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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 (SO_2), however, as EPA determined that the use of low-sulfur fuels remains BSER for SO_2.

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.

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