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AN ENVIRONMENTAL AND ENERGY LAW PRACTICE

2025 Environmental and Energy Law Forecast

FEDERAL

Overview of Trump Administration Expectations

Michael Dillon, Esq. and Wesley S. Stevenson, Esq.

With the inauguration of Donald J. Trump on January 20, 2025, we anticipate potentially significant changes in the Executive's priorities with respect to environmental and energy issues. The prior Trump administration's efforts in these areas—including emphasis on energy independence, deregulation, and rollback of climate change related regulations—provide some insights about what is to come. President-elect Trump also has made distinct promises on the campaign trail and during the transition period that may preview changes in the environmental arena.

During his first administration, President Trump removed the United States from the Paris Climate Agreement, and one of the first things President Biden did was rejoin that Agreement. We anticipate that the second Trump administration will again remove the U.S. from the Paris Agreement and potentially identify other climate-related rules and regulations enacted over the last four years as candidates for reform. On the campaign trail, President-elect Trump called for repeal of climate change related regulations, as well as repeal of the Inflation Reduction Act, which includes tax credits and other incentives designed to promote the use of clean energy sources.

The first Trump administration also pushed for deregulation, striving for the elimination of two rules for every rule the Executive branch added. As a candidate this time around, President-elect Trump pledged to eliminate ten rules for each new rule and to create the Department of Government Efficiency to audit government spending and performance before proposing significant reforms. With respect these deregulatory efforts at EPA, we anticipate a rollback of some Biden administration guidance documents and rules, particularly those related to climate and environmental justice; and a shift to bolstering state and local priorities. To accomplish these and other environmental objectives, President-elect Trump is expected to issue initial Executive Orders addressing EPA rules and guidance materials adopted during the Biden administration, as well as grants of funding as the incoming administration assesses personnel, budgets, climate-related policies, and rules to stay and (potentially) re-propose.

With respect to appointments, President-elect Trump has nominated Lee Zeldin to lead the U.S. Environmental Protection Agency and Chris Wright to lead the U.S. Department of Energy. The appointment of Mr. Wright, the CEO of Liberty Energy, the second-largest fracking company is North America, is expected to further President-elect Trump's goals of rolling back of climate and other regulations and fostering energy independence. The confirmation hearings for Zeldin and Wright began the week of January 13.

Lee Zeldin, a former Republican congressman from New York, was announced as President-elect Trump's pick to maintain the "highest environmental standards" while simultaneously ensuing fair and swift deregulatory decisions to unleash the power of American industry. For his part, Zeldin has stated that his selection is an honor and that as EPA Secretary he will strive to restore energy dominance, bring back auto manufacturing jobs, and make the U.S. a global leader of AI while protecting access to clean air and water. In Congress, Zeldin was known to be diligent and well versed on the relevant issues but lacks significant environmental experience. He has spoken publicly about a renewed EPA focus on environmental efforts at the state and local level, rather than forging this path at a federal level. This approach could lead to decreased federal enforcement efforts, as well as an increase in cooperative efforts with the regulated community to evaluate environmental issues and compliance. An exception may be for the Superfund program, which remained strong during the first Trump administration. President-elect Trump likewise noted his support for clean air and water programs throughout the presidential campaign.

The Trump administration's articulated means for fostering energy independence place an emphasis on increased drilling and fracking for oil, as well an expansion of production and use of fossil fuels (with a corresponding roll-back of renewable energy sources). It is anticipated that investment in biofuels, including by the U.S. military, will be reduced as encouragement of fossil fuel production becomes the priority. In this effort, it is believed that heavy investment in science and energy development will ensure access to affordable and reliable energy in the domestic market. Additionally, an "all of the above" energy policy will foster more private sector competition and innovation that will best serve the American people. And while President-elect Trump called for the end of the "EV mandate" for federal agencies, it will be interesting to see if his administration takes any formal steps to limit the use of electric vehicles,

President-elect Trump also has promised to cut energy prices in half within 18 months of taking office. Doing so would be a tall order, as domestic oil and gas production already was at a record-high during the Biden administration. Boosting production could be accomplished through additional drilling projects and associated pipelines, potentially bolstered by the D.C. Circuit's recent decision finding regulations under the National Environmental Policy Act (NEPA) to be non-binding where they have been published by the Council on Environmental Quality.

Finally, it will be interesting to see how President-elect Trump's appointee to lead the U.S. Department of Health and Human Services (HHS), Robert F. Kennedy, Jr., may impact environmental policies related to food production and pesticide use. While President-elect Trump has previously prioritized large-scale agriculture production, and has expressed support for U.S. farmers, Kennedy's stated goals of pushing back on ultra-processed foods, removing chemicals from the food supply, and restricting pesticide use suggest the possibility of stricter regulation of the agricultural sector.

Trump Announced Appointments to Key Environmental Positions

Shoshana (Suzanne Ilene) Schiller Esq.

EPA:

Administrator

Lee Zeldin has been tapped as EPA Administrator, previously serving as a representative to Congress from Long Island, New York. He does not have extensive environmental experience but is known as an

advocate of deregulation and it is anticipated that he may seek roll back of some of the clean energy initiatives in the Biden administration's Inflation Reduction Act.

Deputy Administrator
David Fotouhi, a litigator, has been nominated to be Deputy Administrator of the EPA. Fotouhi served in various counsel positions at the EPA during the first Trump administration and was involved in many of the high-profile environmental matters that came before the courts, including the Clean Power Plan and the WOTUS rule. After leaving the administration, he returned to the litigation group at Gibson Dunn & Crutcher.

Interior:
Secretary
Doug Burgum is the former Governor of North Dakota, the third largest oil and natural gas producing state, serving from 2016 until 2024. As Governor, Burgum set a goal for North Dakota to be carbon-neutral by 2030. He was an advisor to the Trump campaign on energy policy and is a strong supporter of the fossil fuel industry. There may be an uptick in oil and gas leasing on public lands, including the Arctic National Wildlife Refuge, under his auspices.

Deputy Secretary
Katharine MacGregor has been slated to return to the position of Deputy Secretary of the Interior, which she held during the final year of the first Trump administration. Most recently, she has been serving as Vice President of Environmental Services for NextEra Energy, the world's largest generator of solar and wind energy, headquartered in Florida.

Energy:
Secretary
Chris Wright is the CEO of Liberty Energy, the second largest hydraulic fracturing company in the country. Like other appointees, Wright believes in reliance on fossil fuels for energy independence. While acknowledging that greenhouse gases contribute to climate change, he believes that the consequences of warming trends are neither dire nor immediate and can be addressed without imposing new regulatory burdens on businesses. Most recently he testified against SEC rules requiring the disclosure of greenhouse gas emissions and climate change risks.

Deputy Secretary
James Danly served in numerous positions at the Federal Energy Regulatory Commission (FERC) during the first Trump administration, including chair of FERC. Since that time, he has been leading Skadden, Arps, Slate, Meagher & Flom LLP's Energy Regulatory Group.

Attorney General
Pam Bondi was the Florida Attorney General until 2019 and served on Trump's legal team during his first impeachment trial. In her capacity as Florida's Attorney General she signed on to challenges of several Obama-era regulations, including the August 2015 Clean Power Plan and the June 2015 WOTUS Rule.

Republican-Controlled Congress Expected to Invoke Congressional Review Act to Invalidate Numerous Recent Environmental Regulations

Katherine L. Vaccaro, Esq.

With Trump's first official day in the White House fast approaching, many people are wondering about the fate of the numerous environmental regulations that were promulgated during the Biden Administration. At the start of Trump's first Presidency in 2017, the Republican-controlled Congress relied heavily on a provision of the Congressional Review Act (CRA) referred to as the "lookback mechanism" to swiftly invalidate a number of regulations that were issued during the waning days of President Obama's second term. We expect the current Congress to consider invoking the CRA's lookback mechanism as the new session gets underway in earnest.

In all cases, Congress has 60 session days to consider a final agency regulation, and if it so chooses, to introduce a joint resolution of disapproval. If both chambers of Congress approve the joint resolution and the President signs it (or if the President vetoes the resolution, but Congress has enough votes to override the veto), then the regulation is voided in its entirety and treated as if it had never taken effect. After an agency rule has been struck down under the CRA, that rule cannot be "reissued in substantially the same form" unless specifically authorized by Congress (note that it isn't clear what it means for one rule to be in "substantially the same form" as an earlier one). The CRA applies to final agency regulations but not other presidential or administrative actions, such as executive orders, proposed rules, or guidance documents.

In the special case where agency rules are finalized with fewer than 60 days remaining in the Congressional session, the CRA's lookback provision automatically restarts the review clock on such rules when Congress reconvenes. The re-review period begins on the fifteenth working day of each chamber of Congress and lasts the full 60 days specified by the CRA. Although it is undeniably a powerful tool, it goes relatively unused except in one circumstance: when a change in the presidential administration coincides with a new Congress controlled by the new President's party, thereby creating the possibility that both Congress and the President would want to reject agency rules issued by the prior administration. That was the case in early 2017, when the Congress that came in with the first Trump administration used the CRA to invalidate 13 rules within the first four months the new session. A number of those rules had been issued by EPA. Incidentally, we also saw Congress use the CRA when it reconvened in early 2021 and Biden became President, but to a lesser extent than in 2017. We expect to see similar use of the CRA in 2025.

And in December, the House passed the "Midnight Rules Relief Act," which would allow Congress to void whole groups of regulations using a single CRA resolution, rather than having to introduce a separate resolution for each regulation. As of the date this publication, the Senate has not voted on this legislation.

Considering a lookback cutoff date around mid-2024, several environmental regulations will be up for Congressional re-review and vulnerable to disapproval. Of course, EPA rules promulgated before the lookback cutoff date are not immune to recission attempts, but they can only be withdrawn through formal rulemaking including public notice and comment.

ENVIRONMENTAL JUSTICE

Feds Attempted to Advance Environmental Justice Priorities in 2024, But Future Approach Will Undoubtedly Change

Todd D. Kantorczyk, Esq.

Since 2020, we have reported on how the Biden administration has made environmental justice (EJ) considerations a primary focus of its environmental policies through the issuance of executive orders, and how, consistent with those orders, both EPA and the US Department of Justice (DOJ) made structural changes and issued several policy and guidance documents intended to facilitate implementation of these EJ priorities through enforcement of existing environmental laws. While both agencies have continued those efforts through 2024, the ongoing legal actions related to EPA's civil rights investigation into Louisiana's environmental permitting practices, which was noted in last year's issue, has continued to be a thorn in the agency's side regarding EJ-related enforcement. And, more importantly, it is likely that the incoming Trump administration will de-emphasize certain EJ policies and make corresponding structural changes that reflect a shift away from EJ considerations in permitting, rulemaking and enforcement.

Cumulative Impacts

As noted in last year's proposed updates to EPA's *Technical Guidance Document for Assessing Environmental Justice in Regulatory Analysis,* the issue of cumulative effects has been an important—and "evolving"—issue for EJ assessments. To assist with those evaluations, on November 21, 2024, EPA released a draft *Interim Framework for Advancing Consideration of Cumulative Impacts*. According to the *Interim Framework*, cumulative impacts are comprised of the combination of environmental stressors that affect health and quality of life outcomes. The *Interim Framework* includes five principles that are intended to serve as a reference point for when and how to consider cumulative impacts for EPA actions such as standard setting, permitting, rulemaking, cleanup, and emergency response. The *Interim Framework*, however, does not mandate cumulative impact analyses under all circumstances, instead leaving that to policymakers to decide "as appropriate, feasible, and consistent with applicable law." EPA is taking comments on the *Interim Framework* until February 19, 2025.

DOJ

Towards the end of December 2024, the DOJ Office of Environmental Justice finally released its *Environmental Justice Strategic Plan*, as required by the two EJ Executive Orders issued by the Biden administration. The *Strategic Plan* includes four goals that are consistent with DOJ's previously announced EJ priorities:

- Prioritize cases with potential to advance environmental justice and make strategic use of DOJ's legal tools;
- Meaningfully engage with impacted communities and expand efforts to communicate environmental justice efforts;
- Increase education and collaboration relating to environmental justice; and
- Ensure DOJ considers the environmental justice impacts of the management and operation of the agency.

Disparate Impact Under Fire in 2024

As noted in last year's forecast, EPA and the State of Louisiana have been entangled in a dispute since 2022 as to whether the State's air permitting program resulted in disparate impacts on black residents in

violation of Title VI of the Civil Right Act. After initial negotiations broke down, the State sued EPA and sought a preliminary injunction to prevent EPA from applying disparate impact and cumulative impact requirements as part of its oversight of Louisiana's permit program. Shortly thereafter, EPA dropped its investigation and moved to dismiss the case as moot. Louisiana, however, opposed the motion to dismiss, arguing that the proper standard under Title VI is intentional discrimination, and the continued concern over disparate and cumulative impacts was unlawful. In January, Judge Cain of the US District Court for Western Louisiana granted the preliminary injunction, and in August he granted Louisiana's request for a permanent injunction prohibiting EPA from implementing any "disparate-impact regulations" in the state. The state subsequently requested for the injunction to apply nationwide, and that request is pending. Judge Cain's ruling is clearly an issue for DOJ and EPA EJ enforcement efforts going forward. For example, EPA's Office of Environmental Justice and External Civil Rights has a separate webpage stating that it "will not impose or enforce Title VI disparate-impact requirements contained in 40 C.F.R. § 7.35(b), (c) against any entity in the State of Louisiana, nor require compliance with those requirements as a condition of past, existing, or future awards of financial assistance to any entity in the State of Louisiana." And the recently released *Interim Framework for Advancing Consideration of Cumulative Impacts* referenced above includes a statement that EPA "will not impose or enforce any disparate-impact or cumulative-impact-analysis requirements under Title VI against any entity in the State of Louisiana.

Regardless of the outcome of the Louisiana case, the Trump administration is expected to deemphasize, or potentially eliminate, policies and agency structures that consider EJ principles in enforcement, permitting and rulemaking.

LITIGATION:

Environmental Litigation Trends 2025

Garrett D. Trego, Esq.

Environmental litigators will continue to be busy in 2025 across state and federal courts and administrative tribunals. Existing caseloads and typical growth will continue—including cost recovery and contribution cases, toxic tort cases, enforcement cases, non-governmental organization (NGO) advocacy cases, and others—but notable increases are likely in a few key areas where environmental, regulatory, and judicial situations are changing.

Climate Change

Undeniable environmental changes are bringing on increases in the frequency or severity of flooding, wildfire, drought, hurricanes and tornadoes, and overall changes in the way our developed world interacts with the natural world. Those changes already have resulted in increased "climate change" litigation in both the macro and micro sense.

At the macro level, we see more lawsuits against state and federal governments alleging a failure to take more robust actions to combat climate change (*see, e.g.*, *Genesis B. v. U.S. Environmental Protection Agency*, No. 23-cv-10345 (C.D. Cal. 2023)) and more suits against private industry alleging underlying fault or exacerbation of the symptoms of climate change, sometimes filed by state and local governments themselves (*see, e.g.*, *Bucks County, Pennsylvania v. BP p.l.c. et al.*, No 24-1836 (Bucks Cnty. Ct. Com. Pl. Mar. 25, 2024)). These cases continue to wind their way through the courts, primarily in state courts

that plaintiffs often perceive as a more favorable forum. To date, the Supreme Court has declined to review the issue of whether federal preemption warrants removal of these types of climate change cases, which are inherently national or international in scope, to federal courts. *See, e.g.*, *Shell PLC v. City and County of Honolulu, Hawaii*, No. 23-952 (U.S. 2023) (*certiorari* denied). If the Supreme Court were to hold that these cases belong exclusively in federal courts, it may slow the pace at which they are filed going forward.

At the micro level, the impacts of climate change are straining public utilities and private citizens alike, leading to increases in litigation aimed at finding fault in the increased costs incurred or demanded for addressing those impacts or the damages they have caused. These types of cases include tort claims alleging damages from stormwater, increased flooding, drought or other natural disasters. Both the types of plaintiffs and the types of defendants in these cases are varied, and the role of climate change is often as a third party "empty chair" that each side seeks to characterize to its advantage. As climate and weather continue to become more extreme, increases in related litigation will follow. This month's tragedy in Los Angeles is just one example of the increasing trend.

PFAS

Proposed and final federal regulations passed during the Biden Administration under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA) naming multiple per- and poly-fluoroalkyl substances (PFAS) as "hazardous substances" or "hazardous constituents," respectively, are triggering direct legal enforcement activity under those statutes but also further fanning increased litigation activity in other areas. The ubiquity of PFAS in the environment coupled with state and federal concentration standards for these constituents that are so dramatically more stringent than for other contaminants means that "significant" detections of PFAS are being discovered at a higher rate and an increased level of litigation necessarily will follow.

PFAS-focused litigation matters in 2025 will include ongoing and potentially new challenges to these stringent state and federal regulations, claims against manufacturers, suppliers, or distributors of products that (knowingly or unknowingly) contain PFAS, personal injury or medical monitoring tort claims, claims from public utilities and others considering adding additional treatment to water supplies, contribution and cost recovery matters related required PFAS remediation work, and trespass, nuisance and other property damage-related claims. Even if the new federal standards are revoked or repealed by the new Trump administration, the litigation is unlikely to abate.

Judicial Challenges to Administrative Actions

Finally, though experts seem divided on the significance of the substantive impact of the United States Supreme Court's 2024 decision in *Loper Bright Enterprises v. Raimondo*, No. 22-451 (U.S. June 28, 2024), there is little doubt that the decision will prompt a higher volume of judicial challenges to federal administrative actions. *Loper Bright* overturned the traditional *Chevron* deference doctrine and held that courts no longer must defer to a federal agency's interpretation of otherwise silent or ambiguous federal laws. Challenges to environmental agency actions, including those from the United States Environmental Protection Agency, are likely to be among the most frequent under this new doctrine. When paired with *Corner Post v. Board of Governors of the Federal Reserve System*, No. 22-1008 (U.S. July 1, 2024), which increased the flexibility of the six-year statute of limitations for administrative challenges under the Administrative Procedures Act based on the timing of the impact on a particular party, *Loper Bright* is likely to have an even broader impact on the volume of environmental litigation in federal courts.

These decisions open a procedural route to a significantly increased volume of judicial challenges to federal environmental administrative actions. While the volume will almost surely increase, the results are much more in doubt and will depend upon individual cases, advocates and judges. It is important to note that within the increased volume, we are likely to see *both* an increase in private sector challenges to federal actions and non-governmental organization challenges to federal actions, particularly with the incoming Trump Administration set to consider significant changes to national environmental policy.

PFAS Litigation Expected to Continue to Grow and Evolve in 2025

Kate Campbell, Esq.

2025 is expected to bring continued PFAS litigation across the country, marked by both increasing complexity as the science continues to develop and by evolving legal strategies based on the continued development of the case law and a potential if not likely shift in the regulatory landscape under the new Trump administration.

This past year saw many of the largest cases in the AFFF firefighting foam multi-district litigation (MDL) in federal court in South Carolina resolve through multi-billion-dollar settlements by PFAS manufacturers. But there is no shortage of cases that remain pending before the MDL– as of this writing, there remain over 7,000 – or in other federal and state courts across the country. And unlike the infancy of PFAS litigation, the cases are no longer limited to PFAS manufacturers but also extend to those that use PFAS-containing products. One case that PFAS practitioners are closely following is a pending appeal in the Fourth Circuit, in which 3M is challenging the remand of lawsuits filed by Maryland and South Carolina to state court on the grounds that the federal officer removal statute applies because 3M supplied AFFF to the U.S. military. In August, the Seventh Circuit rejected this argument in a case where the State of Illinois excluded AFFF from its claims against 3M. This and other decisions like it have led some plaintiffs to plead their cases to likewise expressly disclaim relief for contamination or injury related to AFFF to avoid an assignment to the federal MDL. Because the Fourth Circuit is where the MDL itself sits, the pending decision an important one to watch.

In addition to cost recovery cases being filed by state and local governments, we are continuing to see consumer class actions involving the PFAS content of many commonly used consumer products, the latest of which include smartwatch bands and candy wrappers, as well as personal injury litigation, which is expected to grow as the list of such products expands. And of course, this year is expected to be a significant one for federal rulemaking challenges, including EPA's April 2024 establishment of new drinking water limits for PFAS and the addition of PFOA and PFOS to the list of hazardous substances under CERCLA. It is inherently difficult to predict how the pending federal rulemaking challenges will be resolved given the demise of *Chevron* deference to agency actions, or how and to what extent the Trump administration will pursue a roll back of the Biden administration's PFAS regulatory efforts. That said, it is all but certain that PFAS tort litigation is here to stay.

Supreme Court Decisions

Shoshana (Suzanne Ilene) Schiller, Esq. and Wesley S. Stevenson, Esq.

The past year was a busy one for followers of decisions by the United States Supreme Court that impact environmental and energy laws and policies, and the current session has already provided, and is likely to continue to provide, more opinions of significance.

Sheetz v. County of El Dorado, California

On April 12, 2024, in *Sheetz v. County of El Dorado, California*, 601 U.S. 267, 144 S.Ct. 893, 218 L.Ed.2d 224 (2024), the Supreme Court unanimously held that county-level legislation that imposes conditions on the issuance of building permits may amount to a taking under the Constitution's Fifth Amendment when the conditions do not have an "essential nexus" to the government's land use interest and a "rough proportionality" to the proposed development's impact on that interest. In the case at bar, the issue was traffic impact fees, but the ruling is applicable well beyond that scope. For example, a court in New York recently invalidated a zoning requirement that conditioned conversion of certain properties from mixed use to residential ones on payment of a fee into an Arts Fund. Thus, we are likely to see similar challenges to various environmental impact and stormwater fees.

Ohio, et al. v. Env't Prot. Agency

In a 5-4 decision, a divided Supreme Court stayed the enforcement of the EPA's Federal Implementation Plan (FIP) to effectuate the Clean Air Act's good neighbor provision, holding that it was likely the Petitioners would prevail on the merits as EPA's failure to reasonably explain the emission control measures set to be used in upwind states to improve ozone levels in downwind states rendered the FIP arbitrary and capricious. *Ohio et al. v. Env't Prot. Agency*, 603 U.S. 279, 144 S. Ct. 2040, 219 L. Ed. 2d 772 (2024). The Court reasoned that EPA's FIP rested on the assumption that all upwind states would adopt emission-reduction measures to ensure effective downwind air quality improvements. EPA, however, failed to reasonably explain if the FIP would be operable if some upwind states fell out of the plan. Although the ruling only stayed enforcement of the FIP, particularly in light of the incoming administration's intention to reduce regulatory burdens, it is unlikely that the FIP will survive further review.

Loper Bright Enterprises v. Raimondo

On June 28, 2024, the United States Supreme Court decided *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2247, 219 L. Ed. 2d 832 (2024), overruling *Chevron U.S.A., Inc. v. Natural Resources Defense Council* to the extent that the earlier decision had instructed federal courts to defer to agencies' reasonable interpretations of ambiguous statutes. In the 6-3 decision, the Court's conservative majority interpreted the Administrative Procedure Act to foreclose such deference. Thus, for example, in *United States Sugar Corp. v. Env't Prot. Agency*, 113 F.4th 984, 1002 (D.C. Cir. 2024), the Court partially set aside a 2022 rule promulgated under the Clean Air Act, relying on *Loper Bright* to hold that EPA misinterpreted the Clean Air Act's definition of "new source."

Corner Post, Inc. v. Board of Governors of the Federal Reserve System

While the Court in *Loper Bright* stated that its decision did not necessarily "call into question prior cases that relied on the *Chevron* framework," the ruling in *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 144 S. Ct. 2440, 219 L. Ed. 2d 1139 (2024) effectively did just that. In *Corner Post*, the Supreme Court held that the six-year statute of limitations for challenging a final agency action under the Administrative Procedure Act runs not from the time of the action but instead when the plaintiff first suffers harm. Thus, the Court allowed a 2018 facial challenge to a 2011 rule because the plaintiff was not subject to the rule (and in fact didn't even exist) when the rule was promulgated. Practically speaking, this allows agency rules to be facially challenged at almost any time as long as there is a party who was only affected by it within the preceding six years.

SEC v. Jarkesy

In *SEC v. Jarkesy*, 144 S. Ct. 2117, 219 L. Ed. 2d 650 (2024), the United States Supreme Court held that the SEC's imposition of civil penalties administered to punish or deter conduct entitled the defendant to a jury trial under the Seventh Amendment, upholding a decision from the Fifth Circuit that vacated a decision by an administrative law judge imposing a $300,000 penalty for certain SEC violations. As *Jarkesy* relied in part on a 1987 case in which the Court found a right to a jury trial for certain civil penalties under the Clean Water Act, *Tull v. United States*, 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365, it can reasonably be expected that this decision will have similar implications for other penalties assessed under other environmental laws.

Cases to be Decided – 2024-25 Term

City and County of San Francisco v. Environmental Protection Agency (No. 23-753)

The issue presented in *City and County of San Francisco* is whether the Clean Water Act allows imposition of generic prohibitions in NPDES permits that subject permit-holders to enforcement for violating water quality standards without identifying specific limits to which their discharges must conform. In the permit at issue, San Francisco is prohibited from discharges that "cause or contribute" to pollution in the ocean. The Supreme Court heard oral argument on the case on October 16, 2024. Based on questioning at argument and the conservative composition of the Court, the narrative limitations may be invalidated, possibly on the ground that they are too ambiguous to give regulated parties notice of conduct that would lead to a violation.

Seven Cnty. Infrastructure Coalition v. Eagle Cnty., Colorado (No. 23-975)

In *Eagle County*, the Court will decide whether NEPA requires an agency to study environmental impacts beyond the proximate effects of the action at issue if those effects go beyond the agency's regulatory authority. Presently, there is a Circuit split with respect to this issue, with the Third, Fourth, Sixth, Seventh, and Eleventh Circuits holding that agency review is limited, while the Second and D.C. Circuits have held that agency review is broader and should include all effects that are reasonably foreseeable. Thus far, the United States' position in the litigation has been consistent with this latter, broader view, but we anticipate this may shift following the change in presidential administration this month. However, oral argument in the case took place on December 10, 2024. It will be interesting to see the scope of the Justices' ruling in the case, in particular whether the Court decides to issue a new or modified test to resolve how agencies should implement their NEPA responsibilities and evaluate the "effects" of proposed actions.

Environmental Protection Agency v. Calumet Shreveport Refining, LLC (No. 23-1229) &
Oklahoma v. Environmental Protection Agency (No. 23-1067)

In these two cases, the Supreme Court is set to take up whether the D.C. Circuit is the proper venue for EPA actions under the Clean Air Act that may be "nationally applicable" or are "based on a determination of nationwide scope or effect" (*Calumet Shreveport Refining*) and EPA actions taken with respect to a single state that affect other states or regions because EPA has claimed to use a consistent analysis for the issue (*Oklahoma*). The cases were consolidated in October and briefs of petitioners and amici were filed earlier this month. Respondents' briefs are due on January 17, 2025.

Diamond Alternative Energy LLC v. Environmental Protection Agency (No. 24-7)

The issue before the Court in *Diamond Alternative Energy* is a prudential one: whether a party may

establish the redressability component of Article III standing by relying on the coercive and predictable effects of regulation on third parties. This issue arises out of automobile fuel producers' challenge to EPA's waiver to California to set its own emissions standards for new motor vehicles under Section 209 of the Clean Air Act. The fuel producers argued that the waiver was improper under the statutory text, but the D.C. Circuit rejected their challenge before reaching the merits, concluding that their alleged injury was not redressable because they had failed to link vacating EPA's waiver with any effect on automobile manufacturers. The Court granted the Petition with respect to this redressability question only on December 13, 2024.

Pending Petitions for Certiorari

Port of Tacoma v. Puget Soundkeeper Alliance (No. 24-350)
The issue presented by this petition is whether Section 505 of the Clean Water Act authorizes citizens to invoke the federal courts to enforce conditions of state-issued pollutant-discharge permits adopted under state law that mandate a greater scope of coverage than required by the Act. Below, the Ninth Circuit held that Section 505 did authorize enforcement in the Article III courts, even those adopted under broader state-law authority, a holding that is in conflict with the Second Circuit's determination with respect to the Act's citizen-suit provision. The petition was distributed for the Court's conference on January 10, 2025.

Protect Our Parks v. Buttigieg (No. 24-311)
This petition seeking review of a Seventh Circuit decision presents a number of issues for review arising out of the planned development of areas of Jackson Park in Chicago, located next to Lake Michigan, for the Obama Presidential Center. At its core, the petition raises whether the planned project is a major federal action under NEPA, though it also raises issues of agency deference after *Loper* Bright. The petition was distributed for the Court's conference on January 10, 2025.

AIR:
EPA Finalizes Toughest Emission Standards to Date for Large Volatile Organic Liquid Storage Vessels

Katherine L. Vaccaro, Esq.

EPA finalized updates to the New Source Performance Standards for Volatile Liquid Storage Vessels (Including Petroleum Liquid Storage Vessels) in October 2024, and the new rule is already in effect. The new standards, codified at 40 C.F.R. Part 60, Subpart Kc ("Subpart Kc"), include a number of key differences from Subpart Kc's predecessor rule, Subpart Kb. In terms of applicability, Subpart Kc has the potential to sweep in many more storage tanks than Subpart Kb, because Subpart Kc lowers the maximum true vapor pressure (TVP) applicability threshold from 2.2 psia for tanks between 20,000- and 40,000-gallons and 0.5 psia for 40,000-gallon or more tanks, to 0.25 psia for all 20,000-gallon or more tanks. If a tank exceeds the TVP applicability threshold, it will become subject to Subpart Kc if it was constructed, modified, or reconstructed after October 4, 2023. And while the meaning of construction and reconstruction is effectively the same as under Subpart Kb, EPA's interpretation of what it means to "modify" a tank under Subpart Kc dispenses with the agency's longstanding regulatory approach that a storage vessel cannot be "modified" merely by changing the type of liquid being stored without making any physical changes to the tank. Instead, under Subpart Kc, a tank is "modified" if the liquid being stored is changed to a volatile organic liquid (VOL) that has a maximum TVP that is higher than all the VOLs historically stored in or

permitted for the tank. New Source Performance Standards do not typically refer to a source's air permit as a basis for triggering applicability or otherwise.

In addition to lowering the applicability thresholds, Subpart Kc lowers the maximum TVP thresholds above which emission controls are required. Tanks between 20,000- and 40,000-gallons storing liquids with maximum TVP of 1.5 psia or more, and 40,000-gallon or more tanks storing liquids with maximum TVP of 0.5 psia or more, are required to install either a floating roof or a closed vent system that routes emissions to a control device. Under Subpart Kb, the maximum TVP thresholds above which storage vessels need to be equipped with controls are materially higher, i.e., less stringent. As context, the Subpart Kc 1.5 psia threshold for the largest tanks is even lower than the parallel provision applicable to refinery-specific tanks pursuant to the National Emission Standards for Hazardous Air Pollutants under 40 C.F.R. Part 63. Part 63 emission standards are often the most stringent for any particular source category, because they are intended to force the maximum emission reductions achievable through the application of control technology. Additional standards under Subpart Kc extend to tank rim seals and deck fittings, distillate flushing to reduce liquid volatility during roof landing or tank cleaning, and lower explosive limit monitoring, among others.

Subpart Kc took effect upon promulgation in October 2024, but it applies retroactively to storage vessels constructed, modified, or reconstructed after October 4, 2023. Industrial facility owners and operators should take a close look at the final regulation to determine how their tanks may be affected Subpart Kc, irrespective of the units' regulatory status under Subpart Kb. Note, however, that because Subpart Kc was finalized with fewer than 60 days remaining in the 2024 Congressional session, the new Congress can void Subpart Kc in its entirety simply by approving a joint resolution of disapproval in accordance with the Congressional Review Act. As such, the implications of Subpart Kc could be short-lived.

Proposed New Source Performance Standards for Stationary Combustion Turbines

Katherine L. Vaccaro, Esq. and Natalia P. Teekah, Esq.

On December 13, 2024, the Environmental Protection Agency issued a proposal to strengthen the New Source Performance Standards (NSPS) for large stationary combustion turbines (CTs) with a designed base load rating equal to or greater than 10.7 gigajoules per hour/10 million Btu per hour based on the higher heating value of the fuel. If finalized, the proposal would be codified at 40 C.F.R. Part 60, Subpart KKKKa ("Proposed Subpart KKKKa"). Proposed Subpart KKKKa would apply to affected sources that are constructed, modified, or reconstructed after December 13, 2024. EPA is accepting comments on Proposed Subpart KKKKa through March 13, 2025.

The most significant provisions of Proposed Subpart KKKKa would require constructed or reconstructed CTs across most size and capacity subcategories to achieve meaningful reductions in emissions of oxides of nitrogen (NOx) by operating selective catalytic reduction (SCR) in combination with combustion controls. Within each size-based subcategory, there are individual NOx standards for both natural gas and non-natural gas fuels. The proposed SCR requirement flows from EPA's determination that SCR now represents the best system of emission reduction (BSER) for NOx, whereas the current NSPS for stationary CTs codified at Subpart KKKK impose NOx limits based only on the use of wet and dry combustor controls. The distinct BSER determinations for Subpart KKKK and Proposed Subpart KKKKa parallel the different approaches to subcategorizing affected sources under the two regulations – i.e., one

final and one proposed. More stringent NOx standards are also proposed for modified CTs. Proposed Subpart KKKKa would maintain the current Subpart KKKK-imposed emission standards for sulfur dioxide (SO2), however, as EPA determined that the use of low-sulfur fuels remains BSER for SO2.

Distinct from the proposed substantive standards, the preamble to Proposed Subpart KKKKa provides some helpful information regarding how to determine whether a stationary CT is "reconstructed" thereby triggering NSPS applicability. Historically, this question has caused some consternation among CT owners and operators because it is often unclear what CT-related equipment comprises the "facility" for purposes of performing the "reconstruction" calculation. Every NSPS applicability analysis requires a comparison of the fixed capital cost of the proposed new equipment components to the fixed capital cost of a comparable entirely new "facility." But while the comparison is relatively straightforward for most affected source categories, it can be difficult for CTs for which the scope of the "facility" definition – on its face at least – is materially different between the two NSPS regulations for CTs that are currently on the books, NSPS Subpart GG and Subpart KKKK. The new preamble language clarifies that if a source owner/operator intends to replace only the components of the CT engine, then the total fixed capital cost of such components should be compared to the fixed capital cost of only an entirely new CT engine – not the combined fixed capital cost of an entirely new CT engine and the ancillary equipment listed in the broader "facility" definition in existing Subpart KKKK, including notably but not limited to, equipment comprising the heat recovery steam generator.

Of course, we won't know for some time whether Proposed Subpart KKKKa will be finalized by a Trump-led EPA, but with increasing electricity generation and distribution challenges largely driven by demand spikes from AI and large data centers, the new administration might not want to further burden CT facilities. Either way, the Proposed Subpart KKKKa preamble offers some guidance on how to perform the reconstruction analysis for CTs under Subpart KKKK that was previously lacking. If Proposed Subpart KKKKa is ultimately finalized, the same guidance will be similarly helpful.

Clean Air Act Risk Management Program Rule and Predictions for 2025

Kelly A. Hanna, Esq. and Michael C. Nines, P.E., LEED AP

On March 11, 2024, EPA promulgated updates to the Clean Air Act Risk Management Program (RMP). *See Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Safer Communities by Chemical Accident Prevention* (Final RMP), 89 Fed. Reg. 17622 (Mar. 11, 2024). This finalization was one of several that has occurred between changing presidential administrations since 2017, and marked the Biden administration's attempt to strengthen the RMP requirements for facilities that use extremely hazardous substances. Perhaps most notable was the inclusion of a requirement to consider ''natural hazards," defined as "meteorological, environmental, or geological phenomena that have the potential for negative impact, accounting for impacts due to *climate change*," during hazard evaluations. Other noteworthy revisions among several include the safer technologies and alternatives analysis, third-party compliance audits, and root cause analysis incident investigation.

Since its finalization, the Final RMP has been the subject of several challenges. On May 9, 2024, several States filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit ("Court" or "D.C. Circuit") and were assigned case number 24-1125. A day later, a coalition of industry members collectively referred to as the "RMP Coalition" filed a separate petition for judicial review in the D.C. Circuit and simultaneously petitioned EPA to reconsider the Final RMP. The D.C. Circuit consolidated

both cases under case number 24-1125. On July 30, 2024, the Court granted the parties' joint motion to hold the litigation in abeyance pending EPA's reconsideration of the Final RMP and stipulated that the parties "file motions to govern within 10 days of [EPA's] ruling on the pending motion for reconsideration or by December 6, 2024, whichever occurs first." On December 18, 2024, the Court extended the abeyance period by 90 days and ordered the parties to file motions to govern future proceedings by March 6, 2025.

On December 30, 2024, EPA formally denied the RMP Coalition's petition for reconsideration in a final rule published in the Federal Register. *See Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Safer Communities by Chemical Accident Prevention; Final Action on Petition for Reconsideration*, 89 Fed. Reg. 106479 (Dec. 30, 2024). Given this outcome, the RMP Coalition can reasonably be expected to file motions to govern further proceedings and lift the abeyance in case number 24-1125 by or before March 6, 2025. For now, the Final RMP remains effective, but the fight over it is likely to continue into 2025.

HAZARDOUS SUBSTANCES and REMEDIATION:
Rules Regarding Remediation of PFAS Under CERCLA And RCRA Advanced in 2024, but 2025 Fate Uncertain

Todd D. Kantorczyk, Esq. and Technical Consultant Will Hitchcock

In 2024, the Biden administration advanced rules designed to use CERCLA and RCRA cleanup authority to address PFAS impacts to soil and groundwater. While it is widely expected that the Trump administration will seek to undo many of the environmental policies of the Biden administration, whether the new remediation rules addressing PFAS will be reversed is more uncertain.

Most notably, EPA's final rule designating PFOA and PFOS as hazardous substances under CERCLA became effective on July 8, 2024. In addition to triggering remediation obligations and allowing for recovery of cleanup costs, the designation established a release reporting threshold of one pound for each of these substances. An EPA enforcement memo released in April 2024 indicated that enforcement efforts would target PFAS manufacturers and users, and not municipal entities. Not surprisingly, however, various industry groups challenged the rule in the D.C. Circuit, with the industry briefs filed the day before the election.

In addition to the seven PFAS (PFBS, PFHxS, PFNA, HFPO-DA, PFBA, PFHxA, and PFDA) identified in EPA's April 2023 Advanced Notice of Proposed Rulemaking, EPA proposed another pair of rules to add nine PFAS compounds as hazardous constituents under RCRA, and amending the definition of hazardous waste as it relates to releases from permitted treatment, storage, and disposal facilities (TSDFs) in February 2024. These rules, if finalized, would require TSDFs engaged in RCRA corrective action to investigate and, if necessary, remediate PFAS releases, and is an important regulatory precursor to designating wastes containing PFAS compounds as RCRA hazardous wastes.

The fate of these PFAS remediation rules in 2025 is uncertain. We expect that EPA will seek a stay of the pending D.C. Circuit challenge while the Trump administration formulates its own policy regarding PFAS and CERCLA. At the same time, the previous Trump administration at times touted its proactive use of CERCLA for brownfields cleanups. Accordingly, these recent PFAS remediation rules may not be rolled back in the next Trump administration.

WATER:

EPA Proposes Significant Changes to List of Approved Methods for Analyzing Effluent under the Clean Water Act, Including PCB and PFAS Methods

Brenda H. Gotanda, Esq., and Technical Consultant Michael C. Nines, P.E., LEED AP

In the flurry of rulemaking occurring in the waning days of the Biden administration, U.S. EPA signed a proposed rule on December 6, 2024, to update the testing procedures known as methods that are approved for use in analyzing and characterizing pollutants in wastewater and surface waters under the Clean Water Act (CWA). If finalized, this proposed rulemaking would change the test methods that could be used for sampling and analysis of pollutants under the National Pollutant Discharge Elimination System (NPDES) permit program, including for polychlorinated biphenyls (PCBs) and per- and polyfluoroalkyl substances (PFAS). The proposed rule, called the Clean Water Act Methods Update Rule 22 for the Analysis of Contaminants in Effluent (MUR 22), would be the latest update to the list of approved CWA methods in 40 C.F.R. Part 136. Written comments on the proposed MUR 22 rulemaking will be due 30 days after publication in the Federal Register.

EPA's proposed MUR 22 would add three new EPA analytical methods to Part 136:

- **EPA Method 1628 -** a method capable of measuring 209 PCB congeners
- **EPA Method 1633A** - a method capable of measuring 40 PFAS compounds
- **EPA Method 1621**- a method capable of measuring adsorbable organic fluorine

The MUR 22 proposal would also remove from Part 136 seven PCB Aroclor mixtures (1016, 1221, 1232, 1242, 1248, 1254, and 1260) and their approved test methods. EPA believes that PCBs in the environment may no longer resemble their original Aroclor formulations due to weathering and that the Aroclor methods may be underestimating the actual presence of PCBs. As such, EPA is proposing to replace the Aroclor-based methods with EPA Method 1628, which can detect 209 individual PCB congeners or groups of co-eluting congeners. EPA relies upon its 2021 multi-laboratory study report to support the approval of this proposed new method. On its website, EPA has explained that Method 1628 was developed to meet the following goals: (i) identify and quantify PCBs using individual congeners rather than Aroclors, (ii) be more sensitive than approved Method 608.3, but not so sensitive that it is susceptible to background contamination issues, and (iii) can be implemented at a typical mid-sized full-service environmental laboratory. Issues of background contamination, high sensitivity, and laboratory accuracy have been common criticisms of EPA's other unapproved method for PCB congener analysis known as Method 1668C. At least one study published in 2024 has raised some questions regarding the accuracy and reliability of EPA Method 1628.

If finalized, these proposed changes to approved PCB methods may impact all dischargers with PCB limits or monitoring requirements in their NPDES permit as EPA anticipates that permitting authorities will require use of the new method upon permit renewal. It may also impact dischargers subject to PCB TMDLs in that new, more sensitive test methods could be required for PCB monitoring.

As indicated above, MUR 22 proposes to add Method 1633 to test for 40 PFAS substances in wastewater and seven other types of media and to add Method 1621 to test for adsorbable organic fluorine. Approval

of these methods through finalization of MUR 22 will support the much-anticipated Organic Chemicals, Plastics, and Synthetic Fibers (OCPSF) Effluent Limitations Guidelines and Standards (40 CFR part 414) rulemaking to address PFAS discharges from facilities manufacturing PFAS. Since the first draft version of Method 1633 was publicly- released in 2021, the method has undergone multiple rounds of comments and revisions as well as a multi-laboratory validation study led by the Department of Defense in collaboration with EPA. EPA has stated that comments received from interested parties have resulted in many changes reflected in the proposed final method and that the validation study was used to add formal performance criteria to the method. EPA believes approval of these methods will assist the regulated community by improving the consistency in analysis of parameters.

EPA has also included in MUR 22 several other updates to the list of approved methods in Part 136. Among other things, it is proposing to withdraw several outdated methods; add methods previously published by voluntary consensus standard bodies for PFAS analytes, peracetic acid and hydrogen peroxide; simplify sampling requirements for two volatile organic compounds; and make a series of minor corrections to existing tables of approved methods.

EPA will accept written comments on the proposed rule for 30 days upon publication of the Federal Register notice. If you have questions concerning the proposal or are seeking assistance in preparing comments, please contact Brenda Gotanda or Mike Nines.

EPA Invites Comment on Proposed 2026 Multi-Sector General Permit (MSGP) for Stormwater Associated with Industrial Activities that Includes Requirements for PFAS Monitoring

Brenda H. Gotanda, Esq., and Technical Consultants Michael C. Nines, P.E., LEED AP, and Will Hitchcock

On December 13, 2024, the U.S. EPA published in the Federal Register its proposed 2026 Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (2026 MSGP) and is soliciting public comments through February 11, 2025. Once finalized, the 2026 MSGP is targeted to replace the existing 2021 MSGP (by February 28, 2026) and would cover stormwater discharges from industrial facilities in areas where EPA is the NPDES permitting authority. Importantly, the 2026 MSGP will likely serve as a guide for other NPDES permitting authorities in developing their own industrial stormwater permitting programs as it has in prior years. The proposed 2026 MSGP contains, among other things, a number of notable updates, including: (i) quarterly stormwater indicator monitoring for per- and polyfluoroalkyl substances (PFAS) for numerous industrial sectors; (ii) new benchmark monitoring for pH, Total Suspended Solids (TSS), Chemical Oxygen Demand (COD), ammonia, nitrate, nitrite, and metals for various industrial sectors; (iii) changes to the benchmark monitoring schedule; and (iv) new monitoring and response measures for pollutants causing impaired waters.

With respect to PFAS indicator monitoring, quarterly sampling requirements would apply to all operators in over 20 different industrial sectors, including those which may not traditionally be thought of with respect to PFAS, such as Land Transportation and Warehousing. Importantly, EPA is proposing that PFAS indicator monitoring apply to all 40 PFAS compounds listed in EPA's newly updated Method 1633A (December 2024). EPA's Fact Sheet explains that the PFAS indicator monitoring is a "report-only" requirement, does not have a benchmark threshold or baseline value for comparison, nor does it require follow-up corrective

actions if PFAS is detected in stormwater effluent. EPA states that the PFAS data is being collected to provide EPA and facility operators with a baseline understanding of PFAS in stormwater and may be used by EPA to inform future consideration of potential PFAS benchmark monitoring for sectors with the potential to discharge PFAS in stormwater. EPA's proposal to require quarterly sampling for 40 PFAS compounds by all listed sectors will likely warrant comment from potentially impacted industrial sectors.

If you are interested in understanding how the 2026 MSGP may impact your industrial operations or would like assistance in submitting comments on the proposed 2026 MSGP, please contact Brenda Gotanda or Technical Consultants Will Hitchcock or Mike Nines of our firm.

Water Quality Standards Handbook Updates

Michael Dillon, Esq. and Kelly A. Hanna Esq.

The U.S. Environmental Protection Agency's (EPA) Water Quality Standards (WQS) Handbook provides a "one-stop resource to facilitate nationally consistent interpretation of the WQS regulations under the Clean Water Act, located at Title 40, Part 131 of the Code of Federal Regulations." On December 12, 2024, EPA issued draft updates to Chapters 2 and 4 of the WQS Handbook on Designated Uses and Antidegradation, respectively. EPA also published a new draft chapter on WQS Variances. Some variation of these draft revisions will likely be finalized in 2025.

Under the Clean Water Act, and 40 C.F.R. § 131.3(i), WQS are defined as "provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses." WQS also include a third component, the antidegradation policy, which provides a framework for maintaining and protecting water quality that already has been attained. 40 C.F.R. § 131.14 includes variance provisions, wherein states, territories, and authorized Tribes may make incremental improvements to water quality despite not being able to attain a designated use for a period of time.

With respect to Chapter 2 on Designated Uses, EPA's revisions include the following: (1) clarification on how to articulate the intended designated uses of waterbodies; (2) outline of procedures for assigning new designated uses, modifying existing uses, or removing designated uses that are not attainable to waterbodies; (3) procedures for protection of downstream uses through applicable criteria; and (4) recommendations on how to reassess designated uses to reflect current conditions and data through Use Attainability Analyses.

The draft revisions in Chapter 4, pertaining to Antidegradation Requirements, attempt to provide clarification and guidance on: (1) utilizing the various tiers of antidegradation protection; (2) developing antidegradation policy; and (3) considerations for implementing an antidegradation implementation method. EPA also has added a new draft chapter relating to the process for seeking a WQS Variance under 40 C.F.R. 131.14, which is a "tool that provides time to states, territories, and authorized Tribes to incrementally improve water quality when and where the designated use and associated criterion are shown to be unattainable for a period of time." This is different from a Use Attainability Analysis, which is used to show that a designated use ultimately cannot be attained. A Variance nonetheless ensures that the protections provided by all other criteria related to the underlying designated use are maintained and the underlying goal remains in place.

The comment period for these draft revisions closes on March 12, 2025. EPA is holding three separate informational webinars on the following dates: February 4, 2025 (noon - 2:00 pm ET) for the general public; February 4, 2025 (2:30 - 4:30pm ET) for States and U.S. territories only; and February 6, 2025, (noon – 2:00 pm ET) for Tribes only.

OSHA:

Expect a Leaner and More Focused OSHA under Trump

Jill Hyman Kaplan, Esq. and Brandon P. Matsnev, Esq.

The incoming Trump administration has been relatively quiet about its vision for OSHA over the next four years. While some are ringing the death knell for the agency, that reaction may not be justified. OSHA was fully operational in Trump's first term, even issuing several new regulations and national emphasis programs. Moreover, OSHA initiatives are often driven by unions, and Trump is coming into office with significant union support. That said, we do expect an OSHA scale back.

The first is, simply put, less funding. The Trump team has indicated that it intends to reduce dramatically the size and scope of the federal government, and its sights are set on federal agencies. The proposed Department of Government Efficiency promises to enact widespread budget and staffing cuts across the government. If that mission is realized, OSHA may be particularly vulnerable to budget cuts. As we have previously noted, the Biden administration made a concerted effort to increase the number of inspectors at the agency, which had dropped to historic lows when Biden entered office. For those looking to cut the budgets of federal agencies, the budgets that have increased in the last few years could be a logical place to start. For OSHA, fewer funds would necessarily mean fewer inspectors, which in turn would mean fewer inspections and citations.

It also is possible that recent proposed OSHA regulations that have not yet been issued in final form, for example the new hazardous heat regulations, could be withdrawn. While any recently proposed regulations are at risk of withdrawal, the heat rule is at risk for two unique reasons. The first is that in regulatory filings, the rule was justified by rising heat due to climate change. This could draw the attention of the Trump team, which has signaled it will seek to eliminate climate-focused initiatives introduced under Biden. The second is that without the rule, OSHA can still address hazardous heat issues under its General Duty Clause, which is how OSHA has dealt with these issues historically. Industry has argued that OSHA's authority under the General Duty Clause is sufficient to deal with hazardous heat. With its goal of cutting red tape, the new administration could be receptive to that argument.

While OSHA may face scale backs under the Trump administration, the agency is not going away and neither will inspections, citations, or fines. As a result, employers should continue to ensure workplace safety and full compliance with all OSHA regulations currently on the books.

OIL AND GAS:

Trump Administration Poised to Reverse Direction on Oil & Gas Industry Regulation

Todd D. Kantorczyk, Esq. and Kelly A. Hanna, Esq.

Though the Biden administration advanced rules regarding the oil and gas industry over the last four years, the incoming Trump administration is likely to undo or take a different approach to many of these actions.

One of the most notable actions taken by the Biden administration was the finalization of the Methane Rule, which revised New Source Performance Standards (NSPS) for Crude Oil and Natural Gas facilities under 40 C.F.R. Part 60, subparts OOOO, OOOOa, and OOOOb and established presumptive emissions guidelines for existing facilities under subpart OOOOc. The regulations, which went into effect on May 7, 2024, reinstated methane-specific rules that were rescinded during the first Trump administration, strengthened leak detection and repair requirements for fugitive emissions, and restricted the use of natural gas flaring. The rule also established a new Super Emitter Program, whereby certified third parties may monitor methane emissions using advanced measurement technologies such as aerial or satellite technologies and report events emitting greater than 100 kilograms of methane per hour to EPA. Owners and operators in the vicinity must then investigate and address the cause of the event and report the results to EPA. The regulations, including the Super Emitter Program, are currently being challenged by certain states and industry groups but the Supreme Court recently denied a request to stay the rules while the litigation is pending. It is doubtful, however, that the Trump administration will devote resources towards defending or enforcing the Methane Rule and instead will more likely work to reinstate the standards favored by the first Trump administration. Of course, these actions will likely spawn their own wave of litigation, raising additional uncertainty as to status of methane regulation of the oil and gas industry in 2025.

In addition to the NSPS, in November 2024 EPA finalized a rule to collect a Waste Emissions Charge from certain oil and gas sources that emit methane at levels greater than 25,000 metric tons of carbon dioxide per year. Republican leaders in Congress have stated that they intend to repeal this rule, either through the Congressional Review Act or legislation to address the Inflation Reduction Act, the statute that gives EPA authority to impose the charge.

Many also believe that the Trump administration will lift the current pause on licenses to export liquified natural gas (LNG) to countries without Free Trade Agreements (FTAs), though a recent study issued by the Department of Energy (DOE) could delay such approvals. In January 2024, the Biden administration paused approvals for LNG exports to countries without FTAs with the U.S., pending updated economic and environmental studies by the DOE that would be used to determine whether such exports are "consistent with the public interest," as required by the Natural Gas Act. On December 17, 2024, DOE published this updated study, which included a number of key findings related to greenhouse gases, and environmental and community effects that could make it more difficult for applicants to argue that an export license is consistent with the public interest. So, while incoming President Trump has promised to approve LNG export licenses on his "very first day back," any hastened approvals may be subject to challenge under the Natural Gas Act, citing the recently published DOE study.

Other oil and gas initiatives of the Biden administration that may be on the chopping block for the Trump administration include green energy credits and electric vehicle tax credits. In addition, the Trump

administration has also voiced its intent to shrink the size of national monuments to allow more drilling and mining on public lands.

Marcellus Shale a New Potential Source of Domestically Produced Lithium

Diana A. Silva, Esq. and Technical Consultant Darryl D. Borrelli

It has been 20 years since the discovery that the Marcellus Shale formation beneath Pennsylvania and nearby states could support the nation's natural gas needs well into the future. Now, another exciting discovery will potentially place Pennsylvania at the national energy forefront again. According to data assembled by researchers at the National Energy Technology Laboratory (NETL), produced water from Marcellus Shale gas wells could supply up to 40 percent of the country's demand for a critical element, lithium, which is a key component of rechargeable batteries that power a wide range of electronic devices, including smartphones, computers, and electric vehicles. Additionally, although not the focus of the NETL research, other critical elements, such as strontium and cobalt, are also known to be present in fracking production water.

While many questions exist about the efficiency and environmental ramifications of extracting lithium and other critical elements from Marcellus Shale production water, requirements of the Infrastructure Investment and Jobs Act to source the raw materials used in EV battery components domestically by 2030, and the expected focus of the Trump administration to rely more heavily on domestic sources of energy, may spur the research needed to further develop necessary innovations. Look for the domestic sourcing of energy and critical resources to be a focus of onshoring industries over the next four years.

OTHER FEDERAL ISSUES

2024 TSCA Review

Carol F. McCabe, Esq. and Reilly Wright, Esq.

TSCA Existing Chemicals Evaluation

In final year of the Biden administration, EPA undertook a substantial amount of regulatory activity under the Toxic Substances Control Act (TSCA), especially in last month of 2024, leaving various proposed and final rules for the incoming Trump Administration to implement or reconsider. Under TSCA Section 6(b), EPA published rules and regulations to assess and manage existing chemical substances in each of the three steps of TSCA's Existing Chemical Evaluation Process: prioritization, risk evaluation, and risk management.

Prioritization

On December 18, 2024, EPA announced that it is initiating the 12-month prioritization process to determine whether five chemicals are either high- or low-priority: 4-tert-Octylphenol, Benzene, Ethylbenzene, Napthalene, and Styrene. TSCA Section 6(b) requires EPA, in the prioritization stage, to designate chemicals as either high-priority or low-priority for risk assessments based on potential hazards to human health and the environment. If the chemical is considered a high-priority substance, EPA must begin the risk evaluation process and applicable public comment periods. Also on December 18, 2024, EPA finalized five chemical substances as high-priority, leaving the responsibility of conducting risk assessments of these

chemicals to the incomingTrump administration: Acetaldehyde, Acrylonitrile, Benzenamine, Vinyl Chloride, and 2-Chloroaniline (MBOCA).

Risk Assessment

In 2024, the Biden administration instituted major changes to EPA's TSCA risk assessment procedures for existing chemicals. As required by the 2016 TSCA amendments, the former Trump administration promulgated a final rule titled, *Procedures for Chemical Risk Evaluation Under the Amended Toxic Substances Control Act*, ("the 2017 Risk Evaluation Rule"). From 2020-2021, EPA finalized ten chemical risk evaluations following the 2017 Risk Evaluation Rule, which allowed EPA the discretion to issue individual risk evaluations for each condition of use of a chemical substance. During the Biden Administration, EPA withdrew these risk evaluations and announced various policy changes to the TSCA risk assessment procedures. One important policy change, informally referred to as "the whole chemical approach," requires EPA to assess all conditions of use in a single risk determination for the chemical rather than evaluating individual conditions of use separately, for purposes of whether a chemical poses an unreasonable risk.

In May 2024, the Biden Administration published its own final rule, *Procedures for Chemical Risk Evaluation Under the Toxic Substances Control Act (TSCA)* ("2024 Risk Evaluation Rule"), codifying the Administration's single risk determination approach. Other major policy changes codified in the 2024 Risk Evaluation Rule include the removal of the definitions for "best available science" and "weight of scientific evidence" from the prior rule and the addition of "overburdened populations" to the list of "potentially exposed or susceptible subpopulations" that EPA must consider in its evaluations. Additionally, EPA will no longer assume the use of personal protective equipment (PPE) for workers, to avoid underestimating the risks of occupational chemical exposures. The 2024 Risk Evaluation Rule also expands the scope of risk assessments by requiring EPA to analyze chemical exposure pathways that are already addressed by other statutes, such as the Resource Conservation and Recovery Act (RCRA), the Clean Air Act (CAA), the Clean Water Act (CWA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

Over the past year, EPA published four final chemical risk evaluations using procedures from the 2024 Risk Evaluation Rule: Tris(2-chloroethyl) phosphate (TCEP) (September 2024), Asbestos Part 2 (November 2024), 1,4-dioxane (November 2024), Formaldehyde (December 2024). Actions taken to manage the risks associated with these chemicals will be the responsibility of the Trump administration.

Risk Management Rules

As required by TSCA Section 6(b), EPA issued various risk management rulemakings to address unreasonable risks to health and the environment established through EPA's risk assessments. In 2024, EPA published final risk management rules for five of the first ten chemicals that the 2016 TSCA Amendments required EPA to evaluate: Asbestos Part 1 (March 2024), Methylene Chloride (April 2024), Carbon Tetrachloride (CTC) (December 2024), Perchloroethylene (PCE) (December 2024), and Trichlorethylene (TCE) (December 2024). These final rules either partially or wholly ban uses of the chemicals and implement enhanced workplace protections for industries engaged in exempted ongoing uses. The rules for Methylene Chloride and Asbestos Part 1, published in the spring of 2024, already face challenges filed in federal court, with oral arguments yet to be scheduled. The most recent rules for CTC, PCE, and TCE, published in mid-December 2024, are likely to face similar legal challenges in the near future. The Trump administration's response to these rules and their legal challenges remains to be seen; the new administration may decide not to defend the Biden administration's rules in court or move for

voluntary remand so that the EPA may reconsider these rules. It is possible that the Trump administration may also try to delay the implementation of the three most recent rules for CTC, PCE, and TCE, before their effective dates. EPA additionally released three proposed risk management rules in 2024: N-Methylpryrrolidone (proposed June 2024), 1-Bromoproane (proposed July 2024), and C.I. Pigment Violet 29 (proposed December 2024). The incoming Trump administration may reconsider these proposed rulemakings and determine whether they will reach the final rulemaking stage as proposed.

TSCA New Chemicals Program

On December 18, 2024, EPA published a final rule revising its procedures for reviewing new chemicals under TSCA section 5, with the goal of improving the efficiency of the New Chemicals Program. TSCA Section 5 requires EPA to determine whether newly created chemical substances present an unreasonable risk to human health or the environment under known or reasonably foreseen conditions of use. Under the Biden administration, EPA's review of most submissions of new chemicals lasted longer than the statutorily required 90-day review period, creating delays and lack of certainty for regulated industry. This rule takes effect on January 17, 2025.

TSCA Safety Data Reporting Rule

On December 13, 2024, EPA issued a final rule under TSCA Section 8 requiring manufacturers and importers of sixteen chemicals to report data from unpublished health and safety studies to EPA. This rule is intended to inform EPA's decisions under the stages of prioritization, risk evaluation and risk management of chemicals under TSCA. The chemicals subject to this rule include: 2-Chloraniline (MBOCA), 4-tert-octylphenol(4-(1,1,3,3-Tetramethylbutyl)-phenol), Acetaldehyde, Acrylonitrile, Benzene, Bisphenol A, Ethylbenzene, Naphthalene, Vinyl Chloride, Styrene, Tribromomethane, Triglycidyl Isocyanurate, Hydrogen fluoride, N-(1,3-Dimethylbutyl)-N'-phenyl-p-phenylenediamine (6PPD), and 2-anilino-5-[(4-methylpentan-2-yl) amino]cyclohexa-2,5-diene-1,4-dione (6PPD-quinone). These chemicals are of particular interest to EPA because they are either in the process of prioritization as candidates for high-priority designation for risk evaluation or are expected to be candidates in upcoming years.

TSCA Coordination Efforts Between EPA and OSHA

In recognition of the overlapping chemical regulation efforts of EPA and the Occupational Safety and Health Administration (OSHA), in December 2024, the two agencies entered into a Memorandum of Understanding (MOU) that formalized agency coordination efforts under TSCA Section 6. Under this MOU, EPA and OSHA will share information regarding the TSCA existing chemicals review process as it pertains to chemical hazards in the workplace, communication and outreach materials for stakeholders regarding EPA and OSHA rules that regulate the same chemical hazards, enforcement activity and inspections of potential violations where mutual agency interest exists, and protocols to ensure the confidentiality of information exchanged between the agencies. EPA and OSHA intend for this MOU to facilitate workplace health and safety protections for workplaces utilizing existing chemical substances regulated under TSCA and the Occupational Safety and Health Act and to improve implementation efforts by both agencies.

PENNSYLVANIA

How The Shapiro Administration Will Respond to Changing Federal Priorities

Diana A. Silva, Esq. and Reilly Wright, Esq.

Despite the anticipated shift on environmental policies and enforcement that is expected at the federal level, we anticipate that Governor Shapiro's administration will continue to prioritize its state-led environmental policies in Pennsylvania in the year ahead. The 2024-2025 budget includes $50 million in funding to clean waterways across Pennsylvania, $11 million to continue finding and capping abandoned wells, and $10.5 million to speed up the Pennsylvania Department of Environmental Protection (PADEP) permitting processes. PADEP will launch two new programs in 2025 to address the Department's permit backlog: the Streamlining Permits for Economic Expansion and Economic Development (SPEED) program and Chapter 105 Joint Permit Pilot Program. The SPEED program provides permit applicants the ability to choose to have a PADEP-verified and qualified professional conduct an initial review of various environmental permit applications, which is anticipated to significantly reduce the total time between permit application and issuance. Likewise, the Chapter 105 Joint Permit Pilot Program aims to reduce errors in applications and cut the total time to process Water Obstruction and Encroachment General Permits by 63 days. These new programs will build upon the Shapiro administration's efforts in 2024 to modernize and streamline permitting in the Commonwealth, including the PAyback program, an online system that provides a money-back guarantee to applicants whose permits applications are not processed by PADEP in the allotted review period.

In March of 2024, Governor Shapiro also introduced his energy plan to lower utility bills and reduce carbon emissions across the state. This plan includes the Pennsylvania Climate Emissions Reduction Act (PACER) that would remove the state from the Regional Greenhouse Gas Initiative (RGGI) and establish a Pennsylvania-specific cap-and-invest program. Additionally, the Governor's energy plan includes the Pennsylvania Reliable Energy Sustainability Standard (PRESS) intended to create a more reliable energy grid by incentivizing investments in state renewable energy, nuclear power, and natural gas projects. While the Pennsylvania Legislature did not vote on the 2024 bills introducing Governor Shapiro's energy plan, the anticipated decreased focus on environmental policies and enforcement at the federal level may cause a resurgence of interest in similar state-led energy initiatives over the next four years.

PADEP's SPEED Program Seeks to Improve Pennsylvania's Permitting Process but Significant Questions Remain

Todd Kantorczyk, Esq. and Reilly Wright, Esq.

In July 2024, the Shapiro administration announced the Streamlining Permits for Economic Expansion and Development (SPEED) program as part of an effort to reduce current delays associated with certain permits issued by the Pennsylvania Department of Environmental Protection (PADEP). The SPEED program, authorized by the 2024-25 budget legislation, allows applicants to have an initial review of specific environmental permits conducted by qualified professionals approved by PADEP. Depending on the number of available qualified professionals for the specific permit, PADEP will either assign a qualified professional or the applicant will be able to choose from a list of three provided by PADEP. Regardless, applicants must agree to pay the qualified professional's fees upfront as part of the initial review. After considering the qualified professional's review and recommendation, PADEP, which retains final decision-

making authority, will either issue a final permit decision or notify the applicant of any technical deficiencies within the application. Permits eligible for the SPEED program include air quality plan approvals (state-only), earth disturbance permits, individual water obstruction and encroachment permits, and dam safety permits.

In October 2024, PADEP began accepting bids for qualified professional reviewers and plans to begin implementing the SPEED program in 2025. As defined in the SPEED program, a qualified professional must have, among other things an applicable professional license and at least five years of relevant permitting experience. Significant questions remain, however, regarding how PADEP will determine and address potential conflicts of interest between the qualified professional and applicant, and whether such rules will dissuade experienced consultants from applying. Notably, the deadline to apply to be a qualified professional was recently extended to March 31, 2025, and it remains to be seen whether enough consultants will apply by then to improve permitting timetables in a meaningful way.

Pennsylvania's Implementation of Climate Change Initiatives

Jessica D. Hunt, Esq. and Reilly Wright, Esq.

On March 1, 2024, the Pennsylvania Department of Environmental Protection (PADEP) released its Priority Climate Action Plan (the Plan) to be eligible to receive federal funding pursuant to the United States Environmental Protection Agency's Climate Pollution Reduction Grant Program authorized by the Inflation Reduction Act. The Plan identifies the following nine cost-effective, ready-to-implement greenhouse gas (GHG) reduction measures that PADEP believes will significantly reduce GHG emissions: (1) industrial electrification, efficiency, and reducing process emissions; (2) incentivizing and increasing the production and use of low-carbon fuels, such as hydrogen and biomethane; (3) developing on-site renewable energy and energy storage systems; (4) carbon capture utilization and storage; (5) reducing fugitive methane emissions; (6) leveraging clean and renewable resources in the region to achieve a net zero electricity generating sector; (7) decarbonizing buildings through energy efficiency, fuel switching, and adaptive reuse; (8) transitioning light-duty conventional internal combustion engine vehicles to electric vehicles and accelerating the adoption of zero-carbon medium- and heavy-duty vehicles; and (9) reducing emissions from the transportation sector by reducing vehicle miles traveled for passenger vehicles. PADEP has estimated that the implementation of these measures will result in a reduction of 102.43 million metric tons of carbon dioxide equivalent emissions by 2030 and 2,023.5 million metric tons of carbon dioxide equivalent emissions by 2050.

PADEP is beginning to implement the measures identified in the Plan. In early 2025, PADEP will be releasing a new grant program, entitled the Reducing Industrial Sector Emissions in Pennsylvania Program (RISE PA), that will award up to $360 million for industrial decarbonization projects aimed at decreasing GHG and co-pollutant emissions from the industrial sector in Pennsylvania. PADEP anticipates providing multiple funding opportunities annually for projects that can be completed prior to April 2029. Additional information regarding PADEP's RISE PA Program can be found here.

If you have any questions regarding climate change initiatives in Pennsylvania or the RISE PA Program, please contact Jessica Hunt at 484-430-2338 or Reilly Wright at 484-430-4996.

Act 2 Changes Anticipated in 2025

Jonathan H. Spergel, Esq. and Technical Consultant Will Hitchcock

In July 2024, the Pennsylvania Department of Environmental Protection (PADEP) proposed extensive changes to the regulations implementing Pennsylvania's Land Recycling Program, more commonly known as the Act 2 program. These proposed changes were commented on by the Pennsylvania Independent Regulatory Review Commission (IRRC) in October 2024, and based on the remaining steps in the Pennsylvania rulemaking process, it is likely that the proposed regulatory revisions will become effective in 2025. The regulatory changes include: (i) the addition of new statewide health cleanup standards (SHSs) in soil and groundwater for certain PFAS substances; (ii) updates to the models, values, and attainment methods for lead-contaminated soils, which will result in more stringent remediation standards for lead in soil; (iii) revisions to the methods for deriving toxicity values for carcinogenic polycyclic aromatic hydrocarbon (PAH) compounds; (iv) newer and more stringent toxicity values for other compounds based on EPA guidance; (v) updates to the sources of toxicity information used by PADEP to develop cleanup standards; and (vi) clarification that drinking water standards become effective as Act 2 cleanup standards upon final publication by the EPA or PADEP.

Additionally, PADEP is currently working to update the Act 2 Technical Guidance Manual and other related guidance documents. Through these updates, PADEP will seek to clarify specific aspects of the Act 2 program, including: (i) what land uses constitute residential or non-residential use; (ii) applicability of vapor intrusion screening values at sites with fluctuating groundwater elevations and/or very shallow sub-slab contamination; (iii) rounding of sample results for demonstrating compliance with cleanup standards; and (iv) remediation of historically-applied pesticides at former agricultural sites.

These upcoming changes have the potential to impact ongoing and future remediation projects in Pennsylvania, and due to the incorporation of the Act 2 cleanup standards in PADEP's Management of Fill Policy, also have the potential to significantly impact construction projects requiring fill importation or exportation. Our firm has been significantly involved in these developments through participation in PADEP's Cleanup Standards Scientific Advisory Board. If you would like to know more about these changes and how they may impact your projects, please contact Jonathan Spergel or Will Hitchcock.

PADEP Expected to Raise the Bar for Residual Waste Coproduct Determinations

Rodd W. Bender, Esq.

In the coming year, the Pennsylvania Department of Environmental Protection (PADEP or the Department) plans to tighten the requirements for materials that would otherwise be regulated as residual waste to qualify as unregulated "coproducts." Under the residual waste regulations in Pennsylvania Code Title 25, Chapter 287, a coproduct is a secondary material generated by a manufacturing or production process, or a spent material, that is (1) consistently equivalent physically and chemically to an intentionally manufactured product or produced raw material; (2) transferred as a commodity, or used by the generator, as a substitute for the product or raw material either for application to the land (or to produce products applied to the land) or as a fuel; and (3) no more harmful to human health and the environment for such use than the use of the product or raw material. The coproduct provisions include several specific conditions that the proponent must evaluate to demonstrate that its proposed use of a secondary material

satisfies these three criteria. Materials that qualify as coproducts are not regulated as a waste when used for the proposed application.

A key difference between the coproduct concept and seeking a permit from PADEP for beneficial use of a residual waste is that qualifying a material as a coproduct is a self-implementing process. In other words, it is up to the proponent to satisfy itself that its proposed use of a material satisfies the coproduct criteria, unlike a permit where a party submits an application to PADEP for review and approval. This self-implementing process carries some risk of enforcement action should PADEP become aware of a coproduct use and question whether the proponent adequately demonstrated that the use satisfies the criteria.

PADEP's interest in tightening the coproduct requirements has been motivated by several instances over the past few years where produced water (known as "brine") from oil and gas wells was spread on roads as a purported dust suppressant. In investigating this activity, PADEP determined that none of the oil and gas operators had performed valid coproduct determinations to authorize this land application of brine. The Department has expressed concerns that the effectiveness of brine as a dust suppressant is limited, and that runoff of contaminants in brine following precipitation events can threaten waterbodies and drinking water supplies.

As a result, in its December 2024 Regulatory Update PADEP indicated its intent to propose amendments to the coproduct regulations to ensure that coproduct determinations adequately demonstrate that the material is effective for the proposed coproduct use and is produced from a consistent process. PADEP is currently developing the new regulatory language, which will likely be reviewed by the Department's Solid Waste Advisory Committee prior to publication in the Pennsylvania Bulletin for public notice and comment.

For more information on this topic, please contact MGKF's Rodd Bender at 484-430-5700.

PADEP Proposing Changes to Spill Reporting under 25 Pa. Code Section 91.33

Jessica D. Hunt, Esq.

On November 12, 2024, the Environmental Quality Board adopted a proposed rule to clarify the immediate notification requirements for unauthorized discharges that would cause or threaten pollution of waters of the Commonwealth, endanger downstream users, or damage property under 25 Pa. Code § 91.33. The proposed rule would incorporate the Federal list of reportable quantities (RQ) of specific hazardous substances in 40 C.F.R. § 117.3 that, if discharged in a quantity greater than or equal to those quantities, must be immediately reported to the Pennsylvania Department of Environmental Protection. If the hazardous substance is discharged in a quantity less than the RQ, then the proposed rule would require the responsible person to evaluate and document the following five factors to determine that the substance does not cause or threaten pollution, endanger downstream users or cause property damage: (1) the properties of the substance or substances involved, including any harmful effects caused by such substance, the persistence of the substance in the environment, the mobility of the substance in soil and water, and the concentration and quantity of the substance; (2) the location of the discharge including the proximity to nearby waters, the characteristics of the nearby waters, land use, soils and geology, and the presence and qualities of relevant infrastructure, such as spill containment systems; (3) the weather conditions before, during, and after the incident; (4) the presence and implementation of adequate

response plans, procedures or protocols; and (5) the duration of the accident or other activity. If any single one or combination of factors can adequately establish that there is no risk of the substance reaching waters of the Commonwealth, such as when a spill occurs into secondary containment or where a spill response plan is used to immediately capture all of a substance with low mobility, then, under the proposed rule, immediate notification would not be required.

The Environmental Quality Board will soon be publishing notice of the proposed rule in the Pennsylvania Bulletin. Interested parties will have an opportunity to submit comments on the proposed rule before it is finalized.

If you would like to learn more about the proposed changes and how they may impact a facility's reporting obligations, please reach out to MGKF's Jessica Hunt or call 484-430-5700.

NEW JERSEY

Anticipated Murphy Administration Response to Changing Federal Priorities

Natalia P. Teekah, Esq. and Reilly Wright, Esq.

While the Trump administration is expected to focus its deregulatory efforts on climate policies advanced during the Biden presidency, Governor Phil Murphy has signaled an intent to remain committed to addressing the impacts of climate change in the State of New Jersey.

Historically, New Jersey has faced the direct effects of climate change, from devastating hurricanes and flooding to the state's most severe drought in 120 years this past summer. Murphy's governance has been marked by a stated commitment to enhancing the state's climate resilience, including setting a benchmark for New Jersey to reach 100 percent renewable energy by 2035. However, the potential impact of a second Trump administration, particularly on infrastructure and clean energy projects that involve federal funding and approvals, is still uncertain.

In a recent press conference, Governor Murphy reaffirmed his commitment to upholding his environmental agenda in 2025 and beyond through state-led policies. The Governor stated that "now more than ever, New Jersey's commitment to combating and adapting to climate change is unwavering. Regardless of which administration is in power at the federal level, our state is not going to back down. We're going to do everything we can to reduce emissions, protect our precious environment and build a more sustainable future." Still, Governor Murphy made it clear that he intends to work with the Trump administration wherever possible, vowing to seize any opportunity to reach common ground.

New Jersey Environmental Justice Initiative Reviews and Takeaways

Jill Hyman Kaplan, Esq. and Jessica D. Hunt, Esq.

It has been more than four years since the New Jersey Legislature enacted the Environmental Justice Law, three years since the New Jersey Department of Environmental Protection (NJDEP) issued its administrative order establishing an interim environmental justice review process under pre-Environmental

Justice Law authority, and almost two years since NJDEP finalized its environmental justice regulations, codified at N.J.A.C. 7:1C (EJ Rules). In that time, there have been more than seventy-five submissions to NJDEP under the administrative order and approximately seven under the EJ Rules. To date, NJDEP has only issued one environmental justice law decision, related to the Passaic Valley Sewerage Commission's July 2, 2021 application to amend its Title V operating permit to authorize the construction and operation of an on-site emergency standby power generating facility.

Here are takeaways that can be gleaned from letters issued by NJDEP to date and the environmental justice law decision:

- Applicants should prepare for an extended timeline for permit issuance. It took NJDEP approximately three years from the date that the Passaic Valley Sewerage Commission submitted a complete application to render its environmental justice law decision, which now clears the way for NJDEP to continue to review and issue the permit modification.

- Applicants should begin engaging the community as early as possible to address community concerns up front. NJDEP has required applicants to restart the environmental justice review process following substantive changes made to an application in response to community input, restarting the process and adding further delay.

- NJDEP has issued at least three deficiency notices to applicants who failed to strictly comply with the EJ Rules. For example, in one deficiency notice, NJDEP found that the environmental justice impact statement was technically deficient, in part because it failed to discuss the information required by the EJ Rules in the order presented in the EJ Rules. In another, NJDEP found that the public meeting held by an applicant failed to comply with the EJ Rules because virtual participants were unable to see the applicant's presentation and had difficulty hearing the presenter and interpreter. Applicants should ensure that all EJ Rule requirements are met to avoid further delays.

- NJDEP imposed eleven special conditions in the environmental justice law decision for the Passaic Valley Sewerage Commission. These special conditions included, among others, providing advance notice to NJDEP and the Ironbound Community Corporation of certain specified events, decommissioning certain equipment, installing alternative energy sources, and submission of a semi-annual environmental justice compliance report. The decision specifies that any conditions imposed will apply not only to the immediate permit application, but to any permit or approval related to the facility. The authority for some of these conditions is not clear.

Additional environmental justice law decisions are likely to be forthcoming and may shed additional light on NJDEP's implementation of the EJ Rules.

Separately, there are two appeals of the EJ Rules pending before the Superior Court of New Jersey, Appellate Division, one of which our firm is handling, challenging many aspects of the EJ Rules as beyond the scope of NJDEP's statutory authority or as otherwise being arbitrary, capricious, and unreasonable. The appeals also challenge the EJ Rules and the Environmental Justice Mapping, Assessment and Protection Tool because they were promulgated in violation of the Administrative Procedure Act. The appeals have been fully briefed and are awaiting the scheduling of oral argument.

New Jersey's Site Remediation Program Changes to Expect in 2025

Natalia P. Teekah, Esq. and Michael C. Nines, P.E, LEEP AP

The New Jersey Department of Environmental Protection's Site Remediation Program advanced significant regulatory initiatives in late 2024 that will likely be finalized in 2025. The main initiatives are addressed below.

New Jersey Site Remediation Proposed Rule

On October 21, 2024, the New Jersey Department of Environmental Protection (NJDEP) published proposed amendments to its Site Remediation Program (SRP), consisting of revisions to the Industrial Site Remediation Act rules, the Administrative Requirements for the Remediation of Contaminated Sites, Technical Requirements for Site Remediation, and the Heating Oil Tank System rules (Proposed Rule). In large part, the Proposed Rule implements 2019 legislative amendments to the Site Remediation Reform Act (SRRA), incorporates amendments related to the 2021 Remediation Standards, and memorializes efforts to streamline and expedite the Remedial Action Permit (RAP) program, but also includes certain key changes to the SRP paradigm that have the potential to significantly impact the regulated community. Comments on the rulemaking proposal are due on January 31, 2025 with the rulemaking anticipated to be finalized sometime in 2025.

Remedial Action Permit (RAP) Changes

NJDEP is making various changes to its RAP program in an attempt to streamline and expedite the permitting process. Of most significance, the proposed regulations would require a permit for any engineering and institutional controls required to address indoor air concerns. In addition, NJDEP is proposing to issue a combined RAP for all impacted media requiring a permit (soil, groundwater, and indoor air), where separate permits are currently required. In support of this change, NJDEP has stated its belief that one combined permit would simplify biennial protectiveness evaluations and fee schedules for the regulated community. As a corollary of the proposed one permit paradigm, NJDEP is proposing to allow for additional permits that may be required after a RAP has been issued to be obtained through a RAP modification. The proposed regulations would also implement a program of five focused RAPs for commonly issued permits that are less technically complicated, potentially allowing NJDEP to expedite application reviews and permit issuance.

Reporting Requirements for Prospective Purchasers

The Proposed Rule would require prospective purchasers who discover the discharge of hazardous substances during due diligence to report the discharge to both the record owner of the property and to the NJDEP hotline (1-877-WARNDEP). Discharges must be reported by the prospective purchaser regardless of whether an LSRP conducted due diligence on behalf of the prospective purchaser, a significant change from the current approach.

The reporting trigger would now be included in the Administrative Requirements for the Remediation of Contaminated Sites at new NJAC 7:26C-2.4, stating:

1. When a person performs remediation as defined at N.J.A.C. 7:26C-1.3, including performing all appropriate inquiry in accordance with N.J.S.A. 58:10-23.11g, and obtains knowledge that a discharge has occurred at any location on a property, that person shall immediately notify the

Department by calling the Department's telephone hotline at 1-877-WARNDEP and shall notify the record owner of the property.

2. If a person who does not own the property is conducting all appropriate inquiry and that person has not discharged a contaminant at the property or is not in any way responsible for a contaminant discharged at the property, then that person shall not be liable for cleanup and removal costs of the discharge unless and until that person acquires the property.
3. Notwithstanding (a) or (b) above, whenever a person obtains knowledge that a discharge has occurred at any location on a property, that person shall immediately notify the Department by calling the Department's telephone hotline at 1-877-WARNDEP.

NJDEP's commentary on this section states that the reporting requirement is triggered when a person "discovers a discharge" during the course of AAI or otherwise "obtains specific knowledge of a discharge" thereby significantly broadening the scope of reportable discharges in New Jersey. The Proposed Rule makes clear that the prospective purchaser that discovers the discharge during due diligence is not responsible for cleanup and removal costs connected with the discharge unless and until that person acquires the property. This proposed rule change is likely to have a significant impact on property transactions.

Indoor Air

Consistent with the 2019 legislative amendments, the Proposed Rule reflects an effort by NJDEP to increase regulatory requirements for indoor air areas of concern (AOCs). First, the Proposed Rule establishes a requirement to establish an Indoor Air Notification Area (IANA) institutional control for areas where indoor air/vapor intrusion may be an exposure pathway of concern. This rule would be similar to the current requirement to establish a Classification Exception Area (CEA) institutional control for areas of contaminated groundwater, and as with CEAs, the establishment of a IANA would require notification to municipalities and counties in which the IANA is located, as well as owners, tenants, and occupants of any occupied structures within the IANA. To secure regulatory closure of an indoor air/vapor intrusion AOC, it would be necessary for a LSRP to issue a Response Action Outcome for the AOC. Second, Immediate Environmental Concern (IEC) requirements require notification of an IEC regardless of whether the structure is occupied, where previously notification was only required for occupied structures or structures capable of being occupied. A carve-out from this proposed requirement would require the property owner to certify that the structure: (1) is not occupied; (2) will not be occupied; and (3) will be demolished.

Comments are open on the Proposed Rule until January 31, 2025.

Ground Water Quality Standards Expected to be Adopted

As referenced in our 2024 Forecast, NJDEP published a proposed rulemaking that makes significant changes to the Ground Water Quality Standards (GWQS) promulgated at N.J.A.C. 7:9C. The proposed revised standards are applicable to Class II-A groundwater designated for potable use, which is the default designation for all groundwater in New Jersey. As such, these standards frequently dictate the allowable concentration of chemicals in groundwater at remediation sites and for NJPDES Discharge to Groundwater permits. The proposed changes include significant reductions to many of the GWQS and are expected to result in increased remediation costs as well as reevaluation and potentially additional remediation at previously closed sites for contaminants subject to a reduction in concentration by an order of magnitude or more. The rulemaking is currently pending adoption, which is anticipated sometime in 2025.

In addition, due to the EPA's publication of the federal National Primary Drinking Water Regulation in April 2024 establishing Maximum Contaminant Levels (MCLs) for certain PFAS in drinking water, the NJDEP automatically incorporates changes to the federal MCLs if they are lower than the standards adopted by New Jersey. N.J.A.C. 7:10-5.1. NJDEP therefore will be required to update its GWQS to mirror the new MCLs. N.J.A.C. 7:9C-1.7(c)3i. Similarly, once the GWQS are updated, they automatically become the groundwater remediation standards. N.J.A.C. 7:26D-2.2(a). Further movement on establishing PFAS GWQS is anticipated for 2025.

NJDEP SRP Guidance Document – PFAS Sampling Fact Sheet Implementation

In August 2024, the NJDEP published its Per- and Polyfluoroalkyl Substances (PFAS) Sampling Fact Sheet (the "Fact Sheet"). Implementation of the Fact Sheet is anticipated to become more prominent during 2025. The Fact Sheet contains important sampling considerations for various media, selection of analytical methods, decontamination considerations and cross-contamination/bias considerations, and NJDEP has inserted a statement of interest to parties conducting PFAS related investigations. Namely, NJDEP is requesting that the full list of PFAS compounds analyzed and reported by the respective analytical methods be reported to the agency, regardless of whether there are relevant remediation standards. NJDEP further states that the Licensed Site Remediation Professional (LSRP) must ensure that the remediation is protective of public health and safety and the environment based upon all information in the possession of the LSRP and the person responsible for conducting the remediation (PRCR). The Fact Sheet then instructs the PRCR and/or LSRP that when it has information regarding the presence of PFAS, irrespective of whether that PFAS is currently listed as a hazardous substance, the PRCR is still responsible for the remediation (including investigation) of such contaminant if the PRCR has reason to believe the presence of the contaminant poses a risk to public health or safety or the environment. These conditions as articulated in the Fact Sheet will potentially have significant ramifications for LSRPs and PRCR's conducting PFAS investigations in 2025 and place additional burdens on site remediation professionals and PRCR's to iron out how to interpret detections of PFAS substances that may not have published toxicity data or relevant screening criteria.

New Jersey's Coastal Flood Rules

John F. Gullace, Esq., Danielle N. Bagwell, Esq. and Natalia Teekah, Esq.

The New Jersey Department of Environmental Protection (NJDEP) has continued its development of more stringent coastal flood protections under the Murphy Administration's Protection Against Climate Threats (PACT) initiative. On August 5, 2024, NJDEP proposed the second of its PACT rules, the Resilient Environments and Landscapes (REAL) rule. The REAL rule, which is more than 1,000 pages in length, amends the Coastal Zone Management rules (N.J.A.C. 7:7), Freshwater Wetlands Protection Act rules (N.J.A.C. 7:7A), Flood Hazard Area Control Act rules (N.J.A.C. 7:13), and Stormwater Management rules (N.J.A.C. 7:8), among others, in an effort to broadly integrate climate science considerations like sea level rise and chronic flooding into New Jersey's regulatory scheme.

Of note, the REAL rule establishes an Inundation Risk Zone (IRZ) to account for projected increased risk to people and property within certain tidal flood hazard areas expected to be underwater, either permanently or twice a day at high tide, by 2100. Properties within an IRZ would be subject to increased risk assessment considerations and required to demonstrate the use of all reasonable measures to avoid or mitigate risk associated with development. NJDEP also proposes to incorporate its interactive mapping tool

into the regulations, which would allow interested parties to see all land within five feet of elevation of the mean high-water line for a given site. IRZ areas may be determined by using this tool, or through site-specific survey data. Developers must be aware of these requirements if seeking to construct or make substantial improvements to residential buildings, critical buildings, or critical infrastructure as defined in the REAL rule.

Another substantive change under the REAL rule is the promulgation of a Climate-Adjusted Flood Elevation (CAFE) which adjusts the flood elevation, floodway limits and/or the flood zone designation for subject coastal and tidal areas. The CAFE is calculated by adding five (5) feet to the Federal Emergency Management Agency's 100-year flood elevation in tidal flood hazard areas. The CAFE changes will subject development within these designated flood-prone areas to more stringent building standards and regulatory requirements once the REAL rule becomes final.

Comments on the REAL rule proposal closed on November 7, 2024. NJDEP is currently reviewing and intends to respond to all comments received. It has signaled that the rule is anticipated to become effective in the summer of 2025. Developers should keep these timelines in mind as the REAL rule will apply to new development, redevelopment and substantial improvement to existing development and will have a significant impact on the ability to secure required approvals. Legacy provisions will remain consistent with current NJDEP rules and applications submitted before the effective date and declared technically complete will qualify for legacy status.

NEW YORK

New York Appellate Court Curtails Enforceability of Green Amendment Claims

Giselle F. Mazmanian, Esq. and Technical Consultant Michael C. Nines, P.E., LEED AP

Over the years, there have been several lawsuits challenging the interpretation and the applicability of New York's environmental rights amendment to the Bill of Rights of the New York State Constitution, Article 1, §19, known as the "Green Amendment", which we reported about in the 2024 forecast. Most notably, in July 2024, an appellate court dismissed Green Amendment claims brought by an environmental group in *Fresh Air for the Eastside, Inc. v. State of New York*, No. 23-00179, 2024 WL 3547674. This is the first Green Amendment case to reach a New York appellate court. In this case, plaintiff claimed that odors and fugitive greenhouse gas emissions from a landfill in upstate New York violates the Green Amendment and that New York State Department of Environmental Conservation (NYSDEC) never conducted an environmental review pursuant to the State Environmental Quality Review Act to address air impacts the community has experienced since 2016. Plaintiff sought closure of the landfill or more enforcement by the NYSDEC. In 2022, the trial court dismissed claims against the landfill operator and New York City as a waste generator but denied the motions to dismiss by the State of New York and NYSDEC and, among other rulings, found that plaintiff had a viable Green Amendment claim. The trial court held that private citizens could bring a Green Amendment case based on the alleged rights violations, which the court could compel New York state to address. Defendants filed an interlocutory appeal.

On appeal, the Appellate Division, Fourth Department dismissed the claims against NYSDEC, holding that enforcement decisions of an administrative agency against a private entity are generally not suitable for

judicial review. The appellate court noted that the lawsuit was in fact an Article 78 proceeding seeking mandamus rather than a declaratory judgment action. As to the trial court's dismissal of the claim against New York City, the appellate court agreed with the trial court that lawful conduct in contracting for waste disposal could not be a violation of the Green Amendment. Finally, the court affirmed that Green Amendment claims cannot be made against private parties, such as the landfill operator, because constitutional rights only regulate government action.

The Fourth Department's decision appears to curtail the enforceability of the Green Amendment and maintain environmental regulators' discretion to decide whether to enforce particular regulatory standards. The decision may yet be appealed to New York Court of Appeals.

New York Finalizes Policy for Evaluating Permit Impacts on Disadvantaged Communities

Giselle F. Mazmanian, Esq. and Technical Consultant Michael C. Nines, P.E., LEED AP

In 2024, the New York State Department of Environmental Conservation (NYSDEC) issued policy guidance for assessing impacts of environmental permits on disadvantaged communities. The policy, DEC Program Policy – Permitting And Disadvantaged Communities Under The Climate Leadership And Community Protection Act (DEP-24-1), outlines the requirements for analyses developed pursuant to section 7(3) of the Climate Leadership and Community Protection Act (CLCPA). This section of CLCPA requires NYSDEC permitting decisions to (i) not disproportionately burden disadvantaged communities and (ii) prioritize reductions of greenhouse gas emissions and co-pollutants in disadvantaged communities.

The policy applies to permit applications designated as "major" under the Uniform Procedures Act (UPA), Article 70 of the Environmental Conservation Law (ECL), in addition to any project requiring a UPA permit from NYSDEC involving the construction of energy production, generation, transmission, or storage facilities, and any project requiring an UPA permit from NYSDEC with sources and activities that may result in greenhouse emissions. For the policy to apply to the project, NYSDEC must also determine that the project is "likely to affect" a "disadvantaged community". Disadvantaged communities are generally "communities that bear burdens of negative public health effects, environmental pollution, impacts of climate change, and possess certain socioeconomic criteria, or comprise high-concentrations of low- and moderate- income households" (as identified by New York's Climate Justice Working Group). The "likely to affect" standard is met where a permit would increase greenhouse gases or co-pollutants in a disadvantaged community, even where the source is located outside of the disadvantaged community. DEP-24-1 describes the analyses and procedures required to be followed by NYSDEC staff when reviewing various permit application types pursuant to the requirements of Section 7(3), including considering potential impacts within a half mile of the facility.

Once a project is determined to be subject to DEP-24-1, facilities operating in "disadvantaged communities" are required to prepare "existing burden reports" identifying information such as existing pollution sources affecting the community and potential routes of human exposure to pollution from those sources, ambient concentrations of regulated air pollutants and regulated or unregulated toxic air pollutants, noise and odor levels, and the projected contribution of the proposed action to existing pollution burdens in the community and potential health effects of such contribution. A permit applicant may propose, or NYSDEC may impose, conditions on the permit to address any disproportionate burden. The analysis will be subject to

enhanced public participation opportunities following guidance set out in NYSDEC Commissioner's Policy 29 (CP-29).

DEP-24-1 is one of several actions taken by New York state to implement the CLCPA. On December 30, 2024, New York's Cumulative Impacts Bill came into effect, amending the State Environmental Quality Review Act (SEQRA) and the UPA to require consideration of the effects of disproportionate pollution impacts on a disadvantaged community. In 2022, the NYSDEC Commissioner's Policy 49 (CP-49) / Climate Change and DEC Action, and NYSDEC Division of Air Resources Policy 21 (DAR-21) / CLCPA and Air Permit Applications were finalized.

New York's New Climate Superfund Law Signed

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On December 26, 2024, New York Governor Hochul signed the Climate Change Superfund Act (CCSA) into law to attempt to impose the cost to repair climate change impacts on the fossil fuel industry. The CCSA amends the New York State Environmental Conservation Law to establish a climate change adaptation cost recovery program overseen by the New York State Department of Environmental Conservation (NYSDEC).

Predicated on the "polluter pays" principle, the new law authorizes New York State to issue cost recovery demands to "responsible parties" defined as entities that "engaged in the trade or business of extracting fossil fuel or refining crude oil" during any part of the period from January 1, 2000 to December 31, 2018 (the covered period), and that NYSDEC determines is responsible for more than one billion tons of covered greenhouse gas (GHG) emissions.

The CCSA applies a formulaic approach to determining the amount of GHGs attributable to a responsible party:

- 942.5 tons of CO_2 equivalent is treated as released for every million pounds of coal attributable to a responsible party
- 432,280 metric tons of CO_2 equivalent is treated as released for every million barrels of crude oil attributable to a responsible party; and
- 53,440 metric tons of CO_2 equivalent is treated as released for every million cubic feet of fuel gas attributable to a responsible party.

NYSDEC has until the end of 2025 to promulgate regulations implementing the CCSA. The legislation requires NYSDEC to create a climate change adaptation master plan for New York state by the end of 2026. CCSA is expected to face significant legal challenges on issues such as the scope of the legislation's reach, its retroactive application, federal preemption arguments, and due process concerns.

New York State PFAS Update

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Effective January 1, 2025, New York's Environmental Conservation Law (ECL) established a restriction of per- and polyfluoroalkyl substances (PFAS) in apparel applying specifically to apparel with intentionally

added PFAS. According to that provision, no person shall sell or offer for sale in New York, any new, not previously used, apparel containing PFAS as intentionally added chemicals after January 1, 2025. After January 1, 2028, a new restriction will go into effect that applies specifically to outdoor apparel for severe wet conditions with intentionally added PFAS, such that no person shall sell or offer for sale in New York any new, not previously used, outdoor apparel for severe wet conditions containing PFAS: (a) at or above a level that the department shall establish in regulation, or (b) as intentionally added chemicals. Under the ECL, PFAS are defined as "a class of fluorinated organic chemicals containing at least one fully fluorinated carbon atom."

With respect to Environmental Remediation Programs, New York State Department of Environmental Conservation (NYSDEC) is in the process of establishing a rural background level of PFAS in soils for purposes of developing soil cleanup objectives (SCOs). In the interim, NYSDEC has proposed *Soil Cleanup Guidance* values for perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS) for use in the environmental cleanup context.

NYSDEC's Division of Water is anticipated to finalize its draft *Technical and Operational Guidance Series (TOGS) 1.3.14: "Publicly Owned Treatment Works (POTWs) Permitting Strategy for Implementing Guidance Values for PFOA, PFOS, and 1,4-Dioxane"* in 2025. The TOGS 1.3.14 will establish Guidance Values (GVs) for certain PFAS as applied to State Pollutant Discharge Elimination System permits for POTWs. This guidance is anticipated to have a material impact on industrial wastewater dischargers into POTWs due to the low levels expressed by the GVs for these contaminants. As such, the introduction of any detectable amount of PFOA or PFOS would represent a substantial change in character of the wastewater discharge and would require notice to the NYSDEC. In addition, as part of the regularly required pollutant scan of industrial dischargers that POTWs conduct, the NYSDEC will require influent sampling for all 40 PFAS compounds available through EPA's Method 1633 and may raise additional concerns for impacted industrial users.

Under NYSDEC jurisdiction for issuance of air pollution control permits and registrations to sources of air pollution, NYSDEC previously published revisions to its *DAR-1: Guidelines for the Evaluation and Control of Ambient Air Contaminants Under Part 212,* which established *Annual and Short-term Guideline Concentration (AGC/SGC)* values for several PFAS in the context of air permitting. According to NYSDEC staff, the DAR-1 will be updated in early 2025 and is anticipated to contain several new additional PFAS. The DAR-1 updates will be developed in consultation with the New York State Department of Health toxicology section to revise and derive the ambient air values based on the latest science available.