District 3 was unconstitutional. Virginia opted not to appeal. However, members of Congress appealed to the Supreme Court, and the Justices noted that an "'intervenor cannot step into the shoes of the original party' (here, the Commonwealth) 'unless the intervenor

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[2]136 S. Ct. 1540 (2016).

independently fulfills the requirements of Article III.'"[3] The Court concluded that none of the three intervenors satisfied the standing requirements because (a) one former Congressperson decided not to seek reelection; and (b) the other two members of Congress, who claimed their base electorate would be diluted, had merely alleged "a nonobvious harm, without more."[4]

The United States Courts of Appeals also gave us notable standing decisions. In *Atay v. County of Maui*,[5] the Ninth Circuit dealt with the standing requirements for ballot initiative proponents. The voters of Maui County passed a ballot initiative that effectively banned the growth and testing of genetically engineered (GE) crops. Opponents of the initiative (Monsanto, farmers, and others) filed suit in the federal district court, which agreed that the ordinance was unconstitutional because it was expressly and impliedly preempted by federal law.[6] Appeal was brought by private supporters of the initiative, but not Maui officials, who opposed the ordinance. At the Ninth Circuit, Monsanto and the other opponents of the ballot measure argued that under the United States Supreme Court's decision in *Hollingsworth v. Perry*,[7] the citizens did not have standing to appeal when Maui officials declined to do so. The appellate court disagreed, holding that "intervenors can establish standing if they can do so independently of their status as ballot initiative proponents."[8] Here, the court concluded that individual citizens had done so, with one citizen, for example, alleging that he would no longer be able to collect wild plants and microorganisms around GE farms because of the risk of genetic contamination.

In *In re: Idaho Conservation League*,[9] the D.C. Circuit addressed the "incentives-based theory" of standing. The petitioners requested that the EPA be directed to establish "financial assurance" rules, which would require entities to set aside money in the event a hazardous waste cleanup was needed. The court concluded that while the rulemaking would not redress the environmental problems directly, it would provide entities with incentives to develop best practices. Ultimately, it would be more difficult for mine operators to cause hazardous releases and avoid paying the cleanup costs by declaring bankruptcy or sheltering assets. This was sufficient to satisfy the redressability prong of the standing analysis.

Other appellate court standing cases from this year include:

- *Missouri ex rel. Koster v. Harris*, in which the Ninth Circuit ruled that Missouri and other states did not have *parens patriae* standing to challenge a California statute that prohibited egg sales in California unless producers met certain animal care standards. The court determined that the first requirement[10] of *parens patriae*

[3]Wittman v. Personhuballah, 136 S. Ct. 1732, 1736 (2016) (quoting Arizonans for Official English v. Arizona, 520 U.S. 43, 65 (1997)).
[4]*Id.* at 1737.
[5]842 F.3d 688, 695 (9th Cir. 2016).
[6]*Id.* For discussion of the preemption analysis, see section III below.
[7]*Id.* at 696; (citing Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (holding that ballot initiative proponents did not have standing to appeal a judgment that a California ballot initiative was unconstitutional when state officials declined to do so)).
[8]*Id.*
[9]811 F.3d 502 (D.C. Cir. 2016).
[10]842 F.3d 658 (9th Cir. 2016). Beyond the traditional standing requirements, a party invoking *parens patriae* standing must also satisfy two additional requirements. "First, 'the State must articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party.' Second, '[t]he State must express a quasi-sovereign interest.'" *Id.* at 662 (quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 607 (1982)).

standing was not met because there were no "specific allegations about the statewide magnitude" of the alleged harms. Additionally, the states had not alleged cognizable harms on behalf of any group besides egg farmers, who could bring a claim for relief on their own behalf.

- *North Dakota v. Heydinger*,[11] in which the Eighth Circuit held that a group of electric cooperatives had standing to bring a challenge to a Minnesota's "Next Generation Energy Act" under the Commerce Clause (discussed in section II below). The statute prohibited individuals from "import[ing] or commit[ting] to import from outside the state power from a new large energy facility that would contribute to statewide power sector carbon dioxide emissions; or . . . enter[ing] into a new long-term power purchase agreement that would increase statewide power sector carbon dioxide emissions."[12] Plaintiffs have standing to challenge a statute under the Commerce Clause if the statute "'has a direct negative effect on their borrowing power, financial strength, and fiscal planning.'"[13] The court concluded that the cooperatives met this requirement because the record was clear that the statute interfered with their ability to conduct business occurring entirely outside the state of Minnesota.

- *Markle Interests, LLP v. U.S. Fish & Wildlife Service*,[14] where the Fifth Circuit decided that landowners satisfied the injury in fact requirement by alleging that a critical habitat designation decreased their property values. On the other hand, the court concluded that lost future development would not establish an injury in fact because it was too speculative. Finally, although the court had decided the prudential "zone of interest" standing question sua sponte in the past, it declined to do so here and concluded that the government waived any argument against prudential standing.

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."[15] 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.

Less than a week apart during the summer of 2016, two significant environmental and energy cases both come out of the Eighth Circuit. Both cases deal with the same two states (Minnesota and North Dakota), and both revolve around the "extraterritoriality" prong of the dormant Commerce Clause. Add to this that one case found a dormant Commerce Clause violation, while the other found no violation, and you have a constitutional law casebook writer's dream come true.

In *North Dakota v. Heydinger*,[16] the state of North Dakota and three electric cooperatives challenged Minnesota's ban on importing or signing long-term power

[11]825 F.3d 912 (8th Cir. 2016). The case also involved preemption issues, discussed in section III below.
[12]*Id.* at 913.
[13]*Id.* at 917 (quoting Jones v. Gale, 470 F.3d 1261, 1267 (8th Cir. 2006)).
[14]827 F.3d 452 (5th Cir. 2016).
[15]U.S. CONST. art. I, § 8, cl. 3.
[16]825 F.3d 912 (8th Cir. 2016). For the court's analysis of whether the electric cooperatives had standing, see section I above.

agreements that increased Minnesota's carbon emissions. The court held that Minnesota's law "regulate[d] activity and transactions taking place *wholly outside* of Minnesota."[17] In particular, because electrons flow freely among states within a regional grid, Minnesota's law effectively prevented "adding capacity from prohibited sources anywhere in the grid," which in turn affected power purchased by customers in another state.[18] The court held that Minnesota cannot "seek to reduce emissions that occur outside Minnesota by prohibiting transactions that originate outside Minnesota."[19]

Minnesota law fared better in *Richland/Wilkin Joint Powers Authority v. United States Army Corps of Engineers*,[20] where the power authorities of two states, Minnesota and North Dakota, challenged an Army Corps of Engineers project under the Minnesota Environmental Policy Act. The project sponsor attempted to use the dormant Commerce Clause as a defense, arguing that Minnesota law could not apply extraterritorially here because the project was taking place solely in North Dakota. The court held that Minnesota law applied because the project was connected to "a larger project" that did include construction in Minnesota.[21]

In 2016, there were also two federal appellate court decisions that, although not environmental or energy cases, are notable for giving significant leeway to states to regulate interstate commerce:

- In *Colon Health Centers of America, LLC v. Hazel*,[22] the Fourth Circuit rejected a dormant Commerce Clause challenge to Virginia's certificate-of-need program for medical service providers. Two out-of-state providers of MRI and CT scans argued that the certificate-of-need program discriminated against interstate commerce because 100% of MRI and CT scan providers were headquartered outside Virginia. The court, however, held that "there can be no discrimination in favor of in-state manufacturers when there are no manufacturers in the state."[23] The court also noted the need for judicial restraint in analyzing matters that involve complex policy questions that are best left for state legislatures.

- In *Direct Marketing Ass'n v. Brohl*,[24] the Tenth Circuit held that a Colorado law was not discriminatory on its face or in effect even though it applied only to out-of-state retailers. On its face, the law distinguished between entities that collected Colorado sales and use taxes, and those that did not. Because less than 5% of consumers voluntarily pay sales and use taxes for online transactions (when those taxes are not automatically collected),[25] the law imposed notification requirements to try to increase this compliance rate. These requirements fell only upon out-of-state retailers. The court, however, held that this was not a "geographic distinction."[26] The court further held that although the notification requirements fell only on out-of-

[17] *Id.* at 921 (emphasis in original).
[18] *Id.* at 922.
[19] *Id.* Two judges also held the Minnesota statute was preempted by federal law. See section III below.
[20] 826 F.3d 1030 (8th Cir. 2016).
[21] *Id.* at 1042.
[22] 813 F.3d 145 (4th Cir. 2016).
[23] *Id.* at 155.
[24] 814 F.3d 1129 (10th Cir. 2016).
[25] *Id.* at 1132, n.1.
[26] *Id.* at 1141.

state retailers, there was no discrimination because in-state retailers faced the "greater burden of tax collection and reporting."[27]

III. PREEMPTION

In April 2016, the United States Supreme Court held that a provision of the Federal Power Act (FPA) preempted Maryland's efforts to encourage in-state electrical generation growth by affecting the prices otherwise set by the wholesale market and regulated by the Federal Energy Regulatory Commission (FERC) in interstate power auctions. In that case, *Hughes v. Talen Energy Marketing, LLC*,[28] the Court focused on how Maryland's state regulatory scheme would effectively override the auction-based results of an interstate auction of power and provide a state-based electrical generator with a guaranteed rate. This state regulatory scheme invaded the "regulatory turf" of the FERC, which administers the FPA.[29] Justice Thomas concurred in the judgment, but he once again continued his questioning of the majority's acceptance of the principle of "implied preemption," which rests not on the statutory text of the FPA (or other federal statutes), but rather on the view that a particular state statute operates as an "obstacle" or "conflicts with" a federal statutory scheme.[30] Justice Sotomayor authored a separate concurrence noting that "[p]re-emption inquiries related to such collaborative [federal-state regulatory] programs are particularly delicate" and suggesting that in such cases general reliance upon "talismatic preemption vocabulary," i.e., conclusory terms such as "conflicting, inconsistency, or contrary to", would be unwise.[31] Lower courts, however, are less inclined to heed the cautionary notes sounded by Justices Thomas and Sotomayor in holding state environmental laws preempted.

In *Atay v. County of Maui*,[32] the Ninth Circuit held that a Hawaiian county ordinance regulating the use of genetically engineered plants was expressly preempted by the federal Plant Protection Act (Act) to the extent that the Act regulated such plants as "plant pests" under the Act. To arrive at its holding of limited express preemption, the Ninth Circuit panel relied on the Act's preemption provision, which precluded state (or local) regulation of plants involved "in the movement in interstate commerce." In doing so, the Ninth Circuit swept aside objections that regulation of plants grown only in Maui did not constitute regulation "in the movement in interstate commerce." The court also rejected the appellant's request for development of a factual record, holding that preemption issues are peculiarly issues of law.[33] Ultimately, however, the Ninth Circuit relied upon the *implied* purpose and scope of the Act, citing the "statute's larger context and purpose, which clearly envisions the dissemination of plants and seeds" as constituting a movement in interstate commerce.[34]

In *Oregon Coast Scenic Railroad, LLC v. Oregon*,[35] the Ninth Circuit again expansively interpreted the scope of a separate *interstate* commerce statute to find express preemption of a state statute regulating *intrastate* activity. Oregon alleged that some repairs of a rail line around Tillamook Bay violated a state law regulating fill removal in salmon habitat areas. The Ninth Circuit used the federal Interstate Commerce Commission

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[27] *Id.* at 1144.
[28] 136 S. Ct. 1288 (2016).
[29] *Id.* at 1297.
[30] *See* Wyeth v. Levine, 555 U.S. 555 (2009) (Thomas J., concurring in judgment).
[31] 136 S. Ct. at 1299-1300 (Sotomayor, J., concurring).
[32] 842 F.3d 688, 692-93 (9th Cir. 2016). For a discussion of the Ninth Circuit's holding on standing, see section I above.
[33] *Id.* at 698.
[34] *Id.* at 702.
[35] 841 F.3d 1069 (9th Cir. 2016).

Termination Act, which precluded local regulation of railroads that were "part of the *interstate* rail network," to preempt the Oregon law. To do so, the Ninth Circuit relied upon a regulatory interpretation issued by the Surface Transportation Board (Board) which., in an administrative hearing decision, broadly construed its congressional grant to include "'facilities that are part of the general system of rail transportation and . . . *related to* the movement of passengers or freight[] in interstate commerce.'"[36] While the cited interpretation dealt with a planned interstate passenger rail line from California to Nevada, the Ninth Circuit nevertheless deemed the Board's decision sufficiently persuasive to apply to repairs of the strictly intrastate Tillamook Bay rail line because that rail line might establish a connection to the interstate network at some point in the future.

In *North Dakota v. Heydinger*,[37] an Eighth Circuit panel concluded in three separate opinions that Minnesota's statutory efforts to limit out-of-state power usage and the resultant greenhouse gas emissions violated constitutional limitations. Judge Loken wrote the lead opinion, stating that the Minnesota statute had an unconstitutional extra-territorial reach that violated the dormant Commerce Clause (discussed in section II above). Judges Murphy and Colloton concurred in the judgment but reasoned that the exclusive jurisdiction provisions of the Federal Power Act granted over wholesale sales of electrical power effectively preempted the Minnesota statute.[38] Judge Colloton also found preemption under the Clean Air Act (CAA), separately writing that insofar as the Minnesota statute attempted to regulate out-of-state air emissions through its limitation on importation by out-of-state high-emitting power plants, it was preempted by the federalism provisions of the CAA, which allow for regulation based only on federal standards or standards set by the state where a plant is located, not a neighboring state.[39] For Judge Colloton, this constituted "conflict" preemption with a federal scheme. Judge Colloton's analysis, which invokes the talismatic word "conflict" without further analysis of the precise conflict with the CAA, is inconsistent with the warnings from Justice Sotomayor and Justice Thomas against judicial overuse of the "implied" preemption doctrine.

In contrast, at least three district court opinions have rejected preemption of state common law tort claims based on federal environmental statutes. In *Ansagay v. Dow Agrosciences LLC*,[40] the district court relied upon the United States Supreme Court's earlier decision in *Bates v. Dow Agrosciences LLC*[41] to reject arguments that common law tort claims related to a Dow insecticide, Dursban TC, were preempted by a label warning under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Notably, the district court cited to Justice Thomas's partial concurring opinion in *Bates* as cautioning against an extension of the doctrine of implied preemption given the *Bates* prior rejection of an express statutory preemption argument.[42] In *Sheppard v. Monsanto Co.*,[43] the same district court again rejected a preemption argument premised on FIFRA against state law

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[36]*Id.* at 1075 (quoting DesertXpress Enters., L.L.C., No. FD 34919, 2010 WL 1822102, at *9 (Surface Trans. Bd. 2010) (emphasis added)).

[37]825 F.3d 912 (8th Cir. 2016).

[38]*Id.* at 926-27 (Murphy, J., concurring in judgment).

[39]*Id.* at 928 (Colloton, J., concurring in judgment).

[40]153 F. Supp. 3d 1270 (D. Haw. 2015). Although technically a 2015 case, this decision was issued on December 29, just two days before the start of the new year, and after the 2015 Year in Review went to publication.

[41]544 U.S. 431 (2005).

[42]153 F. Supp. 3d at 1282 (citing Bates v. Dow Agrosciences, LLC, 544 U.S. at 458-459 (Thomas J., concurring in judgment in part)).

[43]No. 16-00043 JMS-RLP, 2016 WL 3629074 (D. Haw. June 29, 2016). *See also* Mirzaie v. Monsanto Co., No. cv-15-04361 DDP, 2016 WL 146421 (C.D. Cal. Jan. 12, 2016) (complaint seeking to impose a different label on Monsanto's Roundup® product was also preempted by FIFRA).

tort claims of alleged injuries caused by exposure to Monsanto's Roundup® herbicide. Finally, in *Winkler v. BP Exploration & Production, Inc.*,[44] a separate district court held that common law claims arising from the Deep Water Horizon oil spill were not preempted by the Clean Water Act, at least as to BP, a "responsible party."

In *People v. Rinehart*,[45] the California Supreme Court concluded that neither the federal Mining Act of 1872 nor the 1955 Surface Resources and Multiple Use Act preempted California's statutory ban on suction mining, a process that involves the use of a high-powered suction hose to dislodge sediment from the bottom of a streambed and then filter out valuable minerals. Finding that California had long protected its state waterways, including fish resources likely to be impacted by such mining, the California Supreme Court applied a "strong presumption against preemption in areas where the state has a firmly established regulatory role," and concluded there was no implied "obstacle" preemption. A similar ruling by the District Court of Oregon, finding no express or implied preemption by the Mining Law of 1872 or the 1944 Surface Resources statute as to Oregon's ban on motorized in-stream mining, is briefed and pending before the Ninth Circuit.[46]

IV. FIFTH AMENDMENT TAKINGS

Takings jurisprudence at the Supreme Court was not as exciting this year as last year's blockbuster decision of *Horne v. United States Department of Agriculture*,[47] which concerned whether the United States Department of Agriculture's mandate to relinquish a specific amount of raisin growers' crop as a condition to engaging in commerce was a per se taking—it was. However, takings issues will or at least may be in front of the Supreme Court in the near future.

First, in early 2016 the Supreme Court agreed to hear *Murr v. Wisconsin*,[48] although as of late 2016 no argument date had yet been set. The Court granted certiorari on the question of whether "[i]n a regulatory taking case, . . . the 'parcel as a whole' concept as described in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 130-31 (1978), establish[es] a rule that two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes?"[49] By way of overview, to determine whether a particular government action has accomplished a taking, courts focus "'both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.'"[50] According to the Court,

> [b]ecause our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, *one of the critical questions is determining how to define the unit of property* 'whose value is to furnish the denominator of the fraction.'[51]

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[44]No. 16-2715, 2016 WL 4679946 (E.D. La. Sept. 7, 2016).
[45]377 P.3d 818, 823 (Cal. 2016).
[46]*Bohmker v. Oregon*, 172 F. Supp. 3d 1155, 1162-1165 (D. Or. 2016), *appeal docketed*, No. 16-35262 (9th Cir. Apr. 7, 2016).
[47]135 S. Ct. 2419 (2015).
[48]Disposition reported at 2015 WI App 13, 359 Wis.2d 675, 859 N.W.2d 628 (Wis. Ct. App. 2014), *review denied*, 862 N.W.2d 899 (Wis. 2015), *cert. granted*, 136 S. Ct. 890 (2016) (Question Presented).
[49]*Id.*
[50]*Id.* (quoting Penn C. Transp. v. City of New York, 438 U.S. 104, 130-31 (1978)).
[51]Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470, 496 (1987) (emphasis added) (quotations and citations omitted).

Murr concerned two adjacent but distinct parcels of land—Lots "E" and "F"—owned by the same owners that cannot be further divided because of certain ordinance limitations. The Murrs' parents purchased Lot F in 1960.[52] They built a cabin on it and transferred title to their plumbing company.[53] "In 1963, the Murrs' parents purchased an adjacent lot, Lot E, which has remained vacant ever since" and which "was purchased as an investment property."[54] The Murrs' parents transferred Lot F to the Murrs in 1994, followed by Lot E in 1995.[55] This transfer brought the lots under common ownership and resulted in a merger of the two lots under a local ordinance, which prohibited the individual development or sale of adjacent lots under common ownership, unless an individual lot has at least one acre of net project area.[56] However, if abutting and commonly owned lots did not each contain the minimum net project area, they together constituted a single, buildable lot.[57] The Murrs alleged that the ordinance deprived them of "'all, or practically all, of the use of Lot E because the lot cannot be sold or developed as a separate lot.'"[58] Because the lot was usable only for a single-family residence, "the lot is rendered useless" "without the ability to sell or develop it."[59] The Wisconsin appellate court affirmed the lower court's grant of summary judgment for defendants, finding that the ordnance "did not deprive the Murrs of all or substantially all practical use of their property."[60] The Wisconsin Supreme Court declined to review the decision, and although the United States Supreme Court initially granted certiorari, when Justice Antonin Scalia was still on the Court, the lack of an argument date after all these many months suggests there may no longer be five votes to hear the case.

Second, in *California Building Industry Ass'n v. City of San Jose*,[61] the high court denied certiorari to a California Supreme Court decision that held that the City of San Jose's inclusionary housing ordinance did not constitute an unjust taking of property.[62] The ordinance compelled all developers of new residential development projects with twenty or more units to reserve a minimum of 15% of for-sale units for low-income buyers, and these units must be sold at an "affordable housing cost," defined as a below-market price not to exceed 30% of the buyers' median income.[63] In a statement concurring in the denial of certiorari, Justice Thomas recognized that the case "implicate[d] an important and unsettled issue under the Takings Clause."[64] However, he nonetheless agreed that denial was warranted because the case below suffered from threshold timeliness issues.[65] Justice Thomas noted that, if San Jose had enacted these conditions by administrative action, *Nollan v. California Coastal Commission*[66] and *Dolan v. City of Tigard*[67] would apply. Because San Jose did so legislatively, and because "lower courts have divided over whether the *Nollan*/*Dolan* test applies in cases where the alleged taking arises from a legislatively

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[52]*Murr*, 2015 WI App 13, at ¶ 4.
[53]*Id.*
[54]*Id.*
[55]*Id.* at ¶ 5.
[56]2015 WI App 13, at ¶ 30.
[57]*Id.* at ¶ 6.
[58]*Id.* at ¶ 8.
[59]*Id.*
[60]*Id.* at ¶ 1.
[61]136 S. Ct. 928 (2016).
[62]Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974, 1006 (Cal. 2015).
[63]*Cal. Bldg. Indus. Ass'n*, 136 S. Ct. at 928 (2016) (Thomas, J., concurring in denial of certiorari).
[64]*Id.*
[65]*Id.* at 929.
[66]483 U. S. 825 (1987).
[67]512 U. S. 374 (1994).

imposed condition rather than an administrative one," Justice Thomas reiterated his "doubt that 'the existence of a taking should turn on the type of governmental entity responsible for the taking.'"[68] An actual holding and opinion on the same awaits another day. However, in light of the expected changing composition of the Supreme Court in the years ahead, as well as the concern at times shared by conservative jurists about the regulation (and over-regulation) of private property rights, Justice Thomas's discussion may hint at an upcoming change to takings jurisprudence.

V. DUE PROCESS

The most significant due process case of 2016 came in the "future generations" lawsuit on climate change. In that case, *Juliana v. United States*,[69] a federal district court in Oregon heard claims by several individuals between the ages of eight and nineteen, an environmental advocacy group, and Dr. James Hansen, serving as guardian for future generations, against the United States, President Barack Obama, and various executive agencies, trying to force action to address climate change. The plaintiffs asserted violations of their substantive due process rights, as well as a violation of the public trust doctrine.

In denying the defendant's motions to dismiss, the court first addressed two potential constitutional hurdles to the suit – the political question doctrine and standing – and concluded that neither defeated jurisdiction. Then, on the merits of the substantive due process claim, the court issued a landmark ruling, finding that "the right to a climate system capable of sustaining human life is fundamental to a free and ordered society."[70] The court analogized to the marriage equality ruling in *Obergefell v. Hodges*, which held that marriage is the "foundation of the family," and here reasoned that "a stable climate system is quite literally the foundation of society."[71] Having found the right fundamental, the court ruled that the plaintiffs could proceed with their substantive due process claim.

Other noteworthy due process cases from this year include:

- *Strategic Environmental Partners, LLC v. Bucco*,[72] in which the District Court for New Jersey held that the state provided adequate procedural due process when it seized a poorly run landfill from the plaintiffs. The seizure could be – and was being – appealed by the plaintiffs through the New Jersey courts, and access to a full judicial review provides the necessary due process. The case is entertaining because the court characterized the plaintiffs' complaint as "hard to construe and sprawling," with claims not only on procedural due process, but substantive due process, First Amendment, equal protection and takings, all dismissed.

- *AES Puerto Rico, L.P. v. Trujillo-Panisse*,[73] in which the District Court for Puerto Rico heard a challenge by a coal-fired power plant to local ordinances restricting the use of combustion ash. The court ruled that the power plant did not have a property interest in using or disposing of the combustion ash in a particular manner, and thus did not have a right protected by procedural due process. (The case also involved dormant

[68] *Cal. Bldg. Indus. Ass'n*, 136 S. Ct. at 928 (quoting Parking Ass'n of Ga., Inc. v. Atlanta, 515 U. S. 1116, 1117-18 (1995)) (Thomas, J., dissenting from denial of certiorari).
[69] No. 6:15-cv-01517-TC, 2016 WL 6661146 (D. Or. Nov. 10, 2016).
[70] *Id.* at *15.
[71] *Id.* (internal quotations omitted).
[72] 184 F. Supp. 3d 108 (D.N.J. 2016).
[73] No. 14-1767 (FAB), 2016 WL 4016825 (D.P.R. July 27, 2016), *appeal docketed*, No. 16-2052 (1st Cir. Aug. 18, 2016).

Commerce Clause and Contract Clause claims that the court likewise rejected.)

VI. First Amendment

Two interesting First Amendment cases in 2016 involved the science of climate change. In *Competitive Enterprise Institute v. Mann*,[74] the local Court of Appeals for the District of Columbia allowed a defamation suit brought by Dr. Michael Mann, a climate scientist, to proceed against his critics. The case involved blog posts by the defendants harshly criticizing Penn State University for failing to adequately investigate whether Dr. Mann falsified or manipulated certain climate data (the controversy about Dr. Mann's data was part of "Climategate"). The court recognized that the defendants' blog posts implicated their free speech rights under the First Amendment, but the court found those interests outweighed by other considerations.

In 2016, the Attorneys General for New York, Massachusetts, and the United States Virgin Islands initiated investigations into whether ExxonMobil, the Competitive Enterprise Institute and others deceived investors and the public about the risks of climate change.[75] In a controversial move, the Attorneys General sought essentially all research and communications by the targets on climate change over several decades. The Attorney General for the United States Virgin Islands eventually withdrew his investigation,[76] but with no let up from New York and Massachusetts, ExxonMobil sued in federal district court in Texas, arguing that the two states were conspiring with the environmental community and other Attorneys General to deprive ExxonMobil of its free speech rights to conduct research and communicate about that research.[77] The court has not yet ruled on the merits.

VII. Eleventh Amendment

The Eleventh Amendment provides state immunity from suit in federal courts, stating that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[78]

In 2016, several courts dealt with environmental issues and the Eleventh Amendment. In *Delaware Riverkeeper Network v. Pennsylvania Department of Environmental Protection*,[79] the Third Circuit held that challenges to state-issued water quality certifications under section 401 of the Clean Water Act (CWA) are not barred by the Eleventh Amendment. At issue were section 401 certifications issued by the New Jersey Department of Environmental Protection (NJDEP) and the Pennsylvania Department of Environmental Protection (PADEP) that would allow the expansion of Transcontinental's natural gas pipeline. Before the FERC could complete its approval of the pipeline under the Natural Gas Act (NGA), the states had to issue the section 401 certifications. Thus, the case involved an interplay between the NGA and the CWA.

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[74]No. 15-CV-101, 2016 WL 7404870 (D.C. Cir. Dec. 22, 2016).
[75]Hans von Spakovsky & Nicolas D. Loris, *The Climate Change Inquisition: An Abuse of Power that Offends the First Amendment and Threatens Informed Debate*, The Heritage Found. (Oct. 24, 2016).
[76]*Id.* at 7.
[77]*See* Keith Goldberg, *Exxon Wants to Add NY AG to Climate Subpoena Suit*, Law360 (Oct. 17, 2016).
[78]U.S. Const. amend. XI.
[79]833 F.3d 360 (3d Cir. 2016).

The Third Circuit first held that section 19(d) of the NGA granted the court jurisdiction to hear challenges to the section 401 certifications because the state agencies were acting, in the words of section 19(d), "pursuant to Federal law" – that is, pursuant to the federal CWA.[80] Next, the court examined NJDEP's and PADEP's arguments "that their mere participation in the [CWA] permitting process does not waive their sovereign immunity provided by the Eleventh Amendment."[81] The Third Circuit rejected the argument, holding that participation in the federal program amounted to a "gratuity waiver," which arises when a state "consent[s] to suit in federal court by accepting a gift or gratuity from Congress when waiver of sovereign immunity is a condition of acceptance."[82] The court explained that "[t]hese 'gifts' need not only be monetary awards; a congressional grant of regulatory authority that a state may not otherwise possess is also a gift."[83] The court noted, however, that "Congress must make its intention to condition acceptance of a gratuity on the waiver of Eleventh Amendment immunity 'unmistakably clear,'"[84] and the court found such unambiguous waiver here.

In a case growing out of the Flint Water Crisis, a federal district court in Michigan held that the Eleventh Amendment did not bar a suit brought by Flint organizations and one Flint resident against state and city officials. In that case, *Concerned Pastors for Social Action v. Khouri*,[85] the plaintiffs alleged that Flint water was not safe to drink and had been unsafe since 2014. The complaint asserted violations of the Safe Drinking Water Act (SDWA) and requested declaratory and injunctive relief. The court explained that "state sovereign immunity as recognized by the Eleventh Amendment does not extend to suits against state officials seeking to enjoin violations of federal law," rather than a monetary award, citing *Ex parte Young*.[86] The court further explained that to "determine whether a claim for such relief avoids sovereign immunity, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective."[87]

The court concluded that the *Ex parte Young* exception applied. "[T]he remedies sought by the plaintiffs plainly are forward-looking. They do not seek an award of damages or other forms of compensation to redress past injuries. Instead, they seek to compel state officials to comply with federal law, a form of relief authorized under the Eleventh Amendment."[88]

Although not directly addressing the Eleventh Amendment, the United States Supreme Court issued an important decision about state sovereign immunity in another state's court in *Franchise Tax Board of California v. Hyatt*.[89] The Court had granted certiorari on two questions: (1) "[w]hether Nevada may refuse to extend to sister States haled into Nevada courts the same immunities Nevada enjoys in those courts"; and (2) "[w]hether *Nevada v. Hall*, 440 U.S. 410 (1979), which permits a sovereign State to be haled into the courts of another State without its consent, should be overruled."[90] On the

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[80] *Id.* at 370-71.
[81] *Id.* at 375.
[82] *Id.* at 375-376 (footnotes omitted).
[83] *Id.*
[84] 833 F.3d at 376.
[85] Concerned Pastors for Soc. Action v. Khouri, No. 16-10277, 2016 WL 3626819 (E.D. Mich. July 7, 2016).
[86] *Id.* at *10 (citing Ex parte Young, 209 U.S. 123, 159-60 (1908)).
[87] *Id.* (citing Dubuc v. Mich. Bd. of Law Exam'rs, 342 F.3d 610, 616 (6th Cir. 2003)) (internal quotations omitted).
[88] *Id.* (citing *Ex parte Young*, 209 U.S. at 159-60).
[89] 136 S. Ct. 1277 (2016).
[90] Disposition reported at 335 P.3d 125 (Nev. 2014), *vacated*, 136 S. Ct. 1277 (2016) (No. 14–1175) (Question Presented).

second question, the Supreme Court was equally divided, and so it did not overrule the 1979 decision.

As to the first question, the Court ruled in favor of California, setting aside a substantial monetary award that respondent Gilbert Hyatt won against the Board in a Nevada state court.[91] Hyatt alleged that the California tax board's auditors committed several intentional torts against him in Nevada as part of the board's decades-old battle over his non-payment of California income taxes. The Nevada Supreme Court had reduced Hyatt's award somewhat, but it did not apply California's sovereign immunity statute, which would have given the California board total immunity. The Nevada court also did not apply Nevada's sovereign immunity statute, which would have limited damages to $50,000 if the suit were against Nevada officials. California argued that these actions violated the Full Faith and Credit Clause. The Supreme Court "agree[d] that Nevada's application of its damages law in this case reflects a special, and constitutionally forbidden, policy of hostility to the public Acts of a sister State, namely, California."[92]

VIII. STATE CONSTITUTIONAL LAW

The Court of Appeals, Third Division, for the State of Washington, held in *Chelan Basin Conservancy v. GBI Holding Co.*,[93] that a savings clause in the Washington Shoreline Management Act[94] barred a public trust challenge to shoreline improvements that predate the effective date of the act. The appellate court rejected the argument that the grandfathering statute itself violated the public trust. It held that statutes and regulations often sort out public trust issues. The public interest plaintiff failed to carry its burden of proof that a limited grandfathering savings clause undermined the State's public trust obligations over navigable waters. The public interest plaintiff appealed to the Washington Supreme Court, which accepted review on December 8, 2016.[95]

The Nebraska Supreme Court held in *Lingenfelter v. Lower Elkhorn Natural Resource District*,[96] that a special irrigation district could bar a farmer from irrigating despite the farmer's uncontroverted testimony that the district had preapproved irrigation of the farm. The district's "look back" provisions certifying acreage that was actually irrigated in any of 1999 to 2008 were not arbitrary and capricious nor treating similarly situated farmers differently. Accordingly, the district did not violate the Nebraska Constitution's substantive due process or equal protection provisions.

The Vermont Supreme Court in *In re LaBerge NOV*[97] rejected a vagueness challenge to a municipal noise ordinance. It upheld a "reasonableness" standard, with key criteria regarding intensity, duration, and frequency. The court cited numerous decisions upholding a reasonableness standard in noise codes nationwide.

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[91] *Franchise Tax Bd. of Cal.*, 136 S. Ct. at 1281.
[92] *Id.* at 1279 (internal quotations omitted).
[93] 378 P.3d 222 (Wash. Ct. App. 2016).
[94] WASH. REV. CODE ANN. § 90.58.270(1) (West 2016).
[95] Chelan Basin Conservancy v. GBI Holding Co., 385 P.3d 769 (Wash. 2016).
[96] 881 N.W.2d 892 (Neb. 2016).
[97] No. 2015-430, 2016 WL 4582182 (Vt. Sept. 2, 2016).

Chapter 27 • GOVERNMENT AND PRIVATE SECTOR INNOVATION
2016 Annual Report[1]

I. PUBLIC-PRIVATE PARTNERSHIP (P3) INFRASTRUCTURE PROJECTS IN 2016

A. Grid Modernization

The United States power grid connects energy producers and consumers throughout the nation. The grid is comprised of three large interconnected systems: the Eastern Connection, the Western Connection, and the Rocky Mountain Section. Today, the grid must meet mandatory reliability standards developed and enforced by the North American Reliability Corporation. The grid was developed in the early 1900's. Given its age, many existing transmission and distribution lines must be replaced or upgraded and many new lines must be constructed.[2]

In January 2016, United States Department of Energy Secretary Ernest Moniz announced up to $220 million in new funding for an assortment of Department of Energy national laboratories and partners to support research and development over the next three years to help modernize the nation's electrical power grid. Eighty-eight projects in total were announced as part of the funding, including forty-eight which would be done in tandem with the National Renewable Energy Laboratory.[3] Included in these projects are grid architecture, grid sensing and measurement strategy, and a wide variety of state-specific projects, including an Alaska microgrid partnership, mitigating bulk system frequency contingency events in Hawaii, and technical support to the New York State REV Initiative.[4]

B. Beautification Projects

The Colorado Department of Transportation is moving ahead with a P3 project to reconstruct part of its highway below grade and partially cover it with a park.[5] Meanwhile, Washington D.C. began its Urban Tree Canopy Program in February, a result of the DC Department of Energy and Environment's first tree summit. Members of the short-term P3 aimed to plant 3,000 trees in the district in 2016. [6]

C. Clean Energy

Ohio State University requested proposals and is in due diligence for their Energy Management Project which will improve the university's resource efficiency and secure long-term renewable energy for reduced rates.[7] The Chicago Infrastructure Trust began replacing the City's and park's streetlights (over 340,000 lights) with Light Emitting Diode

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[1]Brian Hamm edited and contributed to this chapter. Rachael Senatore and William Yon also authored sections of this chapter. Ashton Roberts and Jessica Chiavera also assisted with the editing of this chapter.

[2]*Energy in Brief*, U.S. ENERGY INFO. ADMIN. (last updated Dec. 22, 2015).

[3]*DOE Announces New Projects to Modernize America's Electric Grid*, NAT'L RENEWABLE ENERGY LAB. (Jan. 14, 2016).

[4]*DOE Grid Modernization Laboratory Consortium (GMLC) – Awards*, U.S. DEP'T OF ENERGY (last visited Jan. 7 2017).

[5]RODERICK N. DEVLIN ET AL., MARKET UPDATE: A REVIEW OF RECENT ACTIVITY IN THE US PUBLIC PRIVATE PARTNERSHIP (P3) SECTOR AND THE OUTLOOK FOR THE YEAR TO COME, PRACTICAL LAW 10 (Mar. 3, 2016) [hereinafter DEVLIN].

[6]*DC Launches Urban Tree Canopy Program*, STORMWATER REPORT (Feb. 2, 2016).

[7]*Energy Management: Project Status*, OHIO ST. UNIV. (last visited Jan. 7, 2017).

(LED) for cost and energy savings as part of its Street Lighting P3.[8] The United States Army leased eight acres of land from its airfield in Oahu to the Hawaiian Electric Company that will be used to improve Oahu's electric grid.[9] The plant broke ground in August and will utilize biofuels, solar, and wind power.[10]

D. The Future of P3s for Infrastructure Spending Under President Donald Trump

President Trump has promised to infuse $1 trillion over ten years into rebuilding the nation's infrastructure.[11] With a Republican-controlled Congress and support from House Democratic leader Nancy Pelosi, assuming fiscally conservative Republicans are swayed, the future of P3's for infrastructure revitalization seems safe.[12] However, green infrastructure initiatives and its clean energy and resource protection prerogatives could be threatened.[13]

II. OBSTACLES AND SOLUTIONS FOR P3'S IN 2016

A. Government Accountability Office (GAO) Report on Department of Defense (DOD) Projects

In 2010, President Barack Obama described P3's as a critical element of DOD projects.[14] In September 2016, the GAO published its review of the DOD's involvement with P3's toward the DOD's goal of developing renewable energy projects greater than one megawatt. The GAO reviewed seventeen different projects, and concluded that while the DOD had funded projects in keeping with the DOD's renewable energy goals and energy security objective, documentation was not always clear about how the project met the objectives. Moreover, according to the GAO, while all seventeen of the energy projects reviewed contributed to the DOD's renewable energy production goal, only nine of the seventeen contributed to the DOD's reduction of consumption goal. The remaining eight projects failed to meet this goal because the military services did not retain or replace the renewable energy credits associated with the projects. Going forward, the GAO recommended the DOD improve its analyses of the financial costs and benefits of renewable energy projects by, inter alia, 1) clarifying its guidance to direct all project documentation for alternatively financed projects involving land use agreements to include the value of the land, the compensation DOD would receive for it, and how the value of the land compared with the value of the compensation; 2) clarify how to describe sensitivity

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[8]Devlin, *supra* note 5, at 15.

[9]*Schofield Barracks Hawaii*, US ARMY ET AL. 1 (July 2016).

[10]*New Schofield Barracks Generating Station Will Strengthen O'ahu Grid and Help Renewable Energy Grow*, HAWAIIAN ELEC. (Aug. 22, 2016).

[11]*Donald J. Trump Contract With The American Voter*, DONALD J. TRUMP FOR PRESIDENT, INC. 2 [hereinafter *Donald Trump's Contract*].

[12]Mike Desmond, *Public-Private Partnerships Seen as Innovative Way to Build Infrastructure*, WBFO88.7 (Nov. 14, 2016); Rene Marsh, *Trump's Trillion-Dollar Infrastructure Plan Faces Congressional Scrutiny*, CNN (updated Nov. 17, 2016, 9:39 PM).

[13]*See* Daniel Bush, *Trump's Cabinet Could Change the Face of U.S. Energy*, PBS NEWSHOUR (Dec. 15, 2016, 6:19 PM).

[14]*Public-Private Collaboration in the Department of Defense*, DEF. BUS. BOARD 1 (Report FY 12-04).

analyses in project documentation; and 3) clarify that projects should specify its contribution to DOD's energy production and consumption goals.[15]

B. P3's and Environmental Justice (EJ)

1. 2016 Developments

On September 23, the United States Commission on Civil Rights released a report accusing the EPA of failing to protect low-income and minority communities from pollution. The report stated the agency is not harnessing its statutory or executive authority to infuse its environmental programs with socioeconomic equitability.[16] Coming on the heels of the Flint water crisis, civil rights advocates looked for other methods, and other statutory funding pathways, to benefit America's underserved communities in 2016.[17]

One area for significant EJ gains is through water infrastructure investments. In a July 19 meeting of the National Environmental Justice Advisory Council, the EPA's Office of Water proposed a draft plan to use State Revolving Funds from the Safe Drinking Water and Clean Water acts to promote P3's in low-income communities.[18] It also indicated it planned to leverage the Water Infrastructure and Resiliency Finance Center (WIRFC), the Safe Drinking Water Act's Capacity Development Program, and Technical Assistance Grants in promoting community leaders in areas facing outdated water infrastructure.[19]

Another opening in 2016 emerged through the Clean Energy Incentive Program (CEIP), a portion of the Clean Power Plan (CPP). The program would grant tradable emission credits for every megawatt-hour of electricity demand reduced through low-income community energy efficiency programs and for zero emissions generation for projects. During an August hearing, business associations, community groups, and national non-governmental organizations expressed hope that the CEIP would include more energy-generation technologies and low-income community engagement.[20] The fate of the CEIP program, however, is tied to the fate of the CPP.

Finally, Rep. John Lewis (D-Ga.) introduced a bill which would incentivize universities and non-profits to assist low-income and minority communities to address environmental issues. The Environmental Justice Act of 2016 would establish a tax incentive for organizations which put resources toward "ensuring that existing environmental protections are improved and enforced in every community."[21] By creating financial incentives for experts to assist communities facing technical challenges evaluating and address environmental concerns, the bill aimed to connect scientists with

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[15]*DOD Renewable Energy Projects: Improved Guidance Needed for Analyzing and Documenting Costs and Benefits*, GOV'T ACCOUNTABILITY OFF. 1-2, 4, 19, 34, 45-46 (Sept. 2016).

[16]*Environmental Justice: Examining the Environmental Protection Agency's Compliance and Enforcement of Title VI and Executive Order 12,898*, U.S. COMM'N ON CIVIL RIGHTS (Sept. 23, 2016).

[17]Rachel Leven, *Flint Crisis Warrants EPA Civil Rights Review: Attorney*, BLOOMBERG DAILY ENV'T REPORT 2-3 (July 11, 2016).

[18]*Environmental Justice and Water Infrastructure Finance and Capacity*, NAT'L ENVTL. JUSTICE ADVISORY COUNCIL (Oct. 4, 2016).

[19]*See generally Environmental Justice and Water Infrastructure Finance and Management*, NAT'L ENVTL. JUST. ADVISORY COUNCIL (July 7, 2016).

[20]Michael Bologna, *Clean Energy Credits Sought for Low-Income Communities*, BLOOMBERG ENV'T REPORTER (Aug. 5, 2016).

[21]162 Cong. Rec. H31 (daily ed. Feb. 26, 2016) (statement of Rep. Lewis).

community activists without overburdening the organization. [22] The bill did not proceed beyond the introduction phase.[23]

2. 2017 Developments

Going forward, the Trump administration has expressed support for hydrofracking, the coal industry, the Keystone XL pipeline, and also an intent to undertake major infrastructure projects like the "American Energy Security Act."[24] The American Energy Security Act may refer to the North American Energy Security Act of 2015, which proposed removing the President's role in approving cross-border energy projects and increasing PPPs in the energy sectors with Hispanic Serving Institutions and Historically Black Colleges and Universities, or it may refer to a new bill altogether.[25] In either case, the likely result is that PPPs for energy infrastructure projects will increase under the Trump administration, and at least some of these are likely to stem from low-income and under-served communities.

Regardless of the specific policies advocated by President Trump, in 2017, P3s with a focus on environmental justice issues are likely to gather significant community support. On August 6, 2016, the Black Lives Matter movement issued its policy platform. One of its demands is for the restoration of land, air, water, and housing environments through localized, democratic control of resource preservation, use, and distribution.[26] The Standing Rock protests have also galvanized community organizers across the United States with an environmental agenda.[27]

C. Administration Turnovers

Besides the market and resource risks, private investors in P3s also face political risk.[28] Current P3 enabling legislation does not protect private partners from Administration turnover.[29]

The Kentucky Broadband Project, initially intended to provide all counties of the state with free broadband, illustrates this risk. The project was a priority for then-Governor Steve Beshear, and the provider-company would see return from selling its services to government locations.[30] In February, new Governor Matt Bevin restricted the project to only Eastern Kentucky, a coal-reliant region impacted by a decrease in industry jobs. Gov. Bevin believed it would be better to focus where the project would have a more immediate impact.[31]

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[22]Environmental Justice Act 2016, H.R. 4645, 114th Cong. (2016); 162 Cong. Rec. H31.
[23]*H.R. 4645: Environmental Justice Act of 2016*, GOVTRACK (last visited Jan. 7, 2017).
[24]*Donald Trump's Contract*, *supra* note 11; *see also* Christopher Helman, *President Trump Will Make America's Energy Sector Great Again*, FORBES (Nov. 9, 2016).
[25]David Dayen, *Beware Donald Trump's Infrastructure Plan*, NEW REPUBLIC (Nov. 11, 2016).
[26]*Policy Platform: Economic Justice*, MOVEMENT FOR BLACK LIVES (Aug. 1, 2016).
[27]Jedediah Purdy, *Environmentalism Was Once a Social-Justice Movement: It Can Be Again*, ATLANTIC (Dec. 7, 2016).
[28]*Bridging the Gap Together: A New Model to Modernize U.S. Infrastructure*, BIPARTISAN POLICY CTR. 30 (May 2016) [hereinafter *Bridging the Gap*].
[29]Steve Ahlquist, *Is the Public-Private Partnerships Commission Asking the Right Questions?*, RIFUTURE.ORG (Dec. 22, 2016).
[30]*P3's Driving Kentucky's Broadband Expansion*, NAT'L COUNCIL FOR PUB.-PRIV. P'SHIPS (Jan. 8, 2016).
[31]Bill Estep, *Bevin Aims to Scale Back Broadband Project to Focus on Eastern Kentucky*, LEXINGTON HERALD-LEADER (Feb. 5, 2016, 7:33 PM).

The Maryland Purple Line Project, a light rail transit project in Maryland is another example of this political risk.[32] Although a modified version reached financial close in June, private investors were preparing bids and allocating resources to a project that was reconsidered when the state administration changed.[33]

John Smollen of the National Council for Public-Private Partnerships has thus called for "smart legislation" which anticipates problems private parties will face in order to protect partners and mitigate the perceived additional risk factor. One such proposal is to prioritize proposed projects, in part on how much local hiring is planned for them, with the thinking being that a project with more local hiring will be more popular locally, and thus less vulnerable to being upended if an administration change occurs.[34]

III. PUBLIC INFORMATION AND EDUCATION

A. Public Data Availability

Public data availability allows P3 actors to make informed decisions about the actions that should be taken.[35] In June, Tennessee passed Public Chapter 678, which mandates statewide data collection as a tool to aid P3's addressing traffic issues.[36] In September, the Obama Administration announced a P3 to identify priority information needs and develop open-source platforms to share and use the data. The partnership, Partnership for Resilience and Preparedness (PREP), resulted from the Climate Data Initiative's attempt to address the gaps in the climate data.[37]

B. CH2M Foundation Grant

The CH2M Foundation gave the Nature Conservancy a $200,000 grant to develop a green infrastructure education pilot program at a high school in Philadelphia.[38] The program, a mentorship between the students and conservancy scientists and engineering professionals between 2016 and 2017, is intended to engage the school community in green infrastructure solutions and create healthier urban environments.[39]

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[32]Sean Slone, *States Diversifying Use of Public-Private Partnerships in Infrastructure*, CURRENT ST. (last visited Jan. 7, 2017); DEVLIN, *supra* note 5, at 1.
[33]*Bridging the Gap*, *supra* note 28, at 30.
[34]Ahlquist, *supra* note 29.
[35]Mike Hower, *Public-Private Partnerships Make City Data Actionable*, GREENBIZ (Nov. 4, 2015, 1:14 am).
[36]*Governor Haslam Signs Multiple Laws Sponsored by Sen. Bill Ketron Including Public Private Partnership (P3) Legislation*, SEN. BILL KETRON (June 2016).
[37]Press Release, White House Office of the Press Sec'y, Fact Sheet: Launching New Public-Private Partnership and Announcing Joint Declaration on Leveraging Open Data for Climate Resilience (Sept. 22, 2016).
[38]Press Release, White House Office of the Press Sec'y, Fact Sheet: Building Community Resilience By Strengthening America's Natural Resources and Building Green Infrastructure (Oct. 8, 2014); Nadia Peimbert, *Innovative Public-Private Partnership Honored at White House for Excellence in STEM Mentoring*, NATURE CONSERVANCY (Aug. 15, 2016).
[39]Peimbert, *supra* note 38.

A. Coal Ash Regulation

"Coal combustion residuals (CCRs), also referred to as coal ash, are byproducts of the combustion of coal at power plants by electric utilities and independent power producers."[40] On July 26, 2016, the EPA Administrator signed a direct final rule regulating the disposal of CCRs from Electric Utilities to extend, for certain inactive CCR surface impoundments, the compliance deadlines established by the regulations for the disposal of CCR under the Resource Conservation and Recovery Act, to become effective on October 4, 2016. The final rule includes greater clarity on technical requirements, more actions for addressing the risks from coal ash disposal, and recordkeeping and reporting requirements, including the requirement for each facility to establish and post specific information to a publicly-accessible website. [41]

On September 16, 2016, the United States Senate passed compromise legislation relating to coal ash disposal and the regulations pertaining to it, which was incorporated into the Water Resources Development Act. The legislation, sponsored by Senators James Inhofe (R-OK) and Barbara Boxer (D-CA), allows states to submit to the EPA evidence of a permit program or other system for regulation of coal combustion residual units, in lieu of a federal regulatory program.[42] However, the legislation never passed the House of Representatives.[43]

Coal ash regulation may be weakened in 2017 or beyond, as President Donald Trump has pledged to "cancel job-killing restrictions on the production of American energy, including . . . clean coal."[44]

B. Tax Incentives

Federal tax credits for residential energy efficiency were renewed in 2016, and were also made retroactive for 2015. Throughout 2016, homeowners could claim a tax credit for up to 30% of the cost of installing geothermal heat pumps, small wind turbines, solar energy systems, fuel cells, and for 10% of the cost up to $500 (or a specific amount from $50-$300) for the installation of a host of improvements, including biomass stoves, air source heat pumps, and water heaters. While most expired at the end of 2016, the tax credits for solar installations will continue through December 31, 2019, and then gradually phase out through 2021.[45]

The usage of tax credits to incentivize green energy in the private sector will face an uncertain future in 2017 and beyond. During his presidential campaign, Mr. Trump expressed skepticism toward many green energy programs and regulations but did not

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[40] *Frequent Questions About the Coal Ash Disposal Rule*, ENVTL. PROTECTION AGENCY (last updated July 27, 2016).

[41] *Final Rule: Disposal of Coal Combustion Residuals from Electric Utilities*, ENVTL. PROT. AGENCY (last visited Jan. 7, 2017).

[42] Jeannine Anderson, *Senate Gives Green Light to Coal Ash Legislation as Part of Water Bill*, PUBLICPOWERDAILY (Sept. 16, 2016); S. 2848, 114th Cong. (2016).

[43] S. 2848, *supra* note 42.

[44] Megan Darby, *Trump Prioritises [sic] Axing Coal, Oil, and Gas Regulations*, CLIMATE HOME (Nov. 22 2016, 11:33 am).

[45] Rob Freeman, *5 Green Building Tax Incentives for 2016*, POPLAR NETWORK (Jan. 26, 2016).

make tax incentives a focus of that skepticism, and many analysts expect current policy on tax credits for green energy to remain largely the same.[46]

C. Vehicle-Related Projects

Electric vehicle annual registration fees funded the Washington State Department of Transportation's pilot program, developed to expand the West Coast Electric Highway Network. The state's legislature approved $1 million in funding to incentive private investment in electric vehicle charging stations along highways in Washington State.[47] The Obama Administration also set aside $4.5 billion in loan guarantees that will finance electric vehicle charging facilities.[48] In November, the Federal Highway Administration announced that forty-eight out of fifty-five "alternative fuel corridors" will be electric vehicle charging corridors implemented by companies, including Berkshire Hathaway BMW, General Electric, and PG&E.[49]

D. Fishackathon

Hosted in over forty cities on Earth Day this year, the Annual Fishackathon brought together technologists and coders to create tools to facilitate sustainable fishing.[50] The event locations tripled from the previous year, including international sites and twelve domestic cities.[51] The winning project, the Great Lakes Savior, uses Internet of Things (IOT) technology to help fisheries and Oceans Canada address the issue of invasive Asian carp spawning in the Great Lakes by predicting the spawning and hatching periods of the species so their procreation can be prevented.[52]

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[46]Robert Ferris, *Trump May Not Snuff Out Renewable Energy Despite His Doubts on Climate Change*, CNBC (Nov. 23, 2016).

[47]*Electric Vehicle Charging Infrastructure*, WASH. ST. DEP'T OF TRANSP. (last visited Jan. 27, 2017).

[48]Press Release, White House Office of the Press Sec'y, Fact Sheet: Obama Administration Announces Federal and Private Sector Actions to Accelerate Electric Vehicle Adoption in the United States (July 21, 2016).

[49]Press Release, White House Office of the Press Sec'y, Obama Administration Announces New Actions To Accelerate The Deployment of Electrical Vehicles and Charging Infrastructure (Nov. 3, 2016).

[50]*About Fishackathon*, FISHACKATHON (last visited Jan. 7, 2017) [hereinafter *About Fishackathon*]; *Welcome to the Inaugural Fiashackathon Blog!*, FISHACKATHON (Feb. 22, 2016, 16:00H); *Fishackathon Launches in 40 Cities Worldwide*, U.S. DEP'T OF ST. (Apr. 22, 2016) [hereinafter *Fishackathon Launches*].

[51]*Fishackathon Launches*, *supra* note 50; *Fishackathon*, U.S. DEP'T OF STATE, (last visited Dec. 21, 2016).

[52]*About Fishackathon*, *supra* note 50; Ken Lin et al., *Great Lakes Savior*, DEVPOST (last visited Jan. 7, 2017).

Chapter 28 • INTERNATIONAL ENVIRONMENTAL AND RESOURCES LAW 2016 Annual Report[1]

I. ATMOSPHERE AND CLIMATE

A. Twenty-Second Session of the Conference of the Parties

At the Twenty-First Session of the Conference of the Parties (COP21) to the United Nations Framework Convention on Climate Change (UNFCCC), the parties adopted the Paris Agreement,[2] aimed at limiting the increase in global average temperatures to well below 2ºC above pre-industrial levels. The conditions for entry into force of the Paris Agreement were met on October 5, 2016, with its approval by more than fifty-five countries accounting for 55% of global greenhouse gas (GHG) emissions.[3] The Paris Agreement entered into force on November 4, 2016.

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[1]Any 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 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, Stephanie Altman and Shannon Martin Dilley. The following authors contributed to the Year-in-Review (YIR) report: Stephanie Altman, Section Chief, Office of General Counsel, Oceans and Coasts Section, National Oceanic and Atmospheric Administration (NOAA), contributed on marine environmental protection and conservation; Will Burns, Co-Executive Director, American University, contributed on natural resources; Derek Campbell, Attorney Advisor, International Section, Office of General Counsel, NOAA, contributed on marine environmental protection and conservation; Guilia Carlini, Project Attorney, Center for International Environmental Law contributed on international chemicals; Shannon Martin Dilley, Staff Attorney, California Air Resources Board, contributed on atmosphere and climate, natural resources, marine and environmental protection, and litigation; Chris Generous, Attorney and recent graduate, College of William & Mary, contributed on natural resources; Michael Gerrard, Professor, Columbia Law School, contributed on atmosphere and climate; Brett Grosko, Attorney, U.S. Department of Justice, contributed on marine environmental protection and conservation; Elizabeth B. Hessami, J.D., LL.M., Pro-bono Visiting Attorney, Environmental Law Institute, contributed on natural resources; Richard A. Horsch, Retired Partner/Of Counsel, White & Case LLP, contributed on international hazardous management; Thomas Parker Redick, Global Environmental Ethics Counsel LLC, contributed on international hazardous management and regulation of agricultural biotechnology; Erica Lyman, Professor, Lewis and Clark Law School, contributed on natural resources; Andrew Schatz, Legal Advisor, Conservation Finance Division, Conservation International, contributed on atmosphere and climate, marine and environmental protection, and natural resources; Baskut Tuncak, Visiting Scholar, American University, Washington College of Law, contributed on international chemicals; Jill H. Van Noord, Of Counsel, Holland & Hart LLP, contributed on atmosphere and climate; and Romany M. Webb, Climate Law Fellow, Sabin Center for Climate Change Law, Columbia Law School, contributed on atmosphere and climate.

[2]Conference of the Parties on its Twenty-First Session, Paris, France, *Adoption of the Paris Agreement*, Draft Decision 1/CP.21, UN Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015) [hereinafter COP21 Decision].

[3]*Paris Agreement,* Entry into force, UN Doc. C.N.735.2016.TREATIES-XXVII.7.d (Oct. 5, 2016).

The parties met in Marrakech, Morocco from November 7-18, 2016, for the First Session of the Meeting of the Parties to the Paris Agreement (CMA1), held in conjunction with the Twenty-Second Conference of the Parties (COP22). Discussions at CMA1/COP22 focused on implementing the Paris Agreement, with parties agreeing to accelerate completion of the work program.[4] The parties agreed the work program should be completed "as soon as possible" and at the latest, by 2018.[5]

The Paris Agreement set a target for developed countries to collectively mobilize at least USD $100 billion per year from 2020. A roadmap for achieving this target was agreed to in August 2016 by the European Commission and thirty-eight individual countries.[6] These and other countries made various pledges with respect to financing in the lead up to, and at COP22.[7] COP22 welcomed the progress made by the Green Climate Fund (GCF) over the last year, including its approval of USD $1.17 billion for twenty-seven projects in thirty-nine countries.[8] A number of focus areas for GCF over the next year were identified.[9]

The parties also signed the Marrakech Action Proclamation for Our Climate and Sustainable Development[10] and confirmed partnerships with non-party stakeholders through the Marrakech Partnership for Global Climate Action.[11] The next COP will be held at the headquarters of the UNFCCC Secretariat in Bonn, Germany from November 6-17, 2017.[12] CMA1 will be reconvened at that time.

B. International Civil Aviation

The Nation's International Civil Aviation Organization (ICAO) took the world's first step to curb GHG emissions from international aviation, which accounts for two percent of global emissions. On October 6, 2016, in Montreal, Canada, at ICAO's 39th Assembly, representatives from 191 countries, industry, and civil society agreed to maintain GHG emissions from international aviation (excluding domestic flights) at 2020 levels and improve average fuel efficiency by two percent per year from 2021 to 2050.[13] ICAO adopted Resolution A39-3, creating a Global Market-Based Measure (GMBM), known as the Carbon Offsetting and Reduction Scheme for International Aviation

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[4]Conference of the Parties on its Twenty-Second Session, *Preparations for the entry into force of the Paris Agreement and the first session of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement*, Draft Decision -/CP.22, UN Doc. FCCC/CP/2016/L.12 (Nov. 18, 2016) [hereinafter COP22 Decision].

[5]*Id.* at cl. II.12.

[6]*See* AUSTRALIAN GOV'T DEP'T OF FOREIGN AFFAIRS AND TRADE, ROADMAP TO US$100 BILLION (Oct. 2016).

[7]*See List of Recent Climate Funding Announcements*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE (last visited Feb. 11, 2017).

[8]Conference of the Parties on its Twenty-Second Session, *Report of the Green Climate Fund to the Conference of the Parties and guidance to the Green Climate Fund*, Draft Decision -/CP.22, UN Doc. FCCC/CP/2016/L.5 (Nov. 16, 2016).

[9]*Id*. at cl. 4, 7, 10, 11.

[10]*Marrakech Action Proclamation for our Climate and Sustainable Development*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE (Nov. 2016).

[11]*Marrakech Partnership for Global Climate Action*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE (Nov. 2016).

[12]*Calendar*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE (last visited Feb. 11, 2017).

[13]Int'l Civil Aviation Org. (ICAO), Resolution A39-2: Consolidated Statement of Continuing ICAO Policies and Practices Related to Environmental Protection – Climate Change, ¶¶ 4, 6, Provisional Edition, Oct. 2016.

(CORSIA), which will allow airlines to offset their emissions with carbon credits or equivalent reductions.[14] As of October 12, 2016, sixty-six countries, representing 86.5% of international aviation activity are expected to voluntarily participate, including the United States and China.[15] In the next few years, technical bodies under ICAO will decide what types of activities (i.e. project, sectoral, REDD+) will be eligible as offsets under CORSIA.

C. International Shipping

At its 70th session meeting in October 2016, the Marine Environment Protection Committee (MEPC) of the International Maritime Organization (IMO) took two separate actions to address GHG emissions from international shipping. First, MEPC adopted recordkeeping and reporting requirements for fuel oil consumption. The mandatory regulations require that ships of 5,000 gross tonnage and above will be required to collect consumption data for each type of fuel used, which will assist IMO in making decisions to address GHGs in the future.[16] Second, MEPC approved a roadmap for developing a "Comprehensive IMO strategy on reduction of GHG emissions from ships," which it expects to be adopted in 2018.[17]

D. Twenty-Eighth Meeting of the Parties to the Montreal Protocol

While receiving less attention than the Paris Agreement, members of the global community took one of the single biggest steps ever to combat climate change under the auspices of the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol). Following seven years of negotiations, on October 15, 2016, at the Twenty-Eighth Meeting of the Parties (MOP28) in Kigali, Rwanda, 197 countries adopted the Kigali Amendment to the Montreal Protocol to regulate global consumption of hydrofluorocarbons (HFCs), a powerful GHG chemical used primarily in air conditioning and refrigeration.[18]

The amendment adds HFCs to the list of substances controlled under the Montreal Protocol and establishes a legally binding freeze and gradual phase-down plan for nearly all countries to reduce their HFC consumption to 15-20% of baseline levels by mid-century.[19] The Kigali Agreement is scheduled to enter into force January 1, 2019, provided at least twenty Parties to the Montreal Protocol ratify the amendment.[20] The Kigali Amendment should avoid seventy to eighty billion tons of CO_2-equivalent emissions by 2050 and 0.5 degree Celsius of global warming by the end of the 21st Century.[21]

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[14]ICAO, Resolution A39-3: Consolidated Statement of Continuing ICAO Policies and Practices Related to Environmental Protection – Global Market-Based Measure (MBM) Scheme, ¶¶ 4, 6, Provisional Edition, Oct. 2016.

[15]*Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA)*, INT'L CIVIL AVIATION ORG. (last visited Feb. 12, 2017).

[16]*See New Requirements for International Shipping as UN Body Continues to Address Greenhouse Gas Emissions*, INT'L MAR. ORG. BRIEFING (Oct. 10, 2016).

[17]*Id.*

[18]Montreal Protocol on Substances That Deplete the Ozone Layer, Amendment, Oct. 15, 2016, C.N.872.2016. TREATIES-XXVII.2.f.

[19]AMENDMENT TO THE MONTREAL PROTOCOL ON SUBSTANCES THAT DEPLETE THE OZONE LAYER (Nov. 18, 2016).

[20]U.N. ENVTL. PROGRAMME, FREQUENTLY ASKED QUESTIONS RELATING TO THE KIGALI AMENDMENT TO THE MONTREAL PROTOCOL (Nov. 24, 2016).

[21]ENVTL. INVESTIGATION AGENCY, KIGALI AMENDMENT TO THE MONTREAL PROTOCOL (Nov. 24, 2016).

A. Agreement on Port State Measures to Prevent, Deter & Eliminate Illegal, Unreported & Unregulated Fishing

On June 5, 2016, the 2009 UN Food and Agriculture Organization Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA)[22] entered into force.[23] The PSMA is the first legally binding international agreement focused specifically on illegal, unreported, and unregulated (IUU) fishing. It is intended to help combat IUU fishing through, inter alia, establishing minimum standards for the conduct of fishing vessel inspections and inspector training by port States, requiring denial of port entry and/or access to port services to vessels that have been engaged in IUU fishing or fishing-related activities in support of such fishing, and requiring Parties to the agreement to investigate and take appropriate enforcement action in response to IUU activity detected in an inspection.

B. Marine Protected Areas

In September 2016, the presidents of Costa Rica, Colombia, and Ecuador announced the expansion of three UNESCO World Heritage Sites – the Cocos, Malpelo, and Galápagos Islands – further restricting fishing, seeking to save declining shark species (amongst others), and bringing the marine reserves to 83,600 square miles.[24] These efforts complement the three nations' 2003 commitment with Panama to conserve the 750,000 square mile Eastern Tropical Pacific Seascape ocean wildlife corridor.

On October 28, 2016, after nearly five years of negotiation, the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), at its annual meeting in Hobart, Australia, agreed to designate the world's largest marine protected area in waters around Antarctica. The Ross Sea Region Marine Protected Area will establish 1.55 million square kilometers "to conserve natural ecological structure, dynamics and function throughout the Ross Sea region at all levels of biological organization, by protecting habitats that are important to native mammals, birds, fishes and invertebrates."[25] Seventy-two percent of the sanctuary will be a "no-take" zone, which forbids all fishing, while other sections will permit some harvesting of fish and krill for scientific research. Located well south of New Zealand, the region contains nutrient-rich waters, largely untouched by humans, and is home to 16,000 species, including plankton, krill, fish, seals, penguins, and whales.[26] A key focus of the Ross Sea Region MPA will be improving collaborative marine research by CCAMLR members.[27] The agreement will come into force in December 2017.

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[22]Agreement on Port State Measures to Prevent, Deter, & Eliminate Illegal, Unreported, & Unregulated Fishing, Nov. 22, 2009, U.S.T. 112-4.

[23]*Port State Measures Agreement enters into force as international treaty*, FOOD & AGRIC. ORG. (June 5, 2016).

[24]Jane Braxton Little, *Three Nations Create Giant Reserves for Ocean Life*, NAT'L GEOGRAPHIC (Sept. 9, 2016).

[25]COMM'N FOR THE CONSERVATION of Antarctic Marine Living Res., REPORT OF THE THIRTY-FIFTH MEETING OF THE COMMISSION 8.48 (2016); *See also*, *CCAMLR to Create World's Largest Marine Protected Area*, CCAMLR (Oct. 28, 2016).

[26]Brian Clark Howard, *World's Largest Marine Reserve Created Off Antarctica*, NAT'L GEOGRAPHIC (Oct. 27, 2016).

[27]*Id.*; *see also* Michelle Innis, *Coast of Antarctica Will Host World's Largest Marine Reserve*, N.Y. TIMES (Oct. 27, 2016).

C. Convention for the Strengthening of the Inter-American Tropical Tuna Commission

On February 24, 2016, following the enactment of implementing legislation in the Illegal, Unreported, and Unregulated Fishing Enforcement Act of 2015, the United States ratified the Convention for the Strengthening of the Inter-American Tropical Tuna Commission Established by the 1949 Convention between the United States of America and Costa Rica (Antigua Convention), which updates the Inter-American Tropical Tuna Commission's mandate to reflect modern fisheries management principles.[28]

D. WTO Plurilateral Agreement to Prohibit Harmful Fisheries Subsidies

On September 14, 2016, thirteen World Trade Organization (WTO) members, including the United States, announced their commitment to initiate negotiations of a plurilateral agreement (i.e., among a subset of WTO members) to prohibit harmful fisheries subsidies, including subsidies that contribute to overfishing and overcapacity or are linked to illegal fishing, and to strengthen the reporting and transparency of fisheries subsidies.[29] Separately, in late 2016, the WTO's Negotiating Group on Rules considered three proposals for the development of a multilateral agreement (i.e., among all WTO members) to discipline fisheries subsidies.[30]

E. Ballast Water Management Convention

In September 2016, Finland deposited its instrument of ratification to the International Maritime Organization for the International Convention for the Control and Management of Ship's Ballast Water and Sediments (Ballast Water Management Convention) satisfying the required tonnage to bring the Convention into effect in September 2017.[31] The Ballast Water Management Convention puts in place a set of international standards to "prevent, minimize and ultimately eliminate the transfer of Harmful Aquatic Organisms and Pathogens through the control and management of ships' Ballast Water and Sediments,"[32] and requires, among other things regular removal of sediment from ballast tanks and the establishment of discharge standards for treatment methods of ballast water and sediment.

F. Ensuring Access to Pacific Fisheries Act

On December 16, 2016, President Barack Obama signed into law the Ensuring Access to Pacific Fisheries Act,[33] which included implementing legislation needed for the

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[28]Convention for the Strengthening of the Inter-American Tropical Tuna Commission Established by the 1949 Convention between the United States of America and Costa Rica, Nov. 14, 2003, S. TREATY DOC. NO. 109-2 (2005).
[29]Press Release, WTO, Joint Statement Regarding Fisheries Subsidies (Sept. 14, 2016).
[30]Press Release, WTO, WTO Members Engage on New Fisheries Subsidies Proposals (Dec. 9, 2016).
[31]Press Release, Int'l Mar. Org, Global Treaty to Halt Invasive Aquatic Species to Enter into Force in 2017 (Sept. 8, 2016).
[32]International Convention for the Control and Management of Ships' Ballast Water and Sediments, Adoption of the Final Act and Any Instruments, Recommendations and Resolutions Resulting from the work of the Conference, BWM/CONF/36 ART. 2(1), (Feb. 16, 2004).
[33]Press Release, White House, Statement by the President on Signing the Ensuring Access to Pacific Fisheries Act (Dec. 16, 2016).

United States to ratify the Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean,[34] and the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean,[35] which establish regional fisheries management organizations (RFMO) with international responsibility for the conservation and management of living marine resources in the high seas of the north and south Pacific Ocean, respectively, that are not covered by another RFMO.

G. Our Ocean Conference

The United States hosted the third Our Ocean conference, from September 15-16, 2016, in Washington, D.C.[36] The conference brought together heads of state, scientists, policy makers, charitable organizations, and entrepreneurs from over fifty countries and focused on three principal threats to the ocean—marine pollution, acidification, and overfishing–and resulted in an array of outcomes to protect almost 1.5 million square miles of the ocean[37] through over 136 new marine conservation initiatives valued at USD $5.24 billion.[38] To date, the three conferences have spawned commitments worth USD $9.2 billion and covering 3.8 million square miles of ocean. In 2017, the Our Ocean conference will be hosted by the European Union in Malta.

H. U.S.-Canada Arctic Oil & Gas Development Restrictions

Only one month before leaving office, President Barack Obama, utilizing a rarely used provision of the 1953 Outer Continental Shelf Lands Act, declared the vast majority of United States waters in the Chukchi and Beaufort Seas north of Alaska as "indefinitely off limits to offshore oil and gas leasing."[39] The designation would ban drilling in about 98% of federally owned Arctic waters, constituting 115 million acres.[40] At a joint statement, Prime Minster Trudeau announced Canada will also designate "all Arctic Canadian waters as indefinitely off limits to future offshore Arctic oil and gas licensing, to be reviewed every five years through a climate and marine science-based life-cycle assessment."[41]

III. INTERNATIONAL HAZARDOUS MANAGEMENT

A. Transboundary Movement of Hazardous Waste

In the intercessional period between the twelfth meeting of the Conference of the Parties (COP12) for the Basel Convention on the Transboundary Movements of Hazardous

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[34]Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean, S. Treaty Doc. No. 113-2 (2013).
[35]Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, S. Treaty Doc. No. 113-1 (2013).
[36]Fact Sheet, *Our Oceans 2016 Results*, U.S. STATE DEPT. (Sept. 16, 2016).
[37]*Id.*
[38]*Id.*
[39]Press Release, The White House, United States-Canada Joint Arctic Leaders' Statement (Dec. 20, 2016) [hereinafter United States-Canada Joint Arctic Leaders' Statement].
[40]Coral Davenport, *Obama Bans Drilling in Parts of the Atlantic and the Arctic*, N.Y. TIMES (Dec. 20, 2016).
[41]United States-Canada Joint Arctic Leaders' Statement, *supra* note 39.

Wastes and Their Disposal (Basel Convention),[42] held last year, and the upcoming thirteenth meeting to be held in Geneva, Switzerland in April and May 2017 (COP13), the Parties to the Convention have continued to address the following issues: improving legal clarity in the treaty and the development of guidelines for environmentally sound management of hazardous waste, persistent organic pollutants (POPs) waste, and electronic waste (e-waste). The Open-Ended Working Group (OEWG) guided this work, which is reflected in decisions taken at the OEWG's tenth meeting from May 30 to June 2, 2016 in Nairobi, Kenya.[43]

Furthering decisions from 2011,[44] 2013[45] and 2015,[46] the OEWG continues the process of preparing a glossary of terms, the main focus of which is to clarify the distinction between wastes and non-wastes, and reviewing Convention Annexes I, III, IV, and related aspects of Annex IX to ensure consistent interpretation of terminology throughout the treaty.[47] The OEWG recommended that at COP13 the Parties adopt the glossary of terms[48] and consider a report on the review of Annexes I, III, IV, and related aspects of Annex IX, prepared by Canada as lead country.[49]

The OEWG continued to develop guidelines for environmentally sound management of wastes with a view toward the possible adoption of the guidelines by the COP at its thirteenth meeting;[50] a draft outline of guidance to assist parties in developing efficient strategies for achieving the prevention and minimization of the generation of hazardous and other wastes and their disposal, with a view toward its possible consideration by the COP at its thirteenth meeting;[51] and technical guidelines related to POPs waste[52] and e-waste.[53]

B. International Regulation of Agricultural Biotechnology

The number of nations and acres planted with biotech crops leveled out in 2015 after twenty years of increases.[54] Onerous regulatory approval requirements for biotech

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[42] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 126, 28 I.L.M. 657.

[43] Basel Convention, Report of the Open-ended Working Group of 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/OEWG.10/13 (June 24, 2016).

[44] 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 its tenth meeting, U.N. Doc. UNEP/CHW.10/28, at 32-33 (Decision BC-10/3) (Nov. 1, 2011).

[45] Basel Convention, *supra* note 43, at 5-6, 33-34 (Decision BC-11/1).

[46] *Id.* at 46 (Decision BC-12/1).

[47] Basel Convention, Follow-up to the Indonesian-Swiss country-led initiative to improve the effectiveness of the Basel Convention, U.N. Doc. UNEP/CHW.12/INF/52* (Feb. 12, 2015); *see also* COP22 Decision, *supra* note 4, at 8-9.

[48] The Open-ended Working Grp., Decision OEWG-10/8: Providing Further Legal Clarity.

[49] *Id.* at ¶¶ 6-8 (Decision OEWG-10/8).

[50] 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 twelfth meeting, UN. Doc. UNEP/CHW.12/27, at 18-19 (Aug. 13, 2015).

[51] *Id.* at 21.

[52] *Id.* at 25.

[53] *Id.*

[54] *Pocket K No. 16: Biotech Crop Highlights in 2015*, INT'L SERV. FOR THE ACQUISITION OF AGRI-BIOTECH APPLICATIONS (last updated June 2016); *see also, ISAAA Brief 50-2014: Executive Summary*, INT'L SERV. FOR THE ACQUISITION OF AGRI-BIOTECH APPLICATIONS (2016).

crops (both planting and food-feed-processing import approvals) were adopted in more nations than are parties to the 2003 Cartagena Protocol on Biosafety (CPB) to the 1992 Convention on Biological Diversity (CBD).

The CPB has 196 parties (excluding the United States and Holy See) and the CPB added two nations in 2015 to reach 170 parties. The new Nagoya Protocol on Access and Benefit-sharing (Nagoya) has sixty-four Parties, while the Nagoya-Kuala Lumpur Supplemental Protocol to the CPB (NKLS Protocol) on Liability and Redress has thirty-nine parties after Liberia's ratification in August 2015,[55] and only one nation short of the ratifications needed to enter into force.[56] The CPB's eighth meeting of the parties (MOP 8) was held jointly with the CBD's thirteenth meeting of the parties (MOP 13) and Nagoya's second meeting of the parties (MOP 2) in December 2016 in Cancun, Mexico. This meeting was intended to decide, among other issues, whether CPB parties should extend their regulatory language to require pre-market approval for biotech organisms created with new genetic editing tools – which the CPB calls "synthetic biology"; while no decisions were reached on genetic editing, commentators warn that restrictive regulation may soon be forthcoming.[57]

IV. INTERNATIONAL CHEMICALS

A. Persistent Organic Pollutants Review Committee

The twelfth meeting of the Persistent Organic Pollutants Review Committee (POPRC-12) of the Stockholm Convention on Persistent Organic Pollutants convened in Rome, Italy from September 19-23, 2016. The POPRC adopted the following seven decisions:[58] risk profiles of dicofol and pentadecafluorooctanoic acid (PFOA), its salts and PFOA-related compounds, moving the chemicals to the next review stage; recommendations to consider listing short-chain chlorinated paraffins (SCCPs) in Annex A to the Convention; recommendations to list decabromodiphenyl ether (commercial mixture, c-decaBDE) in Annex A to the Convention with specific exemptions; evaluation of new information related to unintentional releases of hexachlorobutadiene (HCBD), concluding that there are unintentional releases of HCBD from certain processes; guidance on alternatives to perfluorooctane sulfonic acid (PFOS) and its related chemicals; and a report on the effective participation in the work of the POPRC.

B. Chemical Review Committee

The twelfth meeting of the Chemical Review Committee (CRC-12) of the Rotterdam Convention convened in Rome, Italy from September 14-16, 2016. The CRC decisions[59] include the adoption of the draft guidance documents on carbofuran and carbosulfan to be listed in Annex III to the Convention as pesticides and review of

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[55] Press Release, U.N. Decade on Biodiversity, The Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Biosafety Protocol comes closer to entry into force with the latest ratifications by Congo, Liberia and Togo, Communiqué (May 25, 2016).

[56] Press Release, U.N. Decade on Biodiversity, Four more instruments of ratifications needed for the entry into force of the Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, Communiqué (Oct. 3, 2016).

[57] *How are governments regulating CRISPR and New Breeding Technologies (NBTs)?*, GMO FAQ, GENETIC LITERACY PROJECT (last visited Feb. 12, 2017).

[58] UNEP, Report of the Persistent Organic Pollutants Review Committee on the Work of its Twelfth meeting, UNEP/POPS/POPRC.12/11 (Oct. 25, 2016).

[59] UNEP, Report of the Chemical Review Committee on the Work of its Twelfth Meeting, UNEP/FAO/RC/CRC.12/9 (Oct. 20, 2016).

notifications of benzidine, hexachlorobenzene, and atrazine. The CRC concluded that the notification of final regulatory action on benzidine met the Annex II notification criteria whereas hexachlorobenzene did not. Consideration of atrazine has been deferred to the CRC-13, which will meet in Rome from October 17-21, 2017.[60]

C. Open-Ended Working Group of the Basel Convention

The tenth meeting of the Open-Ended Working Group of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (OEWG 10) met in Nairobi, Kenya from May 30, 2016 to June 2, 2016 and adopted thirteen decisions[61] on, inter alia: preparation of the midterm evaluation of the strategic framework; developing guidelines for environmentally sound management (ESM); Cartagena Declaration on the Prevention, Minimization and Recover of Hazardous Wastes and Other Wastes; the technical guidelines on ESM of persistent organic pollutant (POPs) wastes; technical guidelines on waste electrical and electronic equipment (WEEE); national reporting; legal clarity; creation of a new partnership for the ESM of household waste; the Partnership for Action on Computing Equipment (PACE); including the cooperation between the Basel Convention and the International Maritime Organization (IMO), and the cooperation with the World Customs Organization (WCO) on the Harmonized Commodity Description and Coding System.

D. Intergovernmental Negotiating Committee on Mercury

Participants from governments, intergovernmental organizations, and non-governmental organizations (NGOs) met for the seventh session of the Intergovernmental Negotiating Committee on Mercury (INC7) in March 2016 in Jordan. Participants prepared for the entry into force of the Minamata Convention on Mercury by agreeing on guidance materials for best available environmental practices, identification of stocks, and development of national action plans, to name a few. As of December 2016, the Minamata Convention on Mercury has 128 signatories and thirty-five parties have ratified.[62] The Convention will enter into force after the ratification of the fiftieth party.[63]

V. NATURAL RESOURCES

A. United Nations Office of Drugs and Crime

In May of 2016, the United Nations Office of Drugs and Crime (UNODC) issued its first ever report on wildlife crime, *World Wildlife Crime Report: Trafficking in Protected Species*.[64] The report is the first international assessment that draws on seizure data from around the world to assess the drivers and dynamics of illegal trade in various wildlife markets, including fashion, perfumes and cosmetics, traditional medicine, pets and zoos, collectibles, and seafood. Importantly, one of the key policy findings is that enforcement legislation such as the United States Lacey Act, which makes the possession

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[60]UNEP, Twelfth Meeting of the Chemical Review Committee (CRC.12) (Sept. 14-16, 2016).
[61]Basel Convention, *supra* note 42.
[62]*Countries*, UNEP MINAMATA CONVENTION ON MERCURY (last visited Dec. 9, 2016).
[63]UNEP Minamata Convention on Mercury, Kumatomo, Japan, Oct. 10, 2013, *Text and Annexes*, Art. 31 ("This Convention shall enter into force on the ninetieth day after the date of deposit of the fiftieth instrument of ratification, acceptance, approval or accession.").
[64]U.N. OFFICE ON DRUGS AND CRIME, WORLD WILDLIFE CRIME REPORT: TRAFFICKING IN PROTECTED SPECIES (2016).

of wildlife harvested in contravention of laws in the source country illegal in the United States, is critical in the fight against wildlife trafficking.[65] Following UNODC's report, the United Nations General Assembly, for the second consecutive year, adopted a resolution expressing concern about the increasing scale of poaching and wildlife trafficking and redoubling member states' commitments to put in place the necessary legislative and regulatory frameworks for fighting wildlife crime.[66]

B. Convention on International Trade in International Fauna and Flora

The seventeenth meeting of the Conference of the Parties (COP17) to the Convention on International Trade in International Fauna and Flora (CITES) was held in Johannesburg, South Africa from September 24 to October 4, 2016. COP17 was hailed as a "game changer" by the Secretariat – protecting 500 new species of animals and plants[67] – and considered by many to represent a marked shift towards greater protection for vulnerable wildlife.[68]

The CITES meeting was largely dominated by the theme of tackling wildlife trafficking. In a series of unanimous decisions, parties agreed to tackle issues of corruption,[69] cybercrime,[70] traceability of product origin,[71] and demand reduction.[72] Collectively, these efforts represent a comprehensive approach to addressing the causes, means, and machinations comprising illegal wildlife trade.

The parties agreed to undertake a study of how CITES might regulate trade in bio-fabricated or bioengineered wildlife products—products that are manufactured in labs or factories from either synthetic or real DNA.

In addition to these efforts, CITES parties provided new protections to a great number of species, including many imperiled by illegal trade. Among the notable sixty-two COP17 Decisions on species-listing proposals, and to great fanfare, parties agreed to transfer all eight species of Pangolin (*manis spp.*) from Appendix II to Appendix I of CITES ensuring that pangolins may not legally be commercially traded.[73] The African grey parrot (*Psittacus erithacus*) was also transferred from Appendix II to Appendix I, prohibiting international trade.[74]

A number of species of sharks and rays were listed on Appendix II, permitting trade in such species only upon scientific evidence that the trade will not be detrimental to the survival of the species in the wild.[75] The parties listed over 300 tree species, including the entire genus of *Dalbergia* (rosewood) in Appendx II.[76] Proposals to return southern African elephant species to Appendix I as well as to list all lion species on Appendix I

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[65] *Id*. at 11.
[66] G.A. Res. 70/301, U.N. Doc. A/RES/70/301 (Sept. 23, 2016).
[67] *See* Press Release, Convention on Int'l Trade in Endangered Species of Wild Fauna and Flora (CITES), New CITES trade rules come into effect as 2017 starts (Jan. 2, 2017).
[68] *See* Press Release, CITES, Largest ever World Wildlife Conference Hailed as a 'Game Changer' (Oct. 4 2016).
[69] CITES, *Prohibiting, Preventing and Countering Corruption-Facilitating Activities Conducted in Violation of the Convention*, CoP17 Doc. 28.
[70] CITES, *Combatting Wildlife Cybercrime*, Cop17 Doc. 29.
[71] CITES, *Traceability*, CoP17 Doc. 45.
[72] CITES, *Demand Reduction Strategies to Combat Illegal Trade in CITES-listed Species*, CoP17 Doc. 18.1.
[73] CITES, *Table of Proposals and CoP17 Outcomes*.
[74] *See also* Earth Negotiations Bulletin (ENB), Summary of the Seventeenth Meeting of the COP-17 of CITES, Vol. 21 No. 97 (Oct. 8, 2016).
[75] *Id.* at 22.
[76] *Id.*

failed by narrow margins,[77] in part because the populations in certain range states were sufficiently high that they failed to meet the requisite biological criteria for Appendix I.[78]

Several of the most contentious proposals, such as re-opening the ivory trade in Zimbabwe and Namibia by delisting African Elephants (*Loxodonta africana*) there and legalizing trade in rhino horn (supported by South Africa, Swaziland, Zimbabwe, Japan, and the DRC), failed to receive the necessary two-third votes. Efforts to ban the trade in captive-bred lion bones and teeth were rejected, but the parties adopted a zero annual export quota for certain lion specimens removed from the wild.[79] Following successful conservation efforts, parties agreed to downlist the Cape mountain zebra and several species of crocodiles and wood bison.[80] Parties adopted several other decisions, including on matters such as corruption, cybercrime and wildlife crime, rural community engagement, strategies to reduce demand for illegally traded wildlife, and efforts to curb illegal trade or killing of helmeted hornbills, totoaba, and vaquita. The next COP will be held in Sri Lanka in 2019.

C. International Union for Conservation of Nature's Red List

According to the International Union for the Conservation of Nature's (IUCN) 2016 Red List, several new species have been uplisted this past year. Among the species of concern: global giraffe populations (vulnerable) have declined thirty-six to forty percent since 1985, four of the six great ape species are now critically endangered, the Plains Zebra population (near threatened) has declined twenty-five percent since 1992, the grey parrot – a popular pet and subject of the wildlife trade – was uplisted to endangered, while many amphibians, reptiles, shark, and ray species are at vulnerable, threatened or endangered levels.[81] Cheetah populations have plummeted to only 7,100 left in the wild and now face possible extinction.[82] The Great Elephant Census found African savanna elephant populations declined by 30% in only seven years (about 8% per year) from about 496,000 to 352,000 between 2007 and 2014, almost exclusively due to poaching fueled by the illegal wildlife trade.[83] Warming ocean temperatures are to blame for the worst coral die-off ever in the Great Barrier Reef, where two-thirds of the shallow-water coral on the reef's 430-mile northern section is now dead.[84] A lone bright spot, the Giant Panda was down-listed from endangered to vulnerable as a result of Chinese conservation efforts through forest protection and reforestation.[85]

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[77] *Id.*
[78] *Id.* at 19.
[79] Earth Negotiations Bulletin, *supra* note 74, at 22.
[80] Twelfth Meeting of the Chemical Review Committee, *supra* note 60.
[81] IUCN, *IUCN Red List of Threatened Species – 2016 Photo Gallery* (last visited Mar. 3, 2017); see also IUCN, *IUCN Red List of Threatened Species – Summary Statistics* (last visited Mar. 3, 2017).
[82] Matt McGrath, *Cheetahs Heading Towards Extinction as Population Crashes*, BBC NEWS (Dec. 26, 2016).
[83] Michael J. Chase et al., *Continent-wide survey reveals massive decline in African savannah elephants*, PEER J (Aug. 31, 2016).
[84] Michelle Innis, *Great Barrier Reef Hit by Worst Coral Die-Off on Record, Scientists Say*, N.Y. TIMES (Nov. 29, 2016).
[85] Liam Stack, *The Giant Panda Is No Longer Endangered. It's 'Vulnerable'*, N.Y. TIMES (Sept. 6, 2016).

D. Convention on Biological Diversity

The Parties to the Convention on Biological Diversity (CBD) convened on December 4-17th, 2016 for their biennial meeting in Cancun, Mexico for the Thirteenth Meeting of the Conference of the Parties (COP13). The parties noted that virtually all member States had incorporated the biodiversity targets established at COP10 for 2011-2020 (Aichi Biodiversity Targets)[86] in their respective national biodiversity strategies and action plans.[87] However, they also concluded that only a minority had established plans that were sufficiently ambitious to comport with its goals and many 2015 targets, such as minimizing stressors contributing to coral reef degradation, ocean acidification, and universal adoption of updated national biodiversity strategy and action plans had not been achieved.[88]

Another dominant theme of the meeting involved integration of biodiversity into specific economic sectors. The parties agreed to guidance for mainstreaming biodiversity-related concerns into the agricultural, forestry, and fisheries sectors.[89]

The parties recognized new ecologically or biologically significant areas (EBSAs), a concept identified by the parties at COP9, to ensure protection of areas of special importance in open-ocean waters and deep-sea habitats.[90] Recognizing the important nexus between climate change and biodiversity, the parties passed a resolution advocating the need to incorporate an ecosystem approach into climate policymaking.[91] The parties also established a detailed three-year action plan to build capacity for the implementation of the

[86] *Strategic Plan 2011-2020: Aichi Biodiversity Targets*, CONVENTION ON BIOLOGICAL DIVERSITY (last visited Feb. 10, 2016).

[87] Conference of the Parties to the Convention on Biological Diversity, Thirteenth Meeting, Cancun, Mexico, *Decision Adopted by the Conference of the Parties to The Convention on Biological Diversity*, Dec. XIII/1 Progress in the implementation of the convention and the strategic plan for Biodiversity 2011-2020 and towards the achievement of the Aichi Biodiversity Targets, at 2, U.N. Doc. CBD/COP/DEC/XIII/1 (Dec. 12, 2016).

[88] *Id.*

[89] Conference of the Parties to the Convention on Biological Diversity, Thirteenth Meeting, Cancun, Mexico, *Decision Adopted by the Conference of the Parties to The Convention on Biological Diversity*, Dec. XIII/3 Strategic Decisions to enhance implementation of the Strategic Plan for Biodiversity 2011-2020 and the achievement of the Aichi Biodiversity Targets, Including with respect to mainstreaming and the integration of biodiversity within and across sectors, at 18, U.N. Doc. CBD/COP/DEC/XIII/3 (Dec. 16, 2016).

[90] Conference of the Parties to the Convention on Biological Diversity, Thirteenth Meeting, Cancun, Mexico, *Decision Adopted by the Conference of the Parties to The Convention on Biological Diversity*, Dec. XIII/12 Marine and coastal biodiversity: ecologically or biologically significant marine areas, at 2, U.N. Doc. CBD/COP/DEC/XIII/12 (Dec. 17, 2016).

[91] Conference of the Parties to the Convention on Biological Diversity, Thirteenth Meeting, Cancun, Mexico, *Decision Adopted by the Conference of the Parties to The Convention on Biological Diversity*, Dec. XIII/4 Biodiversity and climate change, at 1-2, U.N. Doc. CBD/COP/DEC/XIII/4 (Dec. 10, 2016).

Convention and its protocols, including provisions for specific Aichi Biodiversity Targets[92] and adopted several resolutions[93] and decisions.[94]

E. Chinese Measures to Combat Wildlife Trafficking

2016 marked a critical year for China, and consequently the world, as China finally took more aggressive measures to clamp down on their status as the number one demand-driver of illegal wildlife products. In July 2016, China amended its Wildlife Protection Law (WPL) for the first time since 1989, mandating confiscation and significantly harsher fines for the illegal hunting, breeding, trade, use, transport, and food production of endangered wildlife, while maintaining criminal penalties.[95] The WPL also holds officials and agents liable for the failure to implement or enforce the law.[96] Some criticized the law's continued emphasis on consumption and utilization – permitting captive-breeding of species (i.e. tiger farms) and its failure to strengthen bans on the use or consumption of traditional Chinese medicine.[97] However, the law does forbid the production, trade, or purchase of specially protected animals or their products for food.[98]

On December 30, 2016, China announced it will shut down its domestic trade in ivory by the end of 2017. China's move marks the closure of the world's largest legal market in ivory and may be enough to reverse the species' precipitous decline. China's ban leaves Japan as the largest legal destination for ivory.[99]

F. Multilateral Environmental Agreement Updates

The Canadian province of British Colombia reached a historic agreement with environmentalists, the logging industry, and First Nations communities to protect the Great Bear Rainforest – the largest coastal temperate rainforest in the world.[100] After twenty years of negotiations, the parties agreed to conserve 85% of the forest as protected with the other 15% subject to the "most stringent" logging standards in North America. Farther south, Peru and Bolivia signed a $500 million deal to restore and preserve Lake Titicaca, the largest freshwater lake in South America.[101]

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[92]Conference of the Parties to the Convention on Biological Diversity, Thirteenth Meeting, Cancun, Mexico, *Decision Adopted by the Conference of the Parties to The Convention on Biological Diversity*, Dec. XIII/23 Capacity-building, technical and scientific cooperation technology transfer and the clearing-house mechanism, at 6-38, U.N. Doc. CBD/COP/DEC/XIII/23 (Dec. 16, 2016).

[93]CITES, Resolutions of the Conference of the Parties in effect after the 17th meeting (2016) (last visited Feb. 10, 2017).

[94]CITES, *Decisions of the conference of the Parties to Cites in effect after its 17th meeting*.

[95]ENVTL. INVESTIGATION AGENCY, WILDLIFE PROTECTION LAW OF THE PEOPLE'S REPUBLIC OF CHINA (July 5, 2016); ENVTL. INFO. AGENCY, WILDLIFE PROTECTION LAW OF CHINA (1989 AND 2015), Art. 45-49 (July 5, 2016).

[96]WILDLIFE PROTECTION LAW OF CHINA (1989 AND 2015), *supra* note 95, at Art. 42.

[97]*See China's Wildlife Protection Law*, ENVTL. INVESTIGATION AGENCY (July 5, 2016).

[98]WILDLIFE PROTECTION LAW OF CHINA (1989 AND 2015), *supra* note 95, at Art. 28-30.

[99]*Breaking News: China Announces Domestic Ivory Ban*, WILDAID (Dec. 30, 2016).

[100]Justine Hunter, *Final Agreement Reached to Protect B.C.'s Great Bear Rainforest*, THE GLOBE AND MAIL, (Feb. 1, 2016).

[101]Suman Varandani, *Lake Titicaca Cleanup: Bolivia, Peru Sign $500M Deal To Improve Lake's Biodiversity Through 2025*, INT'L BUS. TIMES (Jan. 8, 2016).

G. Invasive Species

In 2016, countries dealt with invasive species in various ways. The European Commission published a regulation pursuant to the EU Invasive Alien Species Regulation ((EU) No 1143/2014).[102] This list and regulation are measures to protect native species and the European economy. Meanwhile, the UN has estimated shipping-based biological spills will continue to introduce invasive and may harm as much as 5% of global economic activity (analogous to a decade's worth of natural disasters).[103]

In Canada, various funding and regulatory efforts are being used to address national and international aquatic invasive species.[104] Further, provincial and local governments have pursued measures, such as issuing guidance,[105] designating species,[106] and funding programs.[107] Sweden's government published a risk assessment of the American lobster in August 2016, which recommended a ban of such lobster imports into the European Union due to concerns over cross-breeding and disease. The Invasive Alien Species Committee, chaired by the European Commission, favored examining alternative measures. [108]

VI. LITIGATION

A. Arbitral Panel Issues Decision in South China Sea Matter

In July 2016, an Arbitral Tribunal from the Permanent Court of Arbitration in the Hague issued its decision concerning a long festering conflict between China and its Southeast Asian neighbors over control of territory and access to resources in the South China Sea.[109] The panel rejected China's claims of control over significant areas of the South China Sea. It also concluded China had failed to respect the Philippines' sovereign rights, violated its obligation under the United Nations Law of the Sea to protect the marine environment, and criticized China's island-building activities during the pendency of the dispute.

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[102]European Commission Press Release EU No. 1143/2104, Commission Adopts First EU List of Invasive Alien Species, an Important Step Towards Halting Biodiversity Loss (July 13, 2016).

[103]Comm'n On Phytosanitary Measures, Recommendation on Sea Containers, U.N. Doc. CPM-10/2015/1 (2015) (citing Anthony Ricciardi, Michelle E. Palmer & Norman D. Yan, *Should Biological Invasions Be Managed as Natural Disasters?*, BIOSCIENCE, (Apr. 1, 2011)).

[104]News Release, Gov't of Can., Taking Action to Protect the Great Lakes: The Government of Canada increases funding to the Sea Lamprey Control Program (June 9, 2016); *see also* News Release, Gov't of Can., Charting Canada's Waters: Government of Canada to Build Seven New Hydrographic Survey Vessels (Apr. 21,2016).

[105]*Guidance for Invasive Species assessments under the Invasive Species Act, 2015*, MINISTRY OF NAT. RES. AND FORESTRY (June 2016).

[106]*Regulation of invasive species under the Ontario Invasive Species Act, 2015*, ENVTL. REGISTRY ONT. (last visited Feb. 11, 2017).

[107]*See Invasive Plant Program*, B.C.: FORESTS, LANDS & NAT. RES. OPERATIONS (last visited Feb. 11, 2017).

[108]*Invasive Alien Species*, EUROPEAN COMM'N – ENV'T (last updated Feb. 27, 2017).

[109]In re Arbitration Between the Republic of the Philippines and the People's Republic of China, PCA Case No. 2013-19, Award (July 12, 2016); Holly Doremus, *Arbitral panel sides with Philippines in South China Sea dispute*, 48 ABA SEER TRENDS 2 (2016); *see also* Ted L. McDorman, *The South China Sea Arbitration*, 20 AM. SOC'Y INT'L L. 17 (Nov. 18, 2016).

B. Hungarian Court Acquits Aluminum Company in Toxic Spill Litigation

In January 2016, a Hungarian court acquitted fifteen individuals on trial in connection with a 2010 heavy metal sludge spill in Hungary which led to the death of ten people.[110] The spill destroyed homes in three towns when an aluminum plant reservoir burst, dumping red sludge into the surrounding areas. The court found the individuals, who were the plant's officials, were not criminally negligent because they had no objective opportunity to discover the hazards that had formed. The court further noted government authorities had approved the reservoir's plans and operations.

C. Chevron Litigation

The United States Court of Appeals for the Second Circuit upheld a lower court's judgment in a Racketeer Influenced and Corrupt Organizations Act (RICO) case against a lawyer who had represented Ecuadorian indigenous peoples in environmental litigation against Chevron and other defendants.[111] Chevron's suit alleged the attorney obtained a multibillion-dollar judgment against Chevron concerning oil contamination in Ecuador through fraud, civil conspiracy, and violations of RICO, and sought an injunction prohibiting the plaintiffs in that Ecuadorian litigation from enforcing the Ecuadorian judgment in the United States.

D. Settlement in Tailings Dam Collapse Matter in Brazil

In November 2015, the Samarco Fundão dam collapsed at an impoundment in Brazil used to store mining tailings by Brazil's Vale, S.A. and the Anglo-Australian BHP Billiton Ltd. The collapse led to the death of nineteen people in Minais Gerais and Espirito Santo states and polluted hundreds of miles of rivers and the Atlantic Ocean. In February 2016, Samarco, a joint venture between Vale and BHP Billiton, entered into an agreement with authorities for approximately $5 billion over fifteen years to restore the environment and communities affected by the dam failure.[112]

E. International Criminal Court Issues Policy Paper on Priorities, Including the Prosecution of Environmental Crimes

In September 2016, the International Criminal Court (ICC), created in the 1998 Rome Statute of the International Criminal Court, based in The Hague, issued a policy paper setting out the considerations guiding its exercise of prosecutorial discretion when it selects and prioritizes cases for investigation and prosecution.[113] The paper noted the ICC will prosecute cases concerning "illegal exploitation of natural resources, arms trafficking,

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[110] *Hungary court acquits leaders of firm behind toxic spill*, REUTERS (Jan. 28, 2016).

[111] Chevron Corp. v. Donziger, 833 F.3d 74 (2d Cir. 2016). In September 2015, the Supreme Court of Canada decided that villagers from Ecuador can enforce the $9.5 billion Ecuadorian court judgment against the Chevron Corporation through its Canadian subsidiary, Chevron Canada. *See also* Catherina Valenzua-Bock, *The Supreme Court of Canada Rules for Ecuadorian Villagers in Suit against Chevron*, AM. SOC'Y INT'L L.: INT'L LAW IN BRIEF (Sept. 4, 2015).

[112] Lisandra Paraguassu, *Samarco to pay at least $5 billion in Brazil dam spill deal*, REUTERS (Mar. 2, 2016).

[113] Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation*, ICC (Sept. 15, 2016). The Rome Statute entered into force in 2002.

human trafficking, terrorism, financial crimes, land grabbing or the destruction of the environment."[114]

F. Climate Change Litigation

On December 15, 2016, the Regional Court dismissed the civil suit due to lack of a linear causal chain in a climate change litigation case filed by a Peruvian farmer and mountain guide, Saùl Luciano Lliuya, against a German utility - RWE at the Regional Court in Essen, Germany. The plaintiff argued climate change is causing the glaciers to melt, which is causing the lake in the area to grow and could cause a possible flood and sought payment from RWE for preventative measures at the glacial lake in accordance with RWE's contribution to climate change.[115] The plaintiff's attorney has announced her client will "most likely" appeal the decision.

In *Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council* (*Verein KlimaSeniorinnen Schweiz v. Schweizerishce Bundeskanzlei*), a group of senior women filed action against the Swiss government alleging that the government failed to uphold obligations imposed by the Swiss Constitution along with the European Convention on Human Rights, and as a result, their demographic will be impacted by the expected heat waves from climate change. The plaintiffs asked the court to require the government to develop a regulatory approach which would achieve GHG reductions of 25% below 1990 levels by 2020 and 50% by 2050.[116]

On November 10, 2016, the United States District Court for the District of Oregon denied the defendant's motions to dismiss and issued an opinion and order[117] in the case of *Juliana v. United States*. Youths, ages nine and twenty sued the federal government, alleging excessive GHG emissions threaten their future and the government failed to protect them, violating the youngest generation's constitutional right to life, liberty, and property and failing to protect public trust resources. The opinion and order comes in response to the government and fossil fuel industry's motions to dismiss, arguing the cause of action was a non-justiciable political question, that the plaintiffs lacked standing to sue, that they did not properly assert a public trust claim, and lacked a cause of action to enforce public trust obligations.

[114] *Id.* at 5; *see also id.* at 14.
[115] *Saùl Versus RWE – The Case of Huaraz*, GERMAN WATCH (Nov. 18, 2016).
[116] *Climate Litigation Chart Updates – December 2016*, SABIN CTR. FOR CLIMATE CHANGE L. (Dec. 12, 2016).
[117] Juliana v. United States, No. 6:15-cv-01517 (D. Or. Nov. 10, 2016).

Chapter 29 • SCIENCE AND TECHNOLOGY
2016 Annual Report[1]

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. AN UPDATE ON THE TOXIC SUBSTANCES CONTROL ACT

In June 2016, Congress overhauled the Toxic Substance Control Act (TSCA) for the first time in forty years.[2] The Frank R. Lautenberg Chemical Safety for the 21st Century Act (Act) was a bipartisan effort to create a systematic procedure to identify hazardous chemicals.[3] In addition, the Act expands the scope of TSCA to consider hazards to potentially exposed or susceptible populations.[4] The Act also:

- secures funding for the EPA to enact and enforce the requirements of the amended TSCA;[5]
- explicitly preempts states from regulating chemicals once the EPA has determined the chemical does not pose an unreasonable risk;[6]
- creates guidelines to limit chemical testing on animals;[7] and
- accounts for the EPA's activities by requiring reports to Congress every five years.[8]

This update focuses on the Act's new requirements for chemical review and prioritization.

A. Reviewing Chemicals with Prioritized Risk Evaluations

The TSCA used to provide that when the EPA found "a reasonable basis to conclude" a chemical posed an "unreasonable risk of injury to health or environment" it

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[1]This report was edited by Vice Chair, Lindsey C. Moorhead, Jackson Walker, L.L.P. Houston, Texas, with the sections being authored by Sarah Munger, J.D. Candidate at the Vermont School of Law (An Update on the Toxic Substances Control Act) and Norman A. Dupont, a partner at Ring Bender LLLP (Climate Change Science and Litigation).
[2]Colby Bermel, *Obama Signs TSCA Reform into Law*, E&E NEWS (June 22, 2016).
[3]*Id.*
[4]*See* Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-182, 130 Stat. 448, 449 (2016) (codified at 15 U.S.C.A. § 2602 (West 2016)) (defining "potentially exposed or susceptible populations" as those that the EPA considers to have a "greater risk than the general population of adverse health effects" from chemical exposure such as "infants, children, pregnant women, workers, or the elderly.").
[5]*See Id.* § 17, 130 Stat. at 500 (codified at 15 U.S.C.A. § 2625 (West 2016)) (establishing that the EPA can set and prescribe fees that will total up to $25 million or will provide enough funding to cover 25% of the costs to carry out the Act, whichever is lower).
[6]*Id.* § 13, 130 Stat. at 493-98 (codified at 15 U.S.C.A. § 2617 (West 2016)).
[7]*Id.* § 4, 130 Stat. at 452-53 (codified at 15 U.S.C.A. § 2603(h) (West 2016)).
[8]*Id.* § 17, 130 Stat. at 502 (codified at 15 U.S.C.A. § 2625(m)(2) (West 2016)).

must publish a rule to mitigate the risk.[9] Now, the EPA's rule making will not occur until it has conducted a risk evaluation of the chemical.[10] Section 6 of the Act outlines the processes the EPA must follow for risk evaluations.[11] The EPA will conduct risk evaluations according to whether the chemical is a high or low priority.[12]

1. Determining Priorities

A high priority chemical is one that the EPA concludes has an unreasonable risk to health, the environment, or a potentially exposed or susceptible population.[13] The EPA must also preference high priority designations for chemicals which: 1) were on the 2014 TSCA plan; 2) scored a three for persistence and bioaccumulation; 3) "are known human carcinogens," and 4) "have high acute and chronic toxicity."[14] A low priority chemical is one the EPA concludes does not pose an unreasonable risk to health, the environment, or potentially exposed or susceptible populations.[15]

To determine a chemical's priority, the EPA will consider the "hazard and exposure potential" to potentially exposed or susceptible populations, chemical storage near drinking water, and the chemical's persistence and bioaccumulation.[16] It will also consider the chemical's conditions of use, changes in use, and the volume manufactured or processed.[17] By December 2019, the EPA must continuously conduct twenty risk evaluations each for high and low priority chemicals; [18] the EPA must start another risk evaluation after completing one.[19] At least half of all the EPA's risk evaluations must review chemicals from the 2014 TSCA work plan.[20]

2. Initial Risk Evaluations

Even before the rulemaking on risk evaluations is complete or any priority designations have been made, the Act directs the EPA to identify ten chemicals from the 2014 TSCA Work Plan to conduct initial risk evaluations.[21] The EPA listed those ten chemicals in December 2016.[22] They are:

- 1, 4 Dioxane;
- 1- Bromopropane;
- Asbestos;
- Carbon Tetrachloride;

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[9]Toxic Substance Control Act, Pub. L. No. 94-469, §§ 4-5, 90 Stat. 2003 (1976) (amended 2016).
[10]Pub L. No. 114-182, 130 Stat. at 462 (codified at 15 U.S.C.A. § 2605(c)(1) (West 2016)).
[11]*Id.* § 6, 130 Stat. at 460-65 (codified at 15 U.S.C.A. § 2605(b) (West 2016)).
[12]*Id.* § 6, 130 Stat. at 461 (codified at 15 U.S.C.A. §§ 2605(b)(1)(B)(i)-(ii) (West 2016)).
[13]*Id.*
[14]*Id.* § 6, 130 Stat. at 462 (codified at 15 U.S.C.A. § 2605(b)(2)(D) (West 2016)).
[15]Pub L. No. 114-182, 130 Stat. at 461 (codified at 15 U.S.C.A. § 2605(b)(1)(B)(ii) (West 2016)).
[16]*Id.* (codified at 15 U.S.C.A. § 2605(b)(1)(A) (West 2016)).
[17]*Id.*
[18]*Id.* § 6, 130 Stat. at 462 (codified at 15 U.S.C.A. §§ 2605(b)(2)(A)-(B) (West 2016)).
[19]*Id.* § 6, 130 Stat. at 463 (codified at 15 U.S.C.A. § 2605(b)(3)(C) (West 2016)).
[20]Pub L. No. 114-182, 130 Stat. at 462 (codified at 15 U.S.C.A. § 2605(b)(2)(B) (West 2016)).
[21]*Id.* § 6, 130 Stat. at 462 (codified at 15 U.S.C.A. § 2605(b)(2)(A) (West 2016)).
[22]*Evaluating Risk of Existing Chemicals under TSCA*, ENVTL. PROTECTION AGENCY (last visited Jan. 15, 2016).

- Cyclic Aliphatic Bromide Cluster (CABC);
- Methylene Chloride;
- N-Methylpyrrolidone;
- Pigment Violet 29;
- Trichloroethylene (TCE); and
- Tetrachloroethylene.[23]

The EPA will continue the rulemaking it had begun prior to the Act's passage for methlyne chloride, n-methylpyrrolidone, and TCE.[24] In addition, the EPA will conduct risk evaluations for those chemicals' uses it did not consider in the separate rulemaking.[25]

B. Results of Risk Evaluations: Exemptions and Expedited Processes

After the EPA conducts a chemical risk evaluation, it must either make a rule to mitigate identified risks[26] or permit manufacturing and processing of the chemical.[27] However, the Act provides that some chemicals may also be exempt from EPA risk mitigation.[28] The EPA may forego rulemaking that mitigates risks if it also finds that:

- The chemical is "critical or essential" and there is no "technically or economically feasible safer alternative"; or
- Complying with the new procedures would "disrupt the national economy, national security, or critical infrastructure";[29] or
- The chemical's use "provides a substantial benefit to health, the environment, or public safety."[30]

On the other hand, the Act also provides the EPA must undergo expedited rulemaking for some chemicals.[31] The EPA does not need to conduct a risk evaluation, and the EPA must promulgate a rule within eighteen months of proposing a rule if the chemical:

- Is in the 2014 TSCA Work Plan;
- Allows a "reasonable basis" for the EPA to conclude it is toxic;
- Scored high for persistence and bioaccumulation in the 2012 TSCA Work Plan Chemical Methods Document or a successive scoring system;
- Is "not a metal or metal compound";
- Has not been part of a "completed Work Plan Problem Formulation" before the Act amended TSCA; and
- Has a use that will or is likely to cause exposure to a potentially exposed or susceptible population or the environment.[32]

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[23]Designation of Ten Chemical Substances for Initial Risk Evaluations under the Toxic Substance Control Act, 81 Fed. Reg. 91,927 (Dec. 19, 2016).
[24]*Evaluating Risk of Existing Chemicals under TSCA, supra* note 22.
[25]*Id.*
[26]Pub. L. No. 114-182, 130 Stat. at 460 (15 U.S.C.A. § 2605(a), (c)(1) (West 2016)).
[27]*Id.* § 5, 130 Stat. at 459 (codified at 15 U.S.C.A. § 2604(g) (West 2016)).
[28]*Id.* § 6, 130 Stat. at 468 (codified at § 2605(g) (West 2016)).
[29]*Id.* (codified at § 2605(g)(1)(B) (West 2016)).
[30]*Id.* (codified at § 2605(g)(1)(C) (West 2016)); *See also* 15 U.S.C.A. § 2605(a) (listing the potential remedies the EPA must generally initiate via rulemaking to mitigate unreasonable risks).
[31]Publ L. No. 114-182, 130 Stat. at 469 (codified at 15 U.S.C.A. § 2605(h)(1) (West 2016)).
[32]*Id.* (codified at 15 U.S.C.A. § 2605(h)(1)(B) (West 2016)).

C. Risk Evaluation Rulemaking

Congress directed the EPA to publish a rule for how it will conduct the risk evaluations by June 22, 2017.[33] To draft the rule, the EPA held public meetings and accepted comments through summer 2016.[34] If interested parties have missed the opportunity for public comment on the risk evaluation process, there will be ongoing opportunity for public comment. After completing a review, the EPA must offer thirty days for public comment before issuing a final evaluation.[35]

II. CLIMATE CHANGE SCIENCE AND LITIGATION

Scientific data on climate change events continued to show increasing temperatures in the United States and abroad. The International Panel on Climate Change commenced work on a Sixth Assessment Report, building on its prior conclusion from its 2014 Synthesis Report[36] of its Fifth Assessment finding that "human influence on the climate system is clear" and growing, with impacts observed on all continents.[37] The National Oceanic and Atmospheric Administration (NOAA) issued monthly climate reports in 2016. In its November 2016 State of the Climate Report,[38] NOAA concluded that with only one month remaining, the 2016 year-to-date global temperature in 2016 was the second highest on record for the United States, and that seven states, including Alaska, experienced their warmest January-November period ever recorded.[39] Some still challenge the scientific consensus[40] on this point, and at least one spokesperson for President-Elect Trump has indicated that he will stop future funding to NOAA's earth science division,[41] which undertakes climate change research.

Public debate over climate change and press allegations of "manipulated" scientific data is already the subject of litigation. A noted climatologist from the Pennsylvania State University, Michael Mann, sued the conservative National Review, the Competitive Enterprise Institute (where Mr. Trump's transition team leader for EPA works), and two writers of the publications. In *Competitive Enterprise Institute v. Mann*,[42] the Court of Appeals for the District of Columbia rejected efforts by the publications and two writers to obtain an earlier dismissal of the suit on First Amendment grounds, finding Professor Mann had adduced sufficient evidence to demonstrate that he was likely to succeed on some of his claims. The court of appeals opinion discusses the now famous "hockey-stick" graph projecting climate change impacts over time, and allegations by defendants that Mann manipulated data to adjust the "blade end" of that graph to artificially show abrupt climate

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[33] *Id.* § 6, 130 Stat. at 463 (codified at § 2605(b)(4)(B) (West 2016)).

[34] Processes for Risk Evaluation and Chemical Prioritization for Risk Evaluation Under the Amended Toxic Substances Control Act; Notice of Public Meetings and Opportunities for Public Comment, 81 Fed. Reg. 48,789 (July 26, 2016); *Meetings and Webinars on the Amended Toxic Substance Control Act*, ENVTL. PROTECTION AGENCY (last updated Dec. 21, 2016) (providing meeting material and agendas).

[35] Pub. L. No. 114-182, 130 Stat. at 465 (codified at § 2605(b)(4)(H) (West 2016)).

[36] IPCC, CLIMATE CHANGE 2014: SYNTHESIS REPORT, SUMMARY FOR POLICY MAKERS 2 (2014).

[37] *Id.*

[38] *State of the Climate: Global Analysis for November 2016*, NAT'L CTRS. FOR ENVT'L INFO. (Dec. 2016).

[39] *Id.*

[40] *Scientific consensus: Earth's climate is warming*, NASA (Jan. 3, 2017).

[41] Oliver Milman, *Trump to scrap NASA climate research in crackdown on 'politicized science'*, THE GUARDIAN (Nov. 23, 2016).

[42] Nos. 14-CV-101, 14-CV-126, 2016 WL 7404870 (D.C. Cir. Dec. 22, 2016).

change in the twentieth century. The Competitive Enterprise Institute and one of its blog writers graphically compared Mann's alleged manipulation of climate data in the "hockey stick" figure to the deceptions practiced by sexual predator and former Penn State assistant coach Jerry Sandusky.[43]

In two separate lawsuits, lawyers have sought to invoke the "public trust" doctrine to sue either state or federal agencies for alleged non-action on climate change matters. In July, an intermediate appellate court in Pennsylvania rejected an effort to invoke that state's "Environmental Rights Amendment" to the state constitution in order to seek redress against state officials for an alleged failure to regulate CO_2 and other greenhouse gases. This Pennsylvania constitution provision expressly makes the Commonwealth a public trustee of the right of state citizens to clean air, pure water, and preservation of the environment. But, in *Funk v. Wolf*,[44] the Pennsylvania Commonwealth Court agreed that petitioners, a group of minors alleging concerns as to impacts of climate change on their future, had established sufficient grounds to obtain prudential standing under Pennsylvania law. The Commonwealth Court, however, held the State's preliminary objection on the grounds that the requested relief could not be judicially granted because the underlying constitutional provision, the Environmental Rights Act, did not provide sufficiently clear mandatory duties on state officials with respect to greenhouse gas reduction.[45] Thus, the Court sustained some of the Commonwealth's preliminary objections and dismissed the case.

In contrast, the United States District Court for Oregon rejected motions by the United States and various industrial intervenors to dismiss a similar suit brought by juveniles in that Court. In *Juliana v. United States*,[46] the district court held that the juvenile plaintiffs had established standing and that the case did not present a non-justiciable political question.[47] The district court then found the allegation that defendants had violated a fundamental right secured by the Fifth Amendment by "'directly caus[ing] atmosphere CO_2 to rise to levels that dangerously interfere with a stable climate system . . .'" stated a claim which could be addressed by judicial determination.[48] The public trust doctrine provided an independent obligation on the sovereign (in this case, the United States) to safeguard resources, including at least impacts to the territorial sea area. The district court also rejected arguments that the common law doctrine of public trust was displaced by express statutory provisions, such as the Clean Air Act, rejecting a prior contrary ruling by the district court for the District of Columbia.[49]

Climate change litigation involving lawsuits by two attorney generals alleging Exxon Mobil Corporation (ExxonMobil) suppressed information in an effort to support climate denial efforts took a side tour to Texas, where ExxonMobil seeks to have a federal judge enjoin the state proceedings as violating the federal civil rights law, 42 U.S.C. section 1983. Both states have filed motions to dismiss on federalism grounds, but on December 9, 2016, the district court for the Northern District of Texas rejected defendants' motions to essentially defer discovery, including an oral deposition of the Massachusetts Attorney General, Maura Healey, pending the motions to dismiss. The state attorney general then sought a writ of mandamus from the Court of Appeals for the Fifth Circuit, *In re Maura T.*

[43] *Id.* at *4.
[44] 144 A.3d 228 (Pa. Commw. Ct. 2016).
[45] *Id.* at 248-51.
[46] No. 6:15-cv-01517-TC, 2016 WL 6661146 (D. Or. Nov. 10, 2016).
[47] *Id.* at *8-9, 14.
[48] *Id.* at *14.
[49] *Id.* at *24 (rejecting Alec L. v. Jackson, 863 F. Supp. 2d 11, 16 (D.D.C. 2012).

Healey,[50] but within one business day of the filing of that writ, the district court reversed itself and cancelled the Healey deposition.[51]

Likewise, the effort by fossil fuel advocates to pressure opponents by demanding the deposition of senior administrators also came to naught in the Fourth Circuit in an effort by Murray Energy Corporation to compel the deposition of EPA Administrator McCarthy in connection with certain EPA coal regulations.[52]

[50]Petition for a Writ of Mandamus, *In re* Maura T. Healey, No. 1611741 (N.D. Tex. Dec. 9, 2016).

[51]Exxon Mobil Corp. v. Schneiderman, No. 4:16-cv-469-K, 2016 WL 6091249, at *1 (N.D. Tex. Dec. 12, 2016).

[52]*In re* Gina McCarthy, No. 15-2390, 2015 U.S. App. LEXIS 21458 (4th Cir. Dec. 9, 2015) (granting writ of mandamus and reversing district court order compelling deposition of Administrator McCarthy in Murray Energy Corp. v. McCarthy).

Chapter 30 • ETHICS AND THE PROFESSION
2016 Annual Report[1]

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 which 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.[2]

I. SEER Book Project

In 2016, 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 and panels at SEER conferences. Additionally, the Committee continued its work on a new book, *Ethics and Environmental Practice: The Practitioner's Guide*, which will be available in 2017.[3]

II. Amendment to Model Rules

On August 8, 2016, the ABA's House of Delegates approved Revised Resolution 109, which amends Rule 8.4 of the ABA Model Rules of Professional Conduct to expressly include anti-harassment and antidiscrimination provisions.[4] More specifically, Model Rule 8.4 (Misconduct) now contains a new section (g) which provides as follows:

> It is professional misconduct for a lawyer to:
>
> (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender

[1]The 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.

[2]To explore more cases of application of principles of legal ethics to the environmental context, *see* Irma S. Russell, Issues of Legal Ethics in the Practice of Environmental Law (2003).

[3]Ethics and Professionalism, A.B.A. Section of Env't, Energy, and Res. (last visited Jan. 28, 2017).

[4]A.B.A. Standing Comm. on Ethics and Prof. Resp., Report to the House of Delegates: Revised Resolution 109 (Aug. 2016).

> identity, marital status, or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.[5]

Several comments to Rule 8.4 have also been modified, consistent with the prohibition against harassment and discrimination now found in section (g). For example, former Comment 3 prohibited lawyers from knowingly manifesting bias or prejudice when such actions were "prejudicial to the administration of justice." That version of Comment 3 has been deleted in its entirety, and in its place, new Comment 3 states:

> [3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).[6]

Additionally, two new comments have been added so that former comments 4 and 5 are now numbered as comments 6 and 7. New Comments 4 and 5 consist of the following:

> [4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.[7]

> [5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. *See* Rule 6.2(a), (b) and (c). A lawyer's representation of a client

[5] *Rule 8.4: Misconduct*, A.B.A. CTR. FOR PROF. RESP. (last visited Jan. 28, 2017).
[6] *Comment on Rule 8.4: Misconduct*, A.B.A. CTR. FOR PROF. RESP. (last visited Jan. 28, 2017).
[7] *Id.*

does not constitute an endorsement by the lawyer of the client's views or activities. *See* Rule 1.2(b).[8]

The amended Model Rule 8.4 will not be directly applicable to lawyers until it is adopted as part of each jurisdiction's own Rules of Professional Conduct. However, if an instance of potential lawyer misconduct arises which could be susceptible to new section (g), the relevant disciplinary tribunal may elect to take the new misconduct provision into account.

III. 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 2016. Nevertheless, some developments in 2016 deserve the attention of the environmental practitioner from an ethics perspective.

A. Unlicensed Practice of Law

1. Attorney Privately Admonished in Minnesota

On August 31, 2016, the Minnesota Supreme Court issued a private admonishment against an attorney for the unlicensed practice of law.[9] The lawyer (not named in the opinion) is licensed to practice law and maintains an office in Colorado, where he concentrates his practice in the areas of environmental, personal injury and debt collection. He is not licensed to practice law in Minnesota. In response to a request from his Minnesota-resident mother and father-in-law, the attorney engaged in a five month, e-mail only, negotiation attempting to resolve a $2,368.13 judgment entered against them for condominium association fees.

In response to an ethics complaint filed by opposing counsel, the Director of the Minnesota Office of Lawyers Professional Responsibility issued a private admonition against the Colorado-based attorney, which was affirmed after an evidentiary hearing by a Panel of the Lawyers Professional Responsibility Board, then further affirmed by the Minnesota Supreme Court.

In so affirming, the Court held that "[w]hether an attorney engages in the practice of law *in* Minnesota by sending e-mails from *another* jurisdiction is a matter of first impression."[10] Resting its decision on the facts that the in-laws, the condominium association, the real estate in question, and the debt to be collected all were located in Minnesota, the Court concluded that "engaging in e-mail communications with people in Minnesota may constitute the unauthorized practice of law in Minnesota, in violation of Minn. R. Prof. Conduct 5.5(a), even if the lawyer is not physically present in Minnesota."[11]

SEER members may wish to pay particular attention to the attention the Minnesota Supreme Court paid to a comment to Rule 5.5. Comment 14 to Minnesota's version of Rule 5.5 (identical to the Model Rule's Comment 14) allows an attorney to provide "temporary legal services" in Minnesota if those services reasonably relate to the lawyer's practice in his or her home jurisdiction when "the client's activities or the legal issues involve multiple jurisdictions; or … the services 'draw on the lawyer's recognized

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[8] *Id.*

[9] *In re* Charges of Unprofessional Conduct in Panel File, 884 N.W.2d 661 (Minn. 2016) (per curiam) (Anderson, J., Chutich, J., and Lillehaug, J., dissenting).

[10] *Id.* at 665.

[11] *Id.* at 663.

expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.'"[12] The Minnesota Supreme Court nonetheless rejected application of those exceptions to the Colorado-based attorney because his in-laws did not reside in Colorado, he had no prior attorney-client relationship with them, and his Colorado-based debt collection work was not based on a body of federal or nationally-uniform laws.

2. Administrative Appeal Void in North Dakota

On December 7, 2015, the North Dakota Supreme Court issued its decision in *Blume Construction Inc. v. State*,[13] voiding an administrative notice of appeal filed by a Colorado attorney on behalf of Blume Construction in a North Dakota unemployment insurance tax penalty action. The Court found the Colorado attorney was not licensed to practice in North Dakota and had not applied for admission pro hac vice before filing the notice of administrative appeal on behalf of Blume Construction.

The *Blume Construction* Court analyzed North Dakota's version of Model Rule 5.5 and the exceptions and comments to the Rule which explain the "safe-harbor" provisions for non-resident attorneys. It then rejected Blume Construction's argument that the notice of appeal was a standard form, completing it did not require legal analysis, and filing it could have been accomplished by a non-lawyer employee of the company. The Court found that completing the form required legal citations and analysis, rendering its completion the "practice of law." The Court went on to observe that corporations are not "natural" persons and so must be represented by an attorney before a legal tribunal – a corporation may not proceed pro se. Finally, the Court determined the Colorado attorney's actions were not protected by the "preparatory activities" safe-harbor provision because there was no evidence to show he "reasonably expected" to secure pro hac vice admission before the administrative tribunal. An application for such admission was due within forty-five days of filing the notice of administrative appeal, and no such application was made.[14]

Again, although the administrative appeal at issue in *Blume Construction* was not an environmental one, the potential implications for environmental practitioners are clear. Rule 5.5 constrains the multi-jurisdictional practice of law which is so common for SEER members, and the safe-harbor provisions allowed by its terms must be carefully considered and respected.[15]

B. Expansions and Refinements of DOJ's "Individual Accountability for Corporate Wrongdoing" Policy (the Yates Memo)

In the 2015 version of the Year-In-Review, the Ethics chapter reported on the then-new policy of the U.S. Department of Justice (DOJ) to make prosecution of individuals the norm for corporate wrongdoing.[16] To refresh recollections, on September 9, 2015, DOJ announced its commitment to prosecuting individuals connected with corporate violations in a memorandum entitled Individual Accountability for Corporate

[12] *Id.* at 668.
[13] 872 N.W.2d 312 (N.D. 2015).
[14] *Id.* at 320.
[15] *Rule 5.5: Unauthorized Practice of Law*, N.D. SUP. CT. (Oct. 1, 2016); *Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law*, A.B.A. CTR. FOR PROF. RESP. (last visited Jan. 28, 2017).
[16] ABA ENV'T, ENERGY & RES. L. THE YEAR IN REV. 2015, 389 (2016).

Wrongdoing, a document which has come to be known as the Yates Memo.[17] While the policy set out in the Yates Memo is not directed at environmental laws per se, the prevalence of corporate organizational actors in the environmental arena and the availability of significant criminal sanctions under the federal environmental laws mean that the individual accountability policy deserves attention from all lawyers who practice in the field.

During the course of 2016, the DOJ continued to implement the policies described in the Yates Memo. In a high-profile example, the DOJ's Summary of the Environment & Natural Resources (ENRD) Division's Accomplishments for Fiscal Year 2016[18] notes the September 2016 guilty plea from a Volkswagen engineer to three criminal conspiracy counts: wire fraud, violation of the Clean Air Act, and defrauding the EPA. These criminal counts emerged from the engineer's role in Volkswagen's decade-long use of software algorithms and calibrations designed to defeat vehicle emissions tests on certain diesel automotive engines. This individual guilty plea was in addition to Volkswagen's separate partial corporate settlement requiring it to spend up to $14.7 billion for vehicle buybacks, emission reduction technology retrofits, nitrogen oxide reduction projects, and green technology investments.[19]

[17] Memorandum from Sally Quillian Yates, Deputy Att'y Gen., Dep't of Justice, to Assistant Att'y Gen., Antitrust Div., et al., Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015).

[18] U.S. DEPT. OF JUSTICE, ENV'T. & NAT. RESOURCES DIVISION, ACCOMPLISHMENTS REPORT: FISCAL YEAR 2016, at 7 (Jan. 15, 2017).

[19] Steve Pawlett, *Volkswagen To Spend Up To $14.7 Billion For Deceiving Customers*, JOBBER NEWS (July 12, 2016).