



TO: Attendees

FROM: Planning Committee

DATE: August 2, 2019

On behalf of the Environmental and Natural Resources Law Section of the State Bar of Texas, the Air and Waste Management Association-Southwest Section, the Water Environment Association of Texas, the Texas Association of Environmental Professionals, the Environmental Health and Safety Audit Center, and the American Bar Association Section of Environment, Energy & Resources, as well as our supporter, EarthX, welcome to the 31st Annual Texas Environmental Superconference – *“The Greatest Superconference on Earth.”*

Course materials are both in print (for those who ordered them) and online. The online materials may be downloaded at the section’s website, <https://www.texenrls.org/superconference-materials/>, using the password “BIGTOP.”

As always, there are evaluation forms for the program. We appreciate your taking the time to complete them and to give us your comments and suggestions. The organizers of this program take these forms into account in planning next year’s conference. In addition, if you have an interest in having a particular topic presented or in speaking on a particular topic, the evaluation form is the appropriate place to provide that information.

Next year’s conference – our 32<sup>nd</sup> – is scheduled, as always, beginning the first Thursday in August, that is, August 6, 2020. Please mark your calendars.

Please also feel free to provide any comments or suggestions to any member of the Planning Committee at the conference, or, thereafter, to Jeff Civins at [jeff.civins@haynesboone.com](mailto:jeff.civins@haynesboone.com) or at (512) 867-8477.

Thanks!

# **31<sup>st</sup> ANNUAL TEXAS ENVIRONMENTAL SUPERCONFERENCE**

***“The Greatest Superconference on Earth”***

**Thursday-Friday, August 1-2, 2019  
Four Seasons Hotel**

**Thursday, August 1, 2019**

7:45 – 8:30 REGISTRATION/CONTINENTAL BREAKFAST  
*“Welcome Children of All Ages”*

8:30 – 9:00 OPENING REMARKS – *“Sending in the Clowns”*

Jeff Civins, Texas Environmental Superconference  
Bruce Fogerty, EarthX  
Steve McMillen, Environmental and Natural Resources Law Section, State Bar of Texas  
Kevin Smith, Air & Waste Management Association, Southwest Section  
Julie Nahrgang, Water Environment Association of Texas  
Rebecca Luman, The Environmental Health and Safety Audit Center  
Alison Suarato, Texas Association of Environmental Professionals  
Danny Worrell, ABA Section of Environment, Energy & Resources

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Moderator: Chris Smith; Smith Jolin LLP

TAB 1 9:00 – 9:30 LEGISLATIVE UPDATE – *“A Three Ring Circus”*

Martha Landwehr, TCEQ

TAB 2 9:30 – 10:00 CASE LAW UPDATE – *“A Menagerie”*

Erika Garcia, Winstead PC

TAB 3 10:00 – 10:30 WATER QUALITY

David Ross, Assistant Administrator, Office of Water, EPA DC

10:30 – 10:45 BREAK—sponsored by Golder

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**[SKIT 1]**

Moderator: Debra Tsuchiyama Baker, Baker Wotring LLP

TAB 4            10:45 – 11:30 COASTAL ISSUES – “*The Greatest Flow on Earth*”

James Murphy, Attorney, Texas Parks & Wildlife Department  
Bob Stokes, President, Galveston Bay Foundation

TAB 5            11:30 – Noon THE STRUGGLE FOR SUSTAINABLE ELECTRICITY  
“*Eating Fire*”

Tom McGarity, Professor, University of Texas School of Law

**[SKIT 2]**

Noon – 1:00    LUNCH – *Intermission* – sponsored by RPS Group

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**[SKIT 3]**

Moderator: Cindy Smiley, Smiley Law Firm

TAB 6            1:00 – 1:20    AIR QUALITY – “*Aerial Artistry*”

Anne Idsal, Acting Assistant Administrator, Office of Air and Radiation,  
EPA DC

TAB 7            1:20 – 2:05    AIR QUALITY – “*Under the Big Top*”

Shannon S. Broome, Hunton Andrews Kurth LLP  
Jean Flores, Guida, Slavich & Flores, P.C.  
Peter Wahl, Jackson Walker

TAB 8            2:05 – 2:35    CLIMATE CHANGE -- “*Cirque du Soleil*”

Pam Giblin, Climate Leadership Council

TAB 9            2:35 – 3:35    ADMINISTRATIVE CHALLENGES AND APPEALS  
(Panel Discussion) -- “*Sword Swallowing*”

The Honorable Jeff Rose, Chief Justice, Third Court of Appeals  
Daniel Wiseman, Assistant Attorney General of Texas  
Adam Sencenbaugh, Haynes and Boone, LLP

3:35 – 3:50    BREAK – sponsored by Geosyntec

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**[SKIT 4]**

Moderator: Jeff Saitas, Saitas and Seales

TAB 10      3:50 – 4:20      PATAGONIA’S ENVIRONMENTAL ADVOCACY  
*“Human Cannonball”*

Avi Garbow, Environmental Advocate, Patagonia

TAB 11      4:20 – 5:20      ENFORCEMENT – “*Globe of Death*”

Lily Chinn, Katten Muchin Rosenman LLP  
Nathan Vassar, Lloyd Gosselink  
Josh Van Eaton, Beveridge & Diamond, PC

**[SKIT 5]**

### Submit Written Quiz

5:20 – 6:10 RECEPTION – “A *Swinging Time*” – sponsored by Ensafe

**Friday, August 2, 2019**

8:00 – 8:25 CONTINENTAL BREAKFAST

8:25 – 8:30    OPENING REMARKS – “*Hurry Hurry, Step Right Up*”

**[SKIT 6]**

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**Moderator:** Cindy Bishop, C Bishop Law PC

TAB 12	8:30 – 9:00	ENVIRONMENTAL, SOCIAL, AND GOVERNANCE (“ESG”) REPORTING—LEGAL RISKS – <i>“A Disappearing Act”</i>
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Laura Whiting, Foley Gardere

TAB 13      9:00 – 9:30      HOT LEGAL ISSUES

Matt Leopold, General Counsel, EPA DC

TAB 14      9:30 – 10:30    OIL & GAS ENVIRONMENTAL ISSUES – “*Taming Tigers*”

Scott Janoe, Baker Botts  
Ann Navaro, Bracewell  
Dan Werner, SVP, LNG Marketing – Europe & Americas,  
Next Decade Corporation

**10:30 – 10:45 BREAK – sponsored by Ramboll**



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**[SKIT 7]**

Moderator: Peter Gregg, DuBois, Bryant & Campbell L.L.P.

TAB 15      10:45 – 11:15 RECONCILING ENERGY DEVELOPMENT WITH  
ENVIRONMENTAL PROTECTION IN THE BIG BEND AREA  
“*A Balancing Act*”

Melinda Taylor, University of Texas School of Law

TAB 16      11:15 – 12:00 REGION 6/TCEQ/OKLAHOMA—ENVIRONMENTAL  
DEVELOPMENTS IN ENERGY DEVELOPMENT – “*Ring Masters*”

David Gray, Acting Regional Administrator, EPA Region 6  
Emily Lindley, Commissioner, TCEQ  
Kenneth Wagner, Secretary of Oklahoma Energy & Environment

**Submit Skit Quiz Answers**

TAB 17      12:00 – 12:20 DOI’S STREAMLINED NEPA PROCESS  
Jason A. Hill, Deputy Solicitor for Energy & Mineral Resources, DOI

12:20 – 1:15    LUNCH – *Intermission* – sponsored by Terracon

1:15 – 1:30    Texas Environmental & Natural Resources Law Section Meeting  
“*At the Midway*”

**Announce Written Quiz Winners**

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Moderator:    Tucker Henson, Assistant Regional Counsel, EPA Region 6

TAB 18      1:30 – 2:00    CERCLA ISSUES – “*Escapology*”

Steven Cook, Deputy Assistant Administrator, Office of Land and  
Emergency Management, EPA DC

TAB 19      2:00 – 2:45    TRANSACTIONS – ENVIRONMENTAL DEAL KILLERS  
“*Throwing Knives*”

Ty’Meka Reeves-Sobers, Kirkland & Ellis  
Matt Dobbins, Vinson & Elkins

TAB 20      2:45 – 3:45    ETHICS – Evolving Issues – “*A High Wire Act*”

Amanda Halter, Pillsbury  
Claude E. Ducloux, Attorney at Law  
Jim Smith, Crain Caton & James

**Announce Skit Quiz Winners**

3:45            ADJOURN – “*Flipping Out*”

SUNDAES– “*A Cool Attraction*” – sponsored by Targus

**Wednesday Evening Program**  
**“WALKING A TIGHTROPE”**  
*Sponsored by Langan*

- 6:00 -- 6:05 PM      OPENING REMARKS—Mary Mendoza, Haynes and Boone, LLP
- OUR ETHICS PANELISTS/COMMENTATORS
- Kevin Dubose, Alexander Dubose & Jefferson LLP  
Beverly Godbey, Amy Stewart Law  
Robert Prentice, McCombs School of Business University of Texas  
Jonathan E. Smaby, Texas Center for Legal Ethics
- 6:05 – 7:00 PM      YOUR BRAIN ON ETHICS – HOW THAT THING BETWEEN  
YOUR EARS CAN LEAD YOU ASTRAY
- 7:00—8:00 PM      ETHICS AND THE ENVIRONMENTAL LAWYER—SKITS AND  
COMMENTARY
- OUR ETHICS PLAYERS
- Daniel Pope, Bracewell LLP  
Kathryn Schroeder, TCEQ  
Andrew Van Osselaer, Haynes and Boone, LLP

**Jeff Civins** is senior counsel at Haynes and Boone, LLP, in Austin. Jeff has practiced all aspects of environmental law since 1975, assisting clients in compliance matters, transactions, and litigation. As an adjunct professor at the University of Texas School of Law, Jeff taught a seminar on Environmental Law Concerns in Business in the spring of 1987 and has been teaching a seminar on Environmental Litigation each spring since 1992.

Jeff is a fellow and a regent of the American College of Environmental Lawyers and co-chair of its disaster planning and response task force. He is the organizer and co-editor of the Thomson Reuters Texas Practice two-volume treatise on Texas Environmental Law and author of the chapter on Environmental Aspects of Business Transactions. He is also a former chair of the Environmental and Natural Resources Law Section of the State Bar of Texas and has been chair of the section's Annual Texas Environmental Superconference, now in its 31st year, since its inception.

Jeff received an AB in chemistry from Brandeis University, an MS in chemistry from Penn State, and a JD from the University of Texas School of Law. Prior to law school, Jeff taught science in public and private schools in New York City.



## **CHRIS SMITH**

Smith Jolin, LLP  
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Austin TX 78701  
(512) 659-6912  
[Chris.Smith@SmithJolin.com](mailto:Chris.Smith@SmithJolin.com)

Chris Smith helps clients solve problems arising under all aspects of environmental laws. He advocates for clients before regulatory agencies and state and federal courts, and counsels them on regulations, compliance, and risk avoidance. Chris enjoys the challenge of helping clients develop practical, cost-effective solutions to often complicated and technical environmental matters. He believes that effective legal representation is founded on trust and he values developing long-lasting relationships with clients, understanding their goals, and learning about their businesses.

A graduate of University of Maryland, Chris served as a Peace Corps volunteer in Jamaica, working with small farmers to develop sustainable agricultural products and practices. After the Peace Corps, Chris attended the University of Texas School of Law and the Lyndon B. Johnson School of Public Affairs.

Prior to co-founding Smith Jolin, Chris was a partner at Thompson & Knight LLP where he worked for 12 years representing a variety of clients, including real estate developers, refineries, chemical plants, steel mills, cement manufacturers, lime manufacturers, oil and gas operators, agricultural operations, local governments, and private citizens. His background includes experience both in the substantive aspects of environmental law and judicial and administrative trial practice.

Chris has been recognized in The Best Lawyers in America® by Woodward/White Inc. (Environmental) for 2016-2019, Chambers USA by Chambers & Partners (Environmental) for 2016, Texas Super Lawyers® by Thomson Reuters (Environmental) 2016-2018, Texas Rising Stars® by Thomson Reuters (Environmental) for 2013-2015, and as a “Recommended Attorney” The Legal 500 US by Legalease (Industry Focus: Energy: Regulatory) for 2015-2016. He serves on the law school committee of the Texas Bar Environmental and Natural Resources Law Section and the planning committee of the Texas Environmental Superconference.

Outside of his law practice, Chris serves on the Executive Committee of the Capitol Area Council of the Boy Scouts of America, is the proud parent of four children, and competes in ultramarathon running events.

#### **SELECTED REPRESENTATIONS**

- A chemical pipeline company in defending a lawsuit brought by more than 300 individuals alleging personal injury damages related to a pipeline explosion
- An independent oil and gas company in conducting a privileged environmental audit assessing wetlands issues at over one hundred sites in the Haynesville Shale and resolved related enforcement and permitting matters with the EPA and Corps of Engineers
- A large manufacturer on compliance with section 404 of the Clean Water Act in connection with the construction of a new plant, including applicability of Nationwide Permits and Regional General Permits to road and utility crossings
- A developer in obtaining permits and mitigation credits to develop property containing jurisdictional wetlands and waters
- A non-profit on negotiating issues related to its Endangered Species Act habitat conservation plan for a high adventure camp and the establishment of a safe harbor agreement and conservation easement bank
- An oil and gas company regarding participation in the Western Association of Fish & Wildlife Agencies Range-wide Conservation Plan for the lesser prairie chicken
- An oil and gas company in conducting an internal investigation related to alleged violations of the Endangered Species Act by company contractors, including defending the company in threatened prosecution alleging criminal violations
- A developer regarding mitigation and permitting requirements for development of medical facility in potential endangered species habitat
- A home builder in developing a Habitat Conservation Plan and seeking an incidental take permit for a construction project in San Antonio
- An oil and gas company in resolving an enforcement action under the Migratory Bird Treaty Act

- A large manufacturer in a water-rights dispute with the Texas Commission on Environmental Quality related to a legacy dam and associated impoundment
- A retail public utility in a contested case hearing protesting an infringement by another utility of the client's Certificate of Convenience and Necessity
- A retail public water utility in transferring a portion of its Certificate of Convenience and Necessity to another party
- A developer-owned water utility in decertification contested case hearing before the Texas Commission on Environmental Quality, as well as a subsequent appeal in Texas state court
- An oilfield service companies in connection regulations affecting water reuse and recycling in oil and gas operations
- Multiple land owners in contested cases related to the siting of electrical transmission lines before the Texas Public Utility Commission and in appeals in Texas state courts
- A landowner client regarding property contamination caused by third-party salt water disposal company
- A shopping center owner whose property was contaminated by releases from a historical dry cleaning operation regarding participation in the Texas Dry Cleaner Remediation Program
- A Bank regarding the environmental risks associated with a brownfield redevelopment involving participation in the Texas Voluntary Cleanup Program
- A major manufacturing facility in a TCEQ enforcement action under the Texas Solid Waste Disposal Act and an EPA investigation under the Resource Conservation and Recovery Act and the Emergency Planning and Community Right to Know Act
- A PRP group conducting a remedial investigation under CERCLA in successfully seeking the appointment of a receiver to oversee cleanup of a contaminated property
- A refinery in a TCEQ enforcement action alleging violations of regulations promulgated under Title V of the CAA and the Texas State Implementation Plan

- A publicly traded oil and gas company regarding hydraulic fracturing, climate change, and water issues as they pertain to U.S. Securities and Exchange filings and required disclosures
- A hospital in conducting environmental audit and developing an air regulations compliance plan for emergency generators located in a CAA nonattainment area
- An industrial client in resolving an enforcement action based on Spill Prevention, Control, and Countermeasure and Facility Response Plan regulations
- An oil and gas company resolving an EPA enforcement action under the general duty clause of section 112(r) of the Clean Air Act
- A refiner in an OSHA enforcement action brought under the Process Safety Management program regulations

## **EDUCATION**

J.D., 2005, with honors, The University of Texas School of Law

M.P.A., 2005, Lyndon B. Johnson School of Public Affairs

B.S., Biology (with honors); B.A. Government (cum laude), 1999, University of Maryland, Phi Beta Kappa

## **ADMISSIONS**

Texas

U.S. District Court for the Eastern District of Texas

U.S. District Court for the Northern District of Texas

U.S. District Court for the Southern District of Texas

U.S. District Court for the Western District of Texas



## **PUBLICATIONS**

Environmental Case Law Update, Aug. 2016, 27th Annual Texas Environmental Superconference

*Emerging Regulatory Trends in Hydraulic Fracturing*, March 2014, American Chemical Society Spring Meeting

*Reviewing the Impact of Natural Resource Protection Laws on Energy Production*, Jan. 2013, Texas Energy Production Land Seminar

*Water Contamination and Hydraulic Fracturing*, Sept. 2012, Environmental Issues in Natural Gas Production Seminar



**Martha K. Landwehr** serves as the Senior Advisor to TCEQ Commissioner Emily Lindley. In that capacity, she advises Commissioner Lindley on policy matters handled by the commission, provides support to the Commissioner on special assignments, and counsels the Commissioner regarding various matters that come before the commission.

Prior to joining TCEQ in 2018, Ms. Landwehr was General Counsel at the Texas Chemical Council, a trade association representing chemical manufacturers in Texas, and the Association of Chemical Industry of Texas, a trade association representing the suppliers, contractors, and service industries supporting the chemical industry. There she was responsible for all legal and regulatory matters involving the associations, led advocacy efforts at the TCEQ, EPA, and the Texas legislature, and provided guidance to the association Boards. Ms. Landwehr also served as liaison to all technical committees of the Council, including Air Conservation, Water & Waste Management, and Industrial Health. In addition, she served as the Policy Subcommittee Chair and Education & Outreach Subcommittee Chair for H2O4Texas.

Prior to joining TCC in fall 2013, she was the Legal Analyst for the Texas House of Representatives Committee on Natural Resources under Chairman Allan B. Ritter (R-Nederland). There she worked on various water-related policy and legislation, including the landmark H.B. 4, which created the monumental SWIFT Fund.

Ms. Landwehr holds both a J.D. and a bachelor's degree in government from The University of Texas at Austin. She participates as a mentor in the UT Women's Law Caucus mentorship program, which she helped institute while serving as President of the organization during her time at UT Law. She is a native Austinite, and enjoys outdoor activities with her dogs, traveling, and live music.

Erika Garcia is a member of Winstead's Environmental Law and Public & Regulatory Law Practice Groups. Prior to joining Winstead, she served as Staff attorney for The Public Utility Commission of Texas (PUCT) where she focused on public interest matters related to the regulation of electric, telecommunications and water. Erika has participated in contested administrative proceedings before the State Office of Administrative Hearings (SOAH) and the PUCT, including but not limited to electric, water, and sewer utility rate cases, Certificate of Convenience and Necessity (CCN) proceedings, and utility sales and transfers.

# Case Law Update

Presented at:

State Bar of Texas  
31<sup>st</sup> Annual Texas Environmental Superconference  
August 1-2, 2019  
Austin, Texas

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## **CASE LAW UPDATE**

This Case Law Update is a compilation of selected cases on environmental law topics that have been decided in federal and state courts since August 2018. This paper represents a sampling of cases, but is not intended to be a comprehensive digest or to constitute legal advice.

### **I. U.S. SUPREME COURT**

#### **A. Limitations of *Auer* Deference**

In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), the Supreme Court declined to overrule *Auer v. Robbins*, 117 S. Ct. 905 (1997), and the decisions outlining *Auer* deference. The Court found that stare decisis cut strongly against overruling *Auer*, which represents the principle that courts should generally defer to agencies' interpretations of their own regulations. Given the long line of precedents going back 75 years or more, abandoning *Auer* would have cast doubt on many settled rule constructions, and Congress has not acted to require de novo review of an agency's interpretation of its regulations. However, the Court restated and expanded the limits of *Auer* deference.

Petitioner James Kisor, a Vietnam War Veteran, was initially denied disability benefits from the Department of Veterans Affairs ("VA") in 1982. He moved to reopen his claim in 2006, and the agency this time agreed he was eligible for benefits, but only from the date of his motion to reopen, not from the date of his first application. The Board of Veterans' Appeals affirmed that retroactivity decision, based on its interpretation of an agency rule governing such claims. The Federal Circuit affirmed by applying the *Auer* doctrine. Kisor asked the Supreme Court to overrule *Auer*, as well as its predecessor *Seminole Rock & Sand Co.*, 65 S. Ct. 1215 (1945), based on two main arguments: (1) that *Auer* does not protect against excessive agency power; and (2) that *Auer* allows agencies to make rules without giving notice to the public.

Justice Kagan announced the judgment and delivered an opinion in which Justices Ginsburg, Breyer, and Sotomayor joined. Chief Justice Roberts joined in part, forming a majority of the Court for those parts. The Court held that *Auer* deference should not be afforded unless, after exhausting all the "traditional tools" of construction, the regulation is genuinely ambiguous. Even where genuine ambiguity exists, not every reasonable agency reading of a genuinely ambiguous rule should receive *Auer* deference. Instead, a court must also make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight. Some important markers for identifying when *Auer* deference is appropriate are: (i) the regulatory interpretation must be the agency's authoritative or official position; (ii) the agency's interpretation must in some way implicate its substantive expertise; and (iii) the agency's reading of a rule must reflect its fair and considered judgment.

As Justice Kagan (joined by Justice Ginsburg, Breyer, and Sotomayor) concluded, *Auer* deference is rooted in a presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities, because it is in the better position to reconstruct its original meaning. The presumption further stems from awareness that resolving genuine regulatory ambiguities often entails the exercise of judgment grounded in policy concerns; an

area where agencies have comparative advantage over courts. Finally, the presumption reflects the well-known benefits of uniformity in interpreting ambiguous rules, rather than through piecemeal litigation. On behalf of the plurality, Justice Kagan went on to address Kisor's arguments. She explained that *Auer* is not inconsistent with the judicial review provision of the Administrative Procedure Act ("APA"), nor does it circumvent the APA's rulemaking requirements. Justice Kagan also cited evidence negating Kisor's arguments that *Auer* encourages agencies to issue vague and open-ended regulations, confident that they can later impose whatever interpretation of those rules they prefer. Finally, Justice Kagan explained that contrary to Kisor's assertion, when properly understood and applied, *Auer* deference does not violate separation of powers principles.

The Court found that the Federal Circuit first "jumped the gun" in declaring the VA regulation ambiguous before bringing all its interpretive tools to bear on the question, and then too quickly assumed that *Auer* deference should apply in the event of genuine ambiguity, instead of assessing whether the interpretation is of the sort that Congress would want to receive deference. Accordingly, the Court vacated the judgment and remanded to the Federal Circuit with instructions to reconsider whether *Auer* deference is warranted, bearing in mind the principles set forth in this opinion.

Chief Justice Roberts filed an opinion concurring in part, in which he noted that the cases in which *Auer* deference is appropriate largely overlap with cases in which it would be unreasonable for a court to be persuaded by an agency's interpretation of its own regulation. He also made the point that issues surrounding judicial deference to agency interpretations of their own regulations are distinct from judicial deference to agency interpretations of statutes enacted by Congress. Chief Justice Roberts also suggested that the distance between the majority and Justice Gorsuch is not as great as it may initially appear. Justice Gorsuch was critical of the Court for not overturning *Auer*, warning in a concurring opinion joined by Justices Thomas, Alito, and Kavanaugh that it would likely have to address the issue again in the near future. Justice Gorsuch wrote a history of *Auer* deference, describing the decision and resulting doctrine as "an accident," and explaining that it is inconsistent with the APA and the separation of powers principle. Justice Kavanaugh wrote a separate opinion concurring in the judgment, joined by Justice Alito, which emphasized points made in Chief Justice Roberts' opinion.

## **B. Agency Decisions Regarding Designation of Critical Habitat Judicially Reviewable**

In *Weyerhaeuser Co. v. United States Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018), the Supreme Court remanded two key issues to the Fifth Circuit, sending the message that lower courts need to define "habitat" to evaluate government plans for protecting areas for rare species, and that agencies' decisions about what land should and should not be protected habitat are subject to judicial review.

This case involved the U.S. Fish and Wildlife Service's ("USFWS") designation of 1,544 acres of private land in Louisiana (dubbed "Unit 1") as unoccupied critical habitat for the dusky gopher frog. Weyerhaeuser, the landowner, challenged the designation, arguing first that the land was not critical habitat, as the frog could not survive there without modifications to the land

(e.g., replacing the closed-canopy timber plantation encircling the ponds with an open-canopy longleaf pine forest, and maintaining an open-canopy through controlled burning).

Second, Weyerhaeuser argued that even if Unit 1 was properly designated as critical habitat, USFWS should have excluded the land from such designation under 16 U.S.C. § 1533(b)(2), which requires the Secretary to take into consideration the economic impact of specifying any particular area as critical habitat, and authorizes him to exclude any area from critical habitat if he determines that the benefits of such exclusion outweighs the benefits of designating the area as critical habitat. Weyerhaeuser contended that USFWS' decision to not exclude Unit 1 was based on a faulty analysis, as USFWS improperly weighed the costs of designating Unit 1 against the benefits of designating all proposed critical habitat, rather than the benefits of designating Unit 1 in particular. Weyerhaeuser further argued that USFWS did not fully account for the economic impact of designating Unit 1 because it ignored, among other things, the cost of making the land habitable for the dusky gopher frog, as well as lost tax revenues for the local Parish if Unit 1 were never developed. The Court of Appeals did not consider this claim because it agreed with USFWS' argument that the Secretary's decision was not reviewable.

With respect to the first issue, the Court held that while "critical habitat" is defined by the Endangered Species Act ("ESA"), the larger category of "habitat" is undefined. The Court remanded the issue to the Fifth Circuit to interpret the term "habitat" and address whether habitat can include areas that, like Unit 1, would require some degree of modification to support a sustainable population of a given species. With respect to the second issue, the Court found that the Secretary's decision not to exclude an area from critical habitat is subject to judicial review, rejecting USFWS' argument that the provision at issue is one of those rare provisions "drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." The Court found that Weyerhaeuser's claim—that the agency did not appropriately consider all relevant statutory factors meant to guide the agency in its exercise of discretion—is in fact the sort of claim that federal courts routinely assess when determining whether to set aside an agency decision as an abuse of discretion. Accordingly, the Court remanded this issue to the Fifth Circuit to consider whether USFWS' assessment of the costs and benefits of designation and resulting decision not to exclude Unit 1 was arbitrary, capricious, or an abuse of discretion.

### **C. Conviction under CWA Vacated Posthumously, Remanded for Consideration of Mootness**

In *Robertson v. United States*, 139 S. Ct. 1543 (2019), the Supreme Court vacated the judgment against the late Joseph Robertson, substituted his widow Carri Robertson as petitioner in his stead, and remanded the case to the Ninth Circuit for consideration of the question whether the case is moot. Mr. Robertson was convicted of criminal violations of the Clean Water Act ("CWA") for excavating and constructing a series of ponds on National Forest System Lands and on privately owned land, which resulted in the discharge of dredged and fill material into the surrounding wetlands and an adjacent tributary that ultimately flowed into the Jefferson River, a traditionally navigable water of the United States. The Ninth Circuit had upheld Mr. Robertson's conviction, rejecting his arguments that the Government did not establish that there was CWA jurisdiction, and that he did not have fair warning of the scope of CWA jurisdiction. Depending on how the Ninth Circuit handles the matter on remand, the case could be brought back up to the

Supreme Court to review the underlying convictions and associated CWA issues, including whether the CWA term “navigable waters” is void for vagueness, and whether the Supreme Court should revisit its decision in *Rapanos*, in order to clearly and authoritatively interpret “navigable waters” under the CWA.

## **II. D.C. CIRCUIT COURT OF APPEALS**

### **A. EPA CCR Rule Partially Vacated**

In *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414 (D.C. Cir. 2018), the court considered consolidated petitions challenging the Environmental Protection Agency’s (“EPA’s”) 2015 rule governing the disposal of coal combustion residuals (“CCRs”) produced by electric utilities and independent power plants, and in a unanimous decision, vacated and remanded significant portions of the rule.

Before oral argument was heard, EPA announced its intent to reconsider the rule, and moved to hold all proceedings in abeyance. Following a request for clarification from the court regarding the exact provisions that would be subject to reconsideration, EPA filed a separate motion to remand six specific provisions. The court denied EPA’s motion for abeyance, and its motion to remand certain provisions. However, the court granted EPA’s motion for voluntary remand with respect to three provisions: the definition of “Coal Residuals Piles,” the 12,400-ton “beneficial use” threshold, and the alternative groundwater protection standards.

The court granted the Petitioners’ challenge and vacated three portions of the CCR rule. First, the court vacated the provision which allowed for the continued operation of existing unlined impoundments until a leak is detected, finding that this approach was arbitrary and capricious and contrary to the Resource Conservation and Recovery Act (“RCRA”) because it does not address the identified health and environmental effects documents in the record. Moreover, the court found that EPA had not shown that harmful leaks would be promptly detected, that once detected such leaks would be promptly stopped, or that contamination, once it occurs, could be remedied. Second, the court vacated the rule insofar as it treats existing impoundments constructed with compacted soil (“clay-lined”) and no geomembrane as if they were lined. The court again found that the rule’s treatment of clay-lined impoundments did not capture the full range of health and environmental harms they pose, as required by RCRA. By responding only to risks from leakage contaminating groundwater a mile from the perimeter of the studied impoundments, and setting minimum criteria that focus solely on harms to humans through drinking water contamination, EPA has failed to ensure “no reasonable probability” of adverse effects to the environment. Finally, the court vacated the exemption of inactive impoundments at inactive facilities (commonly referred to as “legacy ponds”), from the same preventative regulation that applied to all other inactive impoundments under the rule. In its analysis, the court noted that EPA has the authority to regulate inactive units, it is regulating inactive units at active facilities, and the risks posed by legacy ponds are at least as severe as the other inactive impoundment dangers to human health and the environment that the rule specifically seeks to address. The court also rejected EPA’s argument that its reactive approach is justified by the difficulties in identifying the party responsible for legacy ponds, finding that the record indicated that EPA was able to make such determinations. The court held that the

exemption was unreasoned, arbitrary, and capricious, and vacated and remanded the provisions back to EPA.

### **B. Substantiating Confidentiality Claims Under TSCA**

In *EDF v. EPA*, 922 F.3d 446 (D.C. Cir. 2019), the court largely upheld EPA's approach to determining when companies may claim certain chemical information is confidential under the Toxic Substances Control Act ("TSCA"), but found that it was arbitrary and capricious with respect to its exclusion of substantiating questions regarding reverse engineering. When a company makes a confidentiality claim under TSCA it must both "assert" and then "substantiate" the need for such protection. From its Notice of Proposed Rulemaking for the Inventory Rule to its final rule, EPA scrapped, among other things, all substantiation questions related to the requirement that a substance's chemical identity must not be readily discoverable through reverse engineering. The court found that EPA's omission of any such inquiry effectively excised a statutorily required criterion from the substantiation process, and that the agency's explanation for its actions was inadequate. The court denied the Environmental Defense Fund's other four challenges to the Inventory Rule, but remanded the Rule back to EPA to require companies to make this showing to claim confidentiality.

### **C. Associational Standing Requires Substantial Probability of Injury to Member**

In *Sierra Club v. EPA*, 925 F.3d 490 (D.C. Cir. 2019), the court rejected Sierra Club's challenges to EPA's revised regulation governing the review and approval of annual monitoring network plans. The court particularly scrutinized Sierra Club's standing to bring certain claims and found it to be based on hypotheticals and speculation. Sierra Club argued that the rule provision created an inherent risk that monitoring would not detect excess pollution. The court noted that Sierra Club asserted only associational standing, which required that it must demonstrate, not merely allege, that there is a "substantial probability" that one of its members will suffer injury if the court did not take action, *i.e.*, prevent EPA from allowing regional administrators to consider reductions in sampling frequency. The court was unpersuaded by Sierra Club's identification of one monitor in Texas and two in Oregon that were eligible for a reduction in sampling and placed near a Sierra Club member, as Sierra Club failed to show that Texas or Oregon were likely to request frequency reductions at all, let alone for those specific monitors. The court further noted that Sierra Club had identified no reason to believe that an "abrupt reversal in PM<sub>2.5</sub> fortunes" near these low-risk sites was likely, much less certainly impending.

### **D. Venue under the CAA**

In *Sierra Club v. EPA*, 2019 U.S. App. LEXIS 17895 (D.C. Cir. 2019), the court dismissed Sierra Club's challenge of an EPA order renewing a Title V permit for a coal-fired power plant in Utah for lack of venue. The court stated that there are two routes for venue to be proper in this court: EPA's regulation or other final action must be nationally applicable, or the EPA's Administrator may determine that the otherwise locally or regionally applicable action has nationwide scope or effect and publish his finding. Because the challenged order was applicable to only a single plant in a single state, and was not determined by the EPA

Administrator to have nationwide scope or effect, the court dismissed the petition without reaching the merits.

#### **E. EPA's Refusal to Expand Northeast Transport Region Within Agency Discretion**

In *New York v. EPA*, 921 F.3d 257 (D.C. Cir. 2019), the court denied a petition by several States for review of EPA's decision to refuse to expand the Northeast Transport Region to include the upwind states of Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Tennessee, West Virginia, and the remaining portions of Virginia. The court held that EPA's denial of the States' petition complied with the Clean Air Act ("CAA") and was a reasonable exercise of the agency's discretion.

EPA may expand the Region of states subject to mandatory ozone controls upon receipt of a petition, whenever the EPA Administrator has reason to believe that the interstate transport of air pollutants from that state significantly contributes to a violation of the air quality standard in the transport region. EPA exercised its discretion to deny the States' petition here, concluding that compared to the blunt impact of expanding the Region, the use of two other CAA sections, the "good-neighbor" provision and "section 126 petitions" provided more effective and efficient approaches to the ozone transport problem in light of limited agency resources.

The court held that many of the States' arguments against EPA's denial derive from a fundamental misunderstanding of the scope of EPA's discretion. Even if the States were correct that EPA's other CAA tools would not on their own completely solve the interstate ozone transport problem, this would not make enlargement of the Region mandatory. The court further found that EPA adequately explained the facts and policy concerns it relied on, recounted its historical use of the "good-neighbor" provision and the ongoing downward trend in ozone pollution, and accordingly had sufficient basis in the record for predicting that improvement would continue under the current regulatory scheme. Finally, the court rejected the States' claim that EPA refused to consider the inequitable burden that the problem of ozone pollution transport places on downwind states, concluding that EPA did not find equity irrelevant but determined that any equitable concerns could not alone dictate the disposition of the petition.

### **III. FIFTH CIRCUIT COURT OF APPEALS**

#### **A. EPA Steam-Electric Power Plant ELGs Partially Vacated**

In *Southwestern Elec. Power Co. v. United States EPA*, 920 F.3d 999 (5<sup>th</sup> Cir. 2019), the court vacated the "legacy" wastewater and "combustion residual leachate" best available technology economically achievable ("BAT") standards promulgated by EPA in its 2015 power plant effluent limitation guidelines ("ELGs") rule. This case represents a consolidation of four separate lawsuits challenging the final rule that were originally brought in the Second, Fifth, Eighth, and Ninth Circuits.

The Sierra Club, Waterkeeper Alliance, and other environmental petitioners challenged parts of the ELGs, arguing that EPA impermissibly designated in-ground pits, or impoundments, as BAT for legacy wastewater. Legacy wastewater is a subset of five of the other streams, generated prior to the compliance date set for the new rule, which is an as-yet-unspecified date

between 2020 and 2023. Instead of subjecting legacy wastewater to the more advanced and effective technologies that kick in after the rule’s compliance date, the rule sets BAT for legacy wastewater as equal to the best practicable control technology currently available (“BPT”) previously set in 1982 (*i.e.*, surface impoundments). The court concluded that EPA acted arbitrarily and capriciously in setting the BAT limit for legacy wastewater for five reasons: (1) the final rule repeatedly recognizes that impoundments are “largely ineffective” at removing toxins from wastewater, which is in “critical tension” with EPA’s choosing them as BAT given that BAT is supposed to be the CWA’s most stringent standard; (2) EPA refused to set impoundments as BAT for five of the six wastewater streams at issue, precisely because of their flaws—paradoxical action that signals arbitrary and capricious agency action; (3) the final rule describes impoundments as outdated and ineffective pollution control technology yet “freezes” them in place for legacy wastewater, thereby blurring the line between the statutorily distinct concepts of BAT and BPT (the prior standard to BAT); (4) the final rule strongly indicates that other available technologies are far better than impoundments at removing pollutants from legacy wastewater, which is difficult, if not impossible, to square with EPA’s decision to nonetheless set 1980s-era impoundments as BAT; and (5) Congress intended BAT limits to be based on the performance of the single best-performing plan in an industrial field, but the final rule says nothing to indicate that the choice of impoundments as BAT were based on any such performance. The court further rejected EPA’s argument that it lacked data to justify adopting a more advanced treatment technology.

The court also held that EPA’s decision to set BAT for combustion residual leachate as impoundments failed *Chevron* step one by conflating the BAT and BPT standards without explanation, thereby contravening the plain text and structure of the CWA and its careful distinction between the two standards. Alternatively, the court concluded that the leachate regulation failed at *Chevron* step two because it rests on an impermissible interpretation of the CWA. Accordingly, the court set aside the portions of the final rule regulating legacy wastewater and residual combustion leachate and remanded them to EPA for reconsideration.

#### **IV. OTHER U.S. COURTS OF APPEALS**

##### **A. Discharges to Groundwater is Not Basis for CWA Liability in Sixth Circuit**

In *Ky. Waterways Alliance v. Ky. Utils. Co.*, 905 F.3d 925 (6<sup>th</sup> Cir. 2018), the court held that the CWA does not extend liability to pollution that reaches surface waters via groundwater, but RCRA does.

Plaintiffs Sierra Club and Kentucky Waterways Alliance contend that groundwater flows cause the ash ponds containing coal combustion residuals from a coal-burning power plant to release pollutants into Herrington Lake. Plaintiffs offered two theories as to why their claims falls within the scope of the CWA: (1) under the “point source theory,” they argue that groundwater and the karst terrain that carries the groundwater are both point sources that deposits pollutants into the lake; and (2) under the “hydrological connection” theory, they argue that the coal ash ponds are the point source, and the groundwater is a medium through which pollutants pass before being discharged into navigable waters. The court squarely rejected both theories. First, the court found that Plaintiffs’ point source theory fails because the CWA requires that a point source is a “discernible, confined, and discrete conveyance,” and neither the

groundwater nor the karst meet that definition. The court explained that by its very nature groundwater is a “diffuse medium” that seeps in all directions and thus is not confined or discrete. And while dye traces can roughly and occasionally track the flow of groundwater, they do not render it discernible. Similarly, the karst or “soluble rock” is a conduit for the groundwater which allows it to pass through more expediently, it does not change that groundwater does not meet the CWA definition of a point source. Second, the court held that the text of the CWA forecloses the hydrological connection theory. The CWA defines effluent limitations as restrictions on the amount of pollutants that may be “discharged from point sources into navigable waters.” Under the court’s analysis, the term “into” indicates directness, and a point of entry. Thus, for a point source to discharge *into* navigable waters, it must dump directly into those navigable waters—the phrase “into” leaves no room for intermediary mediums to carry the pollutants.

The court went on to emphasize Congress’ clear intent to reserve power over discharges to groundwater to the states, focusing on the CWA’s specific purpose to recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution and plan the development and use of land and water resources. The court also stated that reading the CWA to cover groundwater pollution would upend the existing regulatory framework, because RCRA explicitly exempts from its coverage any pollution that is subject to CWA regulation. Thus, if the CWA covered the utility’s conduct here, the utility’s coal ash treatment and storage practices would be exempted from RCRA’s coverage, which is a problematic result as coal ash is solid waste, which RCRA is specifically designed to cover. The court further held that reading the CWA to cover coal ash ponds would gut the CCR rule issued by EPA, because it would mean that any coal ash pond with a hydrological connection to a navigable water would require an NPDES permit, thus removing it from RCRA’s coverage, and the CCR rule.

The court held that the proper federal channel for Plaintiffs’ complaint is RCRA, reversed the district court’s dismissal of Plaintiffs’ RCRA claim, and remanded for further proceedings on that claim.

In a companion decision issued the same day, *Tenn. Clean Water Network v. TVA*, 905 F.3d 436 (6<sup>th</sup> Cir. 2018), the court similarly rejected the hydrological connection theory, finding that groundwater discharges from coal ash ponds into a nearby river were not coming from a point source and that the CCR rule, not the CWA, was the framework envisioned by Congress to address this issue.

The Sixth Circuit’s holdings in these cases have created a circuit split with the Fourth and Ninth Circuits. As noted in section IX.B below, the U.S. Supreme Court has granted a writ of certiorari to address this issue.

## **B. Standing for NEPA Challenge to USDA Wolf Killing**

In *Western Watersheds Project v. Grimm*, 921 F.3d 1141 (9<sup>th</sup> Cir. 2019), the court reversed the Idaho district court’s ruling that Plaintiff conservationist groups lacked Article III standing to enjoin the federal government’s participation in the killing of Northern Rocky Mountain gray wolves in Idaho pending additional analysis under National Environmental Policy Act (“NEPA”). The court found that declarations from conservationists describing how the



USDA Wildlife Services' wolf-killing activities threatened their aesthetic and recreational interests in tracking and observing wolves in the wild fell under the scope of NEPA's protections, and established injury-in-fact. The court noted that causation was established under the relaxed standard for procedural injuries. The court also found that Plaintiffs' injuries were redressable because enjoining Wildlife Services' killing of wolves in support of the Idaho Department of Fish and Game's ("IDFG's") wolf management program pending further NEPA review could protect Plaintiffs' interests by reducing wolf killings. The court rejected Wildlife Services' argument that redressability would be defeated because without it, IDFG would simply replace the existing lethal wolf management program with an identical program. The court noted that IDFG had not expressed an intent—or ability—to replace Wildlife Services' lethal wolf management operations completely, and whether or not that would occur was a matter of speculation, which does not defeat standing.

## **V. TEXAS FEDERAL DISTRICT COURTS**

### **A. Challenges to EPA's WOTUS Rule**

In *Texas v. United States EPA*, 2019 U.S. Dist. LEXIS 89113 (S.D. Tex. 2019), the court granted Texas' motion for summary disposition, sending EPA's 2015 Waters of the United States ("WOTUS") rule back to the appropriate administrative agencies to proceed with repealing and replacing the rule. Texas' motion for summary disposition requested that the court vacate the final rule on the grounds that it violates the APA, the CWA, the Commerce Clause, and the Tenth Amendment. The court found that the final rule violates the notice-and-comment requirements of the APA and therefore granted summary disposition on that ground alone. The court declined to address the substantive challenges to the final rule as premature, but remanded the rule for further proceedings consistent with the opinion.

### **B. Denial of Petition to Delist Bone Cave Harvestman Overturned**

In *Am. Stewards of Liberty v. DOI*, 370 F. Supp.3d 711 (W.D. Tex. 2019), the court overturned the USFWS' rejection of a petition to delist the bone cave harvestman, an endangered karst invertebrate species which is known to inhabit only Travis and Williamson Counties in Texas. The ESA allows interested persons to petition USFWS to change the status of a species. Within 90 days of the filing of a petition, USFWS must make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. American Stewards of Liberty claimed that USFWS' rejection of a petition to delist the bone cave harvestman was arbitrary and capricious because, among other things, the USFWS based its rejection on the petition's alleged failure to provide population trend data that USFWS admits is not available or attainable. Because USFWS' regulations require a petition to change the status of a species to present only "available information," the court found that USFWS committed a clear error in judgment and acted arbitrarily and capriciously and not in accordance with the APA when it called for more evidence than the law requires. The court vacated USFWS' 90-day finding, and remanded the petition for further consideration consistent with this opinion.

## VI. OTHER DISTRICT COURT OPINIONS

### A. State Water Quality Standard Variances

In *Upper Mo. Waterkeeper v. United States EPA*, 377 F. Supp.3d 1159 (D. Mont. 2019), the court granted partial summary judgement of Upper Missouri Waterkeeper's ("Waterkeeper") challenge to Montana's state water quality standard variance rule.

In 2015, the Montana Department of Environmental Quality ("DEQ") adopted, and EPA approved, base numeric nutrient water quality standards for nutrient pollutants. In 2017, DEQ adopted, and EPA approved, a "variance" from Montana's base water quality standards. The variance rule recognized that some dischargers may experience challenges in meeting the stringent requirements of the base water quality standards, and provided a relaxed limit for larger plants and an even more relaxed limit for smaller plants. The DEQ premised the variance upon the "widespread economic and social impact" to Montana communities associated with the need to comply with the base water quality standards. The variance applied to 36 municipal dischargers, and was approved for a 17-year period. Waterkeeper challenged the variance rule on the basis that (1) the language of the CWA clearly requires the consideration of only "science-based criteria" and does not allow for the consideration of economic and social impacts in setting water quality standards; and (2) that the variance standard effectively replaces Montana's base water quality standards, because the 17-year timeline requires Defendants to meet only the more relaxed variance standard rather than the more stringent criteria in the base water quality standards.

The court rejected Waterkeeper's first argument, finding based on a *Chevron* analysis that EPA did not act contrary to Congressional directives when it interpreted the CWA through its regulation, and that EPA's interpretation of its regulation proves reasonable and deserves deference. However, the court agreed with Waterkeeper's second argument, finding that in engaging in a case-by-case analysis of dischargers that qualify for the variance, there is a fundamental flaw. Using the City of Whitefish, Montana as an example, the court noted that the City does not yet meet even the variance standard. While the point of the variance is to give certain dischargers time to make the necessary changes to come into compliance with the base standards by 2035, the court found that under EPA's own regulations and Montana's variance, there is no guarantee that the Whitefish would ever reach that goal. EPA's regulations on variances allow time for discharging entities like Whitefish to achieve "merely the highest attainable condition," rather than the actual base standards. Accordingly, the DEQ could give Whitefish the entire remaining 17 years of the variance just to meet the variance standards. The court held that the adoption of a 17-year timeline merely to reach the "highest attainable condition" violates the direction of the CWA.

The court held that Defendant agencies must begin with a program that complies with the relaxed criteria of the variance standard, and work toward ultimate attainment of Montana's base water quality standards in order to demonstrate progress toward attainment. The court held that Defendants must adopt a timeline for which attainment of Montana's base water quality standards would be feasible; to hold otherwise would render such standards meaningless. The court ordered Waterkeeper to work with Defendant agencies and intervenors to determine proper remedies given its ruling.

## **B. Environmental Effects of Proposed Border Wall**

In *Sierra Club v. Trump*, 2019 U.S. Dist. LEXIS 88210 (N.D. Cal 2019), Sierra Club and Southern Border Communities Coalition (“Plaintiffs”) filed a motion for a preliminary injunction to prevent President Donald Trump and other executive officers (“Defendants”) from using “reprogrammed” federal funds from the Department of Defense (“DoD”) for the construction of a barrier on the U.S.-Mexico border.

Plaintiffs’ operative Complaint alleges, among other things, that Defendants failed to comply with NEPA, which compels federal agencies to assess the environmental impact of agency actions that significantly affect the quality of the human environment. Plaintiffs allege that Defendants’ use of the reprogrammed funds would injure their members because the noise of construction, additional personnel, visual blight, and negative ecological effects that would accompany a border wall and its construction would detract from their ability to hike, fish, enjoy the desert landscapes, and observe and study a diverse range of wildlife in areas near the U.S./Mexico border.

After Plaintiffs filed their motion for preliminary injunction, the Acting Secretary of Homeland Security invoked his authority under Section 102(c) of the Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”) to waive any NEPA requirements for construction of the border barrier. Defendants argue that such waivers preclude Plaintiffs from advancing a NEPA claim. Plaintiffs in turn argue that the Department of Homeland Security’s (“DHS’s”) authority to waive NEPA requirements for construction under IIRIRA does not extend to construction undertaken by DoD under its own spending authority. The court agreed with Defendants, that Plaintiffs are not likely to succeed on their NEPA argument because of the waivers issued by DHS. The court stated that DoD’s statutory authority here is derivative, as its spending authority under 10 U.S.C. § 284 is limited to providing support to other agencies, and it may only invoke its authority in response to a request from such an agency. Here, DHS requested DoD’s assistance to support DHS’s action under Section 102 of IIRIRA. The court concluded that it was unlikely that Congress intended to impose different NEPA requirements on DoD when it acts in support of DHS’s Section 102 authority in response to a direct request under Section 284 than would apply to DHS itself. The district court granted the preliminary injunction on other grounds.

Defendants appealed to the Ninth Circuit in *Sierra Club v. Trump*, 2019 U.S. App. LEXIS 19978 (9<sup>th</sup> Cir. 2019) for an emergency stay of the district court’s injunction, which the Ninth Circuit granted pending the appeal of the district court’s permanent injunction. The Ninth Circuit’s opinion, however, does not address Plaintiff’s NEPA claims.

## **VII. TEXAS SUPREME COURT**

### **A. Ad Valorem Tax Exemption for Pollution Control Property**

In *Brazos Elec. Power Coop, Inc. v. State Comm’n on Env’tl. Quality & Richard A. Hyde*, 2019 Tex. LEXIS 425 (Tex. 2019), the Texas Supreme Court unanimously held that the Texas Commission on Environmental Quality (“TCEQ”) lacked discretion to deny an ad valorem tax exemption for heat recovery steam generators (“HRSGs”), because Tex. Tax Code Ann.

§ 11.31(m) requires a positive use determination for HRSGs, as the devices were deemed by the Legislature to qualify at least in part, as pollution control property. The Court held that for property that has been established as per se pollution control property by Tex. Tax Code Ann § 11.31(k), the TCEQ Executive Director's discretion is limited to making a determination of what proportion, greater than 0% and less than 100%, of the property is purely productive (*i.e.*, used to produce goods or services) and what proportion is used to control, monitor, prevent, or reduce pollution.

## **B. The “Turbulent Waters” of Governmental Immunity**

In *Chambers—Liberty Counties Navigation Dist. v. State*, 2019 Tex. LEXIS 445 (Tex. 2019), the Texas Supreme Court stated that in addressing this interlocutory appeal, it must once again “navigate the turbulent waters of governmental immunity.”

The Chambers—Liberty Counties Navigation District (“District”) leased approximately 23,000 acres of submerged land to Sustainable Texas Oyster Resource Management, L.L.C. (“STORM”) for oyster production. STORM pursued construction of oyster beds and sent “No Trespass” notices to holders of oyster-production permits issued by the Texas Parks and Wildlife Department (“TPWD”) to other oyster producers, which covered locations within the lease. The District claims that its fee simple ownership of the submerged land and its broad, general statutory authority empower it to lease the submerged land for oyster cultivation, even though the surface waters above the land are property of the State. The State of Texas sued the District, its Commissioners in their official capacities, and STORM, alleging that the Lease is void because it exceeds the lawful authority of the District and Commissioners, who acted *ultra vires* by entering into it. The State also sought monetary relief from the District under Tex. Parks & Wild. Code Sections 12.301 and 12.303.

The Court concluded that governmental immunity bars the State's claim for monetary relief against the District, because while the Legislature has authorized the State to sue political subdivisions for limited monetary relief in particular circumstances, there is no such provision for the State's money-damages claims against the District. The Court stated that it declined the State's invitation to “open up a bottomless pit of local taxpayer liability bounded only by the discretion of the State's lawyers and the willingness of judges and juries to award damages.”

The Court, however, found that governmental immunity did not bar the State's *ultra vires* claim that the District's officers exceeded their authority by entering into the oyster lease (though the State's *ultra vires* claim against the District itself could not proceed, because an *ultra vires* claim may name a government official in his individual capacity, but the underlying governmental entity remains immune from suit). The Court found that given the extensive and exclusive regulatory authority vested in the TPWD by the Legislature to decide who may cultivate and harvest oysters in state waters, on the limited record before the court, the Commissioners exceeded their authority by entering into the Lease that purported to grant STORM, a private party, the exclusive right to cultivate and harvest oysters beneath state waters. The Court remanded the case for further proceedings on the *ultra vires* claim.

## **VIII. TEXAS COURTS OF APPEAL**

### **A. RRC's Withdrawal of Injection Well Permit No-Harm Letter Did Not Invalidate TCEQ Permit**

In *Dyer v. Tex. Comm'n on Env'tl. Quality*, 2019 Tex. App. LEXIS 4171 (Tex. App.—Austin 2019, no pet.), the court upheld a lower court decision that the Railroad Commission of Texas' ("RRC") withdrawal of an injection well permit's no-harm letter did not require TCEQ's rescission of the permit. The court further held that TCEQ's alteration of the Administrative Law Judge's ("ALJ's") findings was not contrary to Tex. Gov't Code Ann. § 2003.047(m) because evidence supported the changes, and the changes prejudiced no substantial rights.

TexCom Gulf Disposal, LLC submitted its injection well permit application to TCEQ in 2005, which included the required no-harm letter from the RRC providing that the operation of the proposed wells would not injure or endanger any known oil or gas reservoir. A contested case hearing was held on the application in 2007, and a remand hearing was held in 2010. In 2010, Denbury Onshore, LLC ("Denbury"), the new lessee-operator of the mineral interests underlying the proposed site intervened in the TCEQ proceeding, and separately requested that the RRC withdraw the 2005 no-harm letter based on its oil and gas operations. After a contested case proceeding of its own, the RRC issued an order rescinding the no-harm letter on January 13, 2011, which did not become final until after the motion for rehearing process ended on April 18, 2011. TCEQ issued a final order approving the permit on February 17, 2011 and then reissued the order on April 7, 2011. The court found that TCEQ did not act arbitrarily and capriciously or abuse its discretion regarding the no-harm letter, as (i) the RRC's order rescinding the 2005 no-harm letter was not final until April 18, 2011, but the initial contested-case hearing in this case was in 2007; (ii) the lessee-operator of the mineral interests from TexCom's submission of its application in 2005 until Denbury's intervention in 2010 did not seek party status to challenge TexCom's proposed facility; (iii) the no-harm letter was admitted during the 2007 hearing without objection and, thus, was properly considered as evidence before the ALJs; (iv) the 2010 hearing on remand was expressly limited to specific topics that did not include the impairment of mineral rights; (v) the administrative record was complete and closed in 2010; and (vi) TCEQ voted to approve TexCom's permit application in January 2011.

The court also rejected Appellants' argument that TCEQ improperly rewrote many of the ALJs' adjudicative and underlying findings of fact and made changes that were not based solely on the record before the ALJs, in violation of the APA. The court found TCEQ's explanations were sufficient, and further stated that Appellants failed to show that their substantial rights were prejudiced by the changes. Appellants also challenged various findings of fact and conclusions of law. The court found that the Appellants had not made substantial evidence challenges to any of the findings of fact, and accepted the facts as established. In a dissent from the panel ruling, Justice Kelly stated that the majority should have applied a stricter standard and forced TCEQ to provide specific reasoning for the changes it made to the ALJs' findings.

### **B. Whitetail Breeder Deer are Not Private Property**

In *Bailey v. Smith*, 2019 Tex. App. LEXIS 5448 (Tex. App.—Austin 2019, no pet.), the court affirmed the district court's holding that captive-bred whitetail breeder deer—raised by

persons with the required TPWD permit—are not considered private property of the deer breeder, but are owned by the state.

Two deer breeders, Peterson and Bailey, sought a declaration under the Uniform Declaratory Judgment Act (“UDJA”) that captive-bred deer are private property rather than wild animals. Based on that ownership claim, they also asserted various due process violations with respect to TPWD’s rules addressing chronic wasting disease, which increased the testing required to be performed by breeders. However, the court concluded that the statutory scheme simply leaves no room for common law property rights to arise in breeder deer, as the deer are public property held under a permit issued by the TPWD. The court also rejected ultra vires claims against three TPWD officials, holding that they were not the proper parties because TPWD, and not the officials, adopted the challenged chronic wasting disease rules under the agency’s statutory authority to regulate breeder deer.

The court also engaged in a detailed analysis regarding the award of attorney’s fees under the UDJA, which allows for the award of costs and reasonable and necessary attorney’s fees as are equitable and just. With respect to reasonableness, the court found that TPWD adequately supported its fee claim through the submission of a sworn affidavit from Mr. Ledbetter, an assistant attorney general experienced in natural resource litigation. Mr. Ledbetter arrived at a reasonable hourly rate for each of the assistant attorneys general assigned to the case by reviewing the average hourly billing rates published in the *Texas Lawyer* for lawyers practicing in Travis County in relevant practice areas, reviewing the billing records kept by each attorney general working on the case, and consulting with each of them regarding the specific services they performed. Based on this review, Mr. Ledbetter individually determined each attorney’s reasonable hourly rate and the reasonable hours worked on the case and arrived at a reasonable fee. The court rejected Peterson and Bailey’s arguments that the TPWD’s records are not sufficiently specific for the district court to determine whether the assistant attorneys general assigned to the case duplicated each other’s work or to determine that the fees of contract attorneys used for document review were reasonable. The court also found that the district court’s award was not inequitable or unjust, and accordingly, upheld the award of attorney’s fees.

## **IX. CASES TO WATCH**

### **A. U.S. Supreme Court to Consider Whether CERCLA Preempts State Law Claims**

On June 10, 2019, in *Atl. Richfield Co. v. Christian*, 2019 U.S. LEXIS 3967 (2019), the U.S. Supreme Court granted a writ of certiorari to address: (1) whether a common-law claim for restoration seeking cleanup remedies that conflict with remedies EPA ordered is a jurisdictionally barred “challenge” to EPA’s cleanup under the Comprehensive Environmental, Response, Compensation, and Liability Act (“CERCLA”); (2) whether a landowner at a Superfund site is a “potentially responsible party” that must seek EPA approval under CERCLA before engaging in remedial action, even if EPA has never ordered the landowner to pay for a cleanup; and (3) whether CERCLA pre-empts state common-law claims for restoration that seek cleanup remedies that conflict with EPA-ordered remedies. Atlantic Richfield seeks to overturn a decision by the Montana Supreme Court in *Atl. Richfield Co. v. Mont. Second Judicial Dist. Court*, 408 P.3d 515 (Mont. 2017), which allowed property owners to seek restoration damages

in state courts beyond EPA determined and mandated clean-up plan for the Anaconda Smelter copper mining contamination.

## **B. U.S. Supreme Court to Address Circuit Split on CWA**

The U.S. Supreme Court granted a writ of certiorari on February 19, 2019, in *Cty. of Maui v. Haw. Wildlife Fund*, 2019 U.S. LEXIS 1103 (2019), to address a circuit split regarding whether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater. The Ninth Circuit in *Hawai'i Wildlife Fund v. City of Maui*, 886 F.3d 737 (9<sup>th</sup> Cir. 2018), and the Fourth Circuit in *Upstate Forever v. Kinder Morgan Energy Partners L.P.*, 887 F.3d 637 (4<sup>th</sup> Cir. 2018) both adopted the hydrological connection theory to find indirect discharges prohibited by the CWA, while the Sixth Circuit expressly rejected that theory in *Ky. Waterways Alliance v. Ky. Utils. Co.*, 905 F.3d 925 (6<sup>th</sup> Cir. 2018) and *Tenn.Clean Water Network v. TVA*, 905 F.3d 436 (6<sup>th</sup> Cir. 2018).

## **C. Affordable Clean Energy Rule**

On June 19, 2019, EPA promulgated the new Affordable Clean Energy (“ACE”) rule, which replaces the Clean Power Plan (“CPP”) and renders all associated lawsuits moot. The ACE rule still requires EPA to regulate greenhouse gases, but is narrower in scope than the CPP. The ACE rule instructs states to reduce emissions, but sets no targets. Instead, it lets states decide how much carbon reduction they consider reasonable, and suggests ways to improve efficiency at individual power plants. The new rule will take effect September 6, 2019, and is expected to be the subject of a new set of legal challenges. The final rule is available at: <https://www.govinfo.gov/content/pkg/FR-2019-07-08/pdf/2019-13507.pdf>

## **D. Climate Change Facility Protections**

In *Conservation Law Foundation v. ExxonMobil*, Case No. 1:16-cv-11950, the U.S. District Court for the District of Massachusetts ruled earlier this year that the Conservation Law Foundation (“CLF”) has plausibly argued that ExxonMobil failed to consider the effects of climate change at its Everett petroleum terminal in Massachusetts, allowing the majority of CLF’s amended complaint to survive ExxonMobil’s motion to dismiss. While the judge has noted that ExxonMobil’s federal discharge permit may not explicitly require ExxonMobil to consider climate change when maintaining the terminal, the appropriate question is whether the permit requires ExxonMobil to consider how extreme weather events might threaten the facility. CLF has a similar pending suit, *Conservation Law Foundation v. Shell Oil Products US et al.*, Case No. 1:17-cv-00396 in the U.S. District Court for the District of Rhode Island, in which it alleges that Shell has not adequately protected its Providence fuel terminal from the effects of climate change.



# 31<sup>st</sup> Annual Texas Environmental Superconference

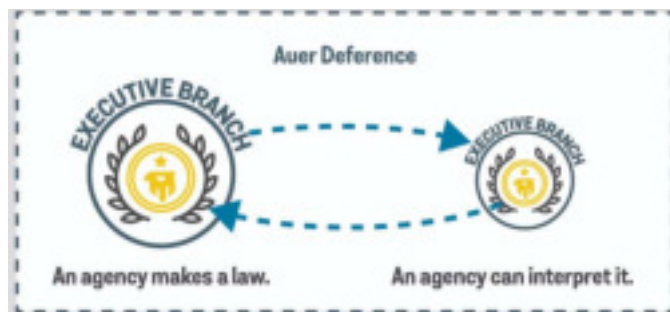
## CASE LAW UPDATE

### *A Menagerie*

Erika Garcia  
egarcia@winstead.com



# *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019)



## Applying *Auer* Deference:

- The regulation is genuinely ambiguous;
- The character and context of the agency interpretation entitles it to controlling weight;
- The regulatory interpretation is the agency's authoritative or official position;
- The agency's interpretation implicates its substantive expertise; and
- The agency's reading of the regulation reflects fair and considered judgement.

# *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (cont'd)

- Justice Kagan—*Auer* deference rooted in presumption that an agency should have primary role in resolving regulatory ambiguities because it is in the better position to reconstruct its original meaning
- Chief Justice Roberts—Where *Auer* deference is appropriate overlaps with cases where it is not. Judicial deference to agency interpretations of their own regulations is distinct from deference to agency interpretations of statutes
- Justice Gorsuch—A “stay of execution” for a rule the Court invented “almost by accident” that is inconsistent with the APA and the separation of powers principle
- Justice Kavanaugh—emphasized Chief Justice Robert’s points

# *Weyerhaeuser Co. v. United States Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018)

- Definition needed for “habitat”
- An agency’s determination of what land should and should not be protected habitat is subject to judicial review



# *Util. Solid Waste Activities Grp. v. EPA* 901 F.3d 414 (D.C. Cir. 2018)



- The court vacated three portions of the CCR rule and remanded back to EPA:
  - ❖ The provision that allowed for the continued operation of existing and unlined impoundments
  - ❖ The rule's treatment of clay-lined impoundments as if they were lined
  - ❖ The exemption of “legacy ponds” from the same preventative regulation applicable to other active impoundments

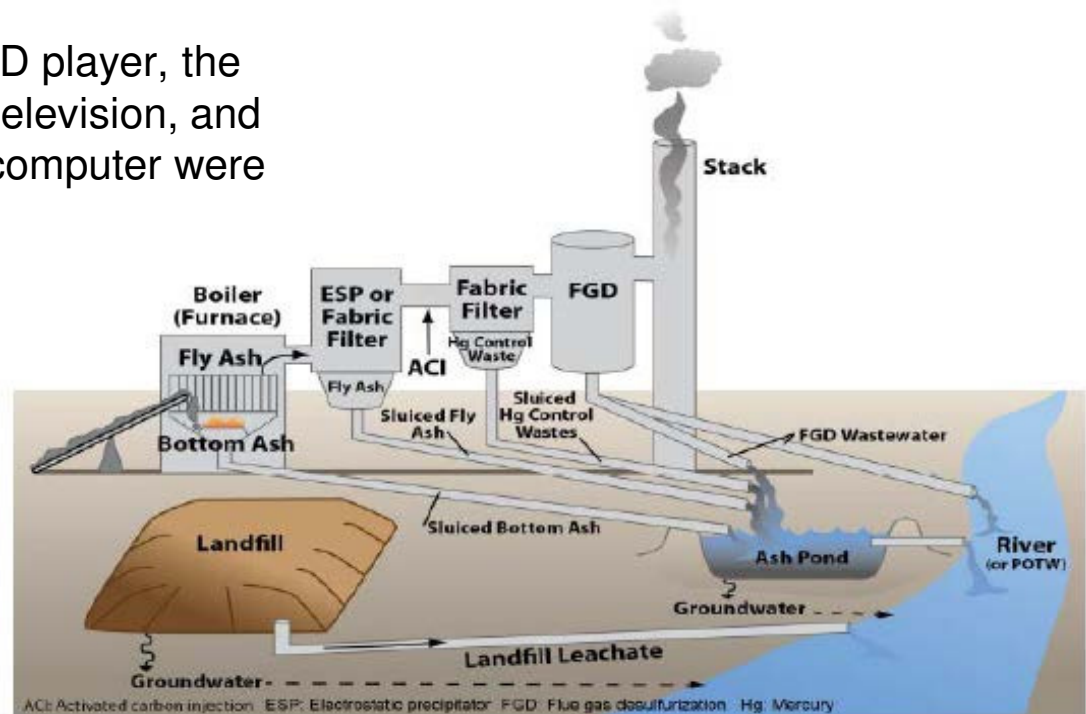
# *EDF v. EPA*

## 922 F.3d 446 (D.C. Cir. 2019)

- EPA's approach to determining when certain chemical information is confidential under TSCA was largely upheld
- The court determined it was arbitrary and capricious for EPA to omit all substantiation questions related to the requirement that a substance's chemical identity must not be readily discoverable through reverse engineering

# *Southwestern Elec. Power Co. v. United States EPA* 920 F.3d 999 (5<sup>th</sup> Cir. 2019)

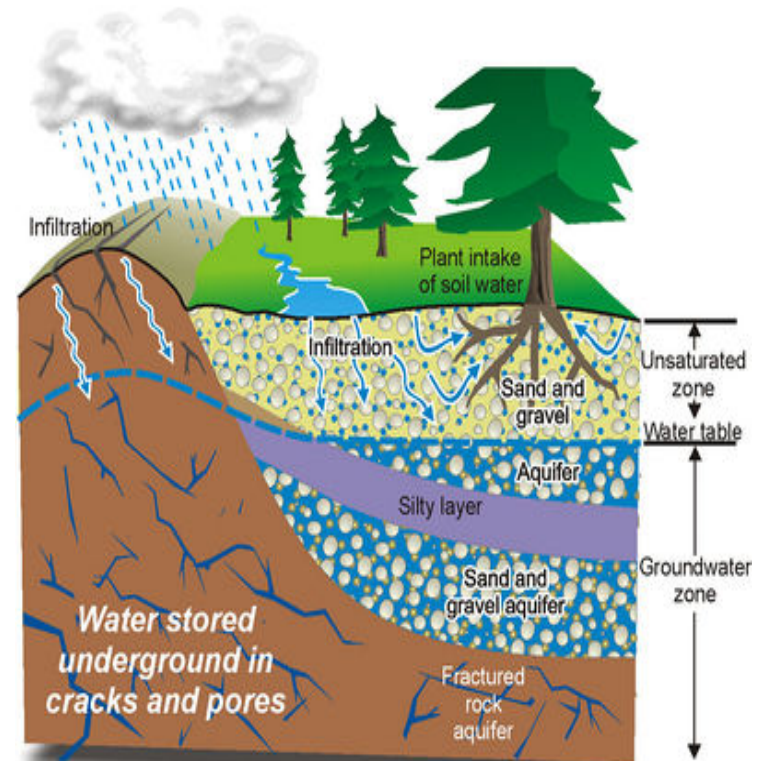
- Remanded the portions of the 2015 ELG rule regulating “legacy” wastewater and residual combustion leachate back to EPA
- BAT v. BPT. The last time the BPT standards were updated
  - Ronald Reagan was president
  - It was the year the first CD player, the Sony Watchman pocket television, and the Commodore 64 home computer were released





*Ky. Waterways Alliance v. Ky. Utils. Co.*, 905 F.3d 925 (6<sup>th</sup> Cir. 2018)  
&  
*Tenn. Clean Water Network v. TVA*, 905 F.3d 436 (6<sup>th</sup> Cir. 2018)

- The court rejected the Fourth Circuit and Ninth's Circuit's holdings that discharges to groundwater can give rise to CWA liability if sufficiently connected to navigable waters
- Concluded that reading the CWA to cover groundwater pollution would upend the existing regulatory framework by exempting regulation of certain solid waste from RCRA and the CCR rule



# *Texas v. United States EPA*

## 2019 U.S. Dist. LEXIS 89113 (S.D. Tex. 2019)



- The 2015 revised definition of “waters of the United States” violates the notice-and-comment requirements of the APA
- Key aspects of the final rule were not a “logical outgrowth” of the proposed rule, and interested parties were not given an opportunity to comment on the Final Connectivity Report, which serves as the technical basis for the final rule



# *Upper Mo. Waterkeeper v. United States EPA* 377 F. Supp.3d 1159 (D. Mont. 2019)



- The court ruled that an EPA-approved variance to Montana's state water quality standards, which allows a 17-year timeline for dischargers to reach the "highest attainable condition" violates the direction of the CWA
- Parties were ordered to determine proper remedies in light of the ruling

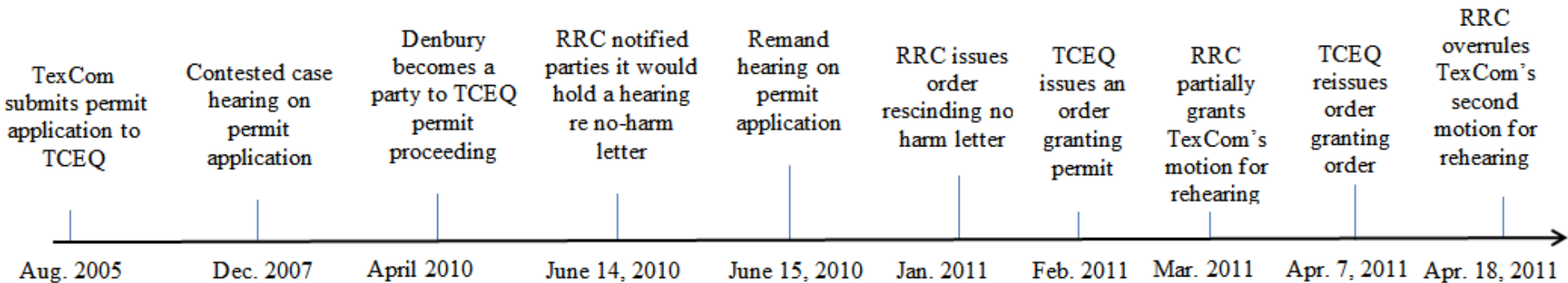
# *Chambers—Liberty Counties Navigation Dist. v. State* 2019 Tex. LEXIS 445 (Tex. 2019)

- Governmental immunity bars the State's claim for monetary relief against the District
- However, governmental immunity did not bar the State's ultra vires claim that the District's officers had exceeded their authority by entering into the oyster lease



# *Dyer v. Tex. Comm'n on Env'tl. Quality*

## 2019 Tex. App. LEXIS 4171 (Tex. App.—Austin 2019)



- TCEQ did not act arbitrarily or capriciously or abuse its discretion in issuing the permit
- TCEQ's explanation of its changes to the ALJs' findings complied with the APA, and were supported by substantial evidence



# CASES TO WATCH



- **Supreme Court to Consider Whether CERCLA Preempts State Law Claims**
  - ❖ *Atl. Richfield Co. v. Christian*, 2019 U.S. LEXIS 3967 (2019)
- **Supreme Court to Address Circuit Split on Groundwater Discharges under CWA**
  - ❖ *Cty. of Maui v. Haw. Wildlife Fund*, 2019 U.S. LEXIS 1103 (2019)
- **EPA Promulgated the New Affordable Clean Energy Rule, Replacing the Clean Power Plan**
- **Climate Change Facility Protections**
  - ❖ *Conservation Law Foundation v. ExxonMobil*, Case No. 1:16-cv-11950, U.S. District Court for the District of Massachusetts, and *Conservation Law Foundation v. Shell Oil Products US et al.*, Case No. 1:17-cv-00396, U.S. District Court for the District of Rhode Island



# THANK YOU

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**Dave Ross**  
**Assistant Administrator for the Office of Water**  
**U.S. Environmental Protection Agency**

Dave Ross is the Assistant Administrator for the Office of Water at the U.S. Environmental Protection Agency. Dave has more than 20 years of experience working on water issues in both state government and the private sector. Prior to joining EPA in January 2018, Mr. Ross worked as the Director of the Environmental Protection Unit at the Wisconsin Department of Justice. Mr. Ross has also worked in the Wyoming Attorney General's Office representing the Water Quality Division of the Wyoming Department of Environmental Quality and as a partner in the land use and natural resources practice at an international law firm in Washington, D.C. Earlier in his career, he worked as an environmental consultant focusing on wastewater reclamation and reuse strategies.





BAKER • WOTRING LLP



**Debra Tsuchiyama Baker** is a founding and managing partner of Baker • Wotring LLP, a nationally-recognized environmental litigation and regulatory law firm providing innovative and results-oriented representation to some of the world's largest domestic and international clients in significant and complex environmental matters across the country for more than 18 years. Ms. Baker has practiced environmental law for more than 35 years and obtained her law degree from the Georgetown University Law Center, where she received the Magoichi Kato Scholarship Award for Academic Excellence for Japanese American students. She obtained a Bachelor of Science degree, Summa Cum Laude, from the University of Maryland. Baker • Wotring LLP is based in Houston, Texas and is a nationally-certified women and minority-owned firm, holding certifications from NAMWOLF (National Association of Minority and Women Owned Law Firms), WBENC (Women's Business Enterprise National Council), NMSDC (National Minority Supplier Development Council), MBE (Minority Business Enterprise) from the City of Houston, and is a certified State of Texas HUB (Historically Underutilized Business).

Ms. Baker has been retained in connection with some of the largest environmental matters in the country, including international representation in emergency response and litigation arising out of significant oil spills and maritime accidents, representation in complex litigation arising out of contamination of waterways resulting in a \$100 million recovery for her client, handling legal issues for one of the largest brownfield redevelopment sites in the nation and recently representing one of the largest data companies in the world as part of the negotiating team handling Texas environmental issues and components of a \$3 billion divestiture. The Firm's combination of environmental regulatory and litigation capabilities has been nationally recognized by the U.S. News & World Report and Chambers USA has identified Ms. Baker as one of the most capable environmental lawyers in the country.

Ms. Baker's environmental practice encompasses the full spectrum of regulatory and litigation issues, with an emphasis on the handling of difficult and complex multi-party environmental cases, Superfund, regulatory counseling and representation in enforcement, permitting, catastrophic release response, compliance and environmental support in corporate/real estate due diligence, mergers, acquisitions and divestitures. As part of her environmental transactional practice, she has structured environmental risk programs to facilitate divestitures of thousands of impacted gas station and convenience store sites, hundreds of dry cleaning plants, sales and risk allocation in connection with numerous historical industrial facilities and has assisted in the decommissioning of oil and gas producing properties and impacted radioactive properties associated with natural resources production, along with other energy-related matters for major oil companies, independents, pipelines and other users of oil and gas industry pipe and tubulars. Ms. Baker has served as an Adjunct Professor of Environmental Law at the University of Houston Law Center and her firm provided initial funding to create that law school's Environment, Energy & Natural Resources (EENR) Center which links energy issues with impacts on environment and natural resources and provides a forum for education and discussion of the most important issues of the day, such as climate change, air pollution, clean coal and renewable energy. In addition to being a founding partner of the EENR Center, Ms. Baker also served as an Adjunct Professor of Environmental Law at South Texas College of Law, and was co-founder and past Chair of the Houston Bar Association's Environmental Law Section. She is a prolific speaker on topics of environmental law and ethics, has authored several books and published more than 50 articles on environmental law and has testified in a variety of cases as an expert witness on environmental law in the United States and Canada.

Bio

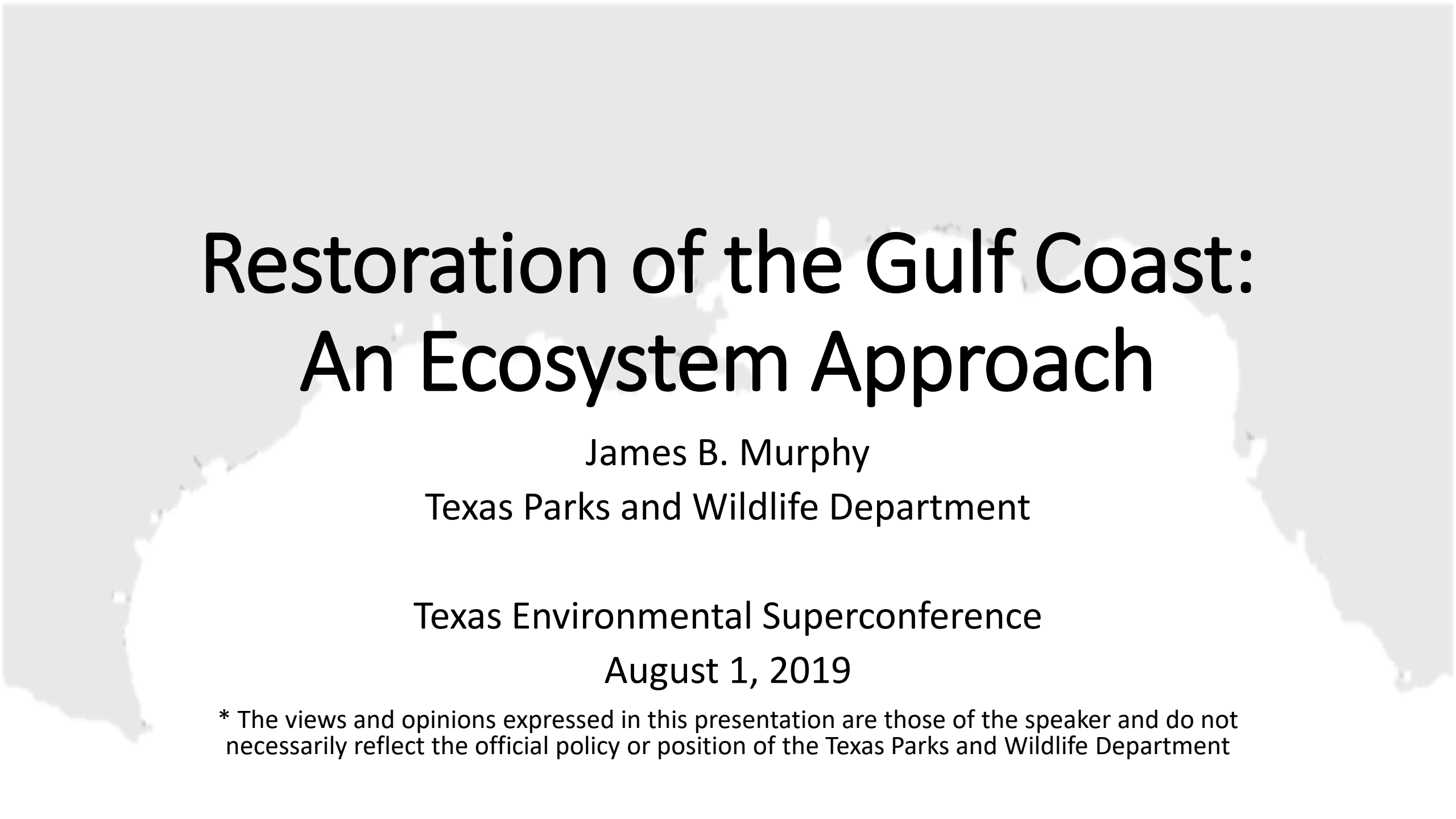
James Murphy

Coastal Issues

Environmental Superconference 2019

James B. Murphy serves as Staff Attorney for the Texas Parks and Wildlife Department, focusing on water quality, natural resource damage assessment and restoration, and land conservation. Prior to TPWD, Mr. Murphy served as Assistant Public Interest Counsel for the Texas Commission on Environmental Quality from 2009-13, Assistant Attorney General in the General Counsel Division, Natural Resources Section, for the Oregon Department of Justice from 2007–09, and as Law Clerk to the Honorable Elizabeth L. Perris of the United States Bankruptcy Court for the District of Oregon from 2006–07. Mr. Murphy is a 2006 graduate of Lewis & Clark Law School with certificates in Environmental & Natural Resources Law and Criminal Law & Procedure and a 2001 graduate of The University of Texas at Austin.





# Restoration of the Gulf Coast: An Ecosystem Approach

James B. Murphy

Texas Parks and Wildlife Department

Texas Environmental Superconference

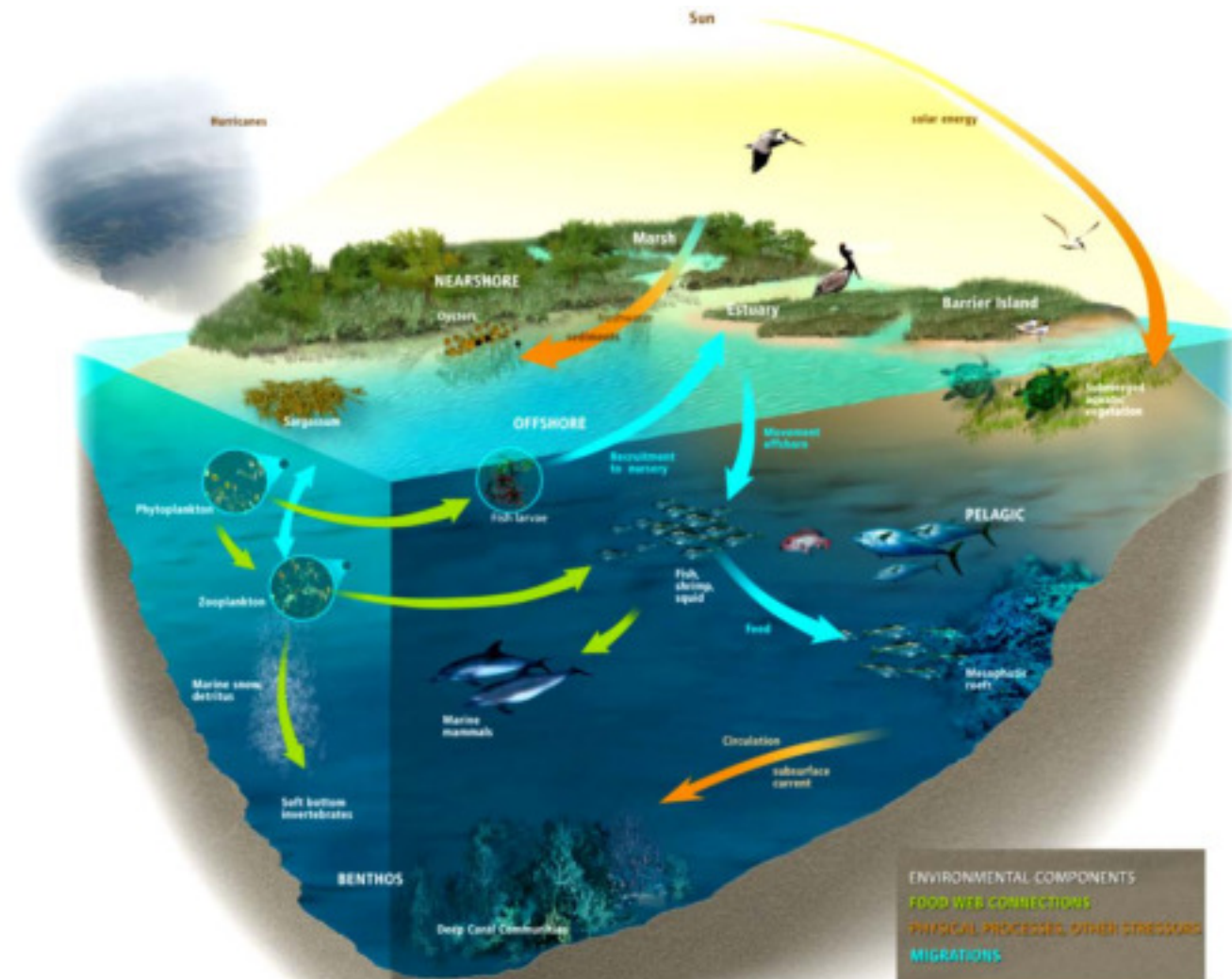
August 1, 2019

\* The views and opinions expressed in this presentation are those of the speaker and do not necessarily reflect the official policy or position of the Texas Parks and Wildlife Department

# Natural Resource Linkages

## **Deepwater Horizon Programmatic Damage Assessment and Restoration Plan/Programmatic Environmental Impact Statement**

The physical and biological connectivity of the northern Gulf of Mexico ecosystem results in a complex web, wherein physical processes and biological interactions in one location may have an important impact on populations of organisms in other locations. The linkages and the close relationship between physical and biological connectivity means that when one part of the regional ecosystem is affected, it can have cascading impacts throughout the greater northern Gulf of Mexico regional ecosystem. Similarly, restoration benefits to one part of the ecosystem—especially when occurring at large spatial scales—can have cascading benefits throughout the greater northern Gulf ecosystem.



© 2013 NOAA. Illustration by Kate Sweeney

# Restoration Goals

## **PDARP: The Components of the Preferred Restoration Portfolio**

- Focus on coastal and nearshore habitat restoration, including improving water quality in priority watersheds.
- **Implement restoration at a broad, regional level to ensure that key linkages are restored.**
- Emphasize restoration in areas known to have been injured by the spill.
- **Consider key ecological factors such as connectivity, size, and distance between projects, as well as factors such as resiliency and sustainability.**
- **Consider the potential impact or synergy of other Gulf restoration activities on NRDA restoration planning.**
- Invest in resource-specific restoration projects as part of the integrated restoration portfolio to ensure that species, life stages, and/or services not fully addressed by coastal and nearshore restoration will be addressed.
- Ensure compensation for lost human use by investing in projects that enhance recreational experiences and work in concert with ecological restoration.
- Follow an adaptive approach to restoration through iterative planning, implementation, and monitoring to optimize restoration results that shift over time in response to scientific data.

# Restoration Goals

## **RESTORE: Council Selected (Bucket 2) Priority Criteria, Gulf Coast Ecosystem Restoration Council, Comprehensive Plan Update 2016**

- Projects that are projected to make the greatest contribution to restoring and protecting the natural resources, ecosystems, fisheries, marine and wildlife habitats, beaches, and coastal wetlands of the Gulf Coast region, without regard to geographic location within the Gulf Coast region.
- **Large-scale projects and programs that are projected to substantially contribute to restoring and protecting the natural resources, ecosystems, fisheries, marine and wildlife habitats, beaches, and coastal wetlands of the Gulf Coast ecosystem.**
- **Projects contained in existing Gulf Coast State comprehensive plans for the restoration and protection of natural resources, ecosystems, fisheries, marine and wildlife habitats, beaches, and coastal wetlands of the Gulf Coast region.**
- Projects that restore long-term resiliency of the natural resources, ecosystems, fisheries, marine and wildlife habitats, beaches, and coastal wetlands most impacted by the Deepwater Horizon oil spill.

# Restoration Goals

## **Gulf Environmental Benefit Fund: BP Plea Agreement Order ¶ 37 and Transocean Plea Agreement Order ¶ 4**

NFWF shall use the money it receives from the defendant pursuant to this Order for the following purposes and subject to the following conditions:

a. To remedy harm and eliminate or reduce the risk of future harm to Gulf Coast natural resources, NFWF shall use approximately half of the payments to conduct or fund projects to remedy harm to resources where there has been injury to, or destruction of, loss of, or loss of use of those resources resulting from the Macondo oil spill. NFWF shall conduct or fund projects in the following states in approximately the following proportions: (1) Alabama, 28%, (2) Florida, 28%, (3) Mississippi, 28%, and (4) Texas, 16%. **NFWF shall consult with appropriate state resources managers, as well as federal resource managers that have the statutory authority for coordination or cooperation with private entities, to identify projects and to maximize the environmental benefits of such projects.**

# Restoration Project Selection Criteria

## **NRDA: OPA Regulations 15 CFR § 990.54(a)**

Once trustees have developed a reasonable range of restoration alternatives . . . they must evaluate the proposed alternatives based on, at a minimum:

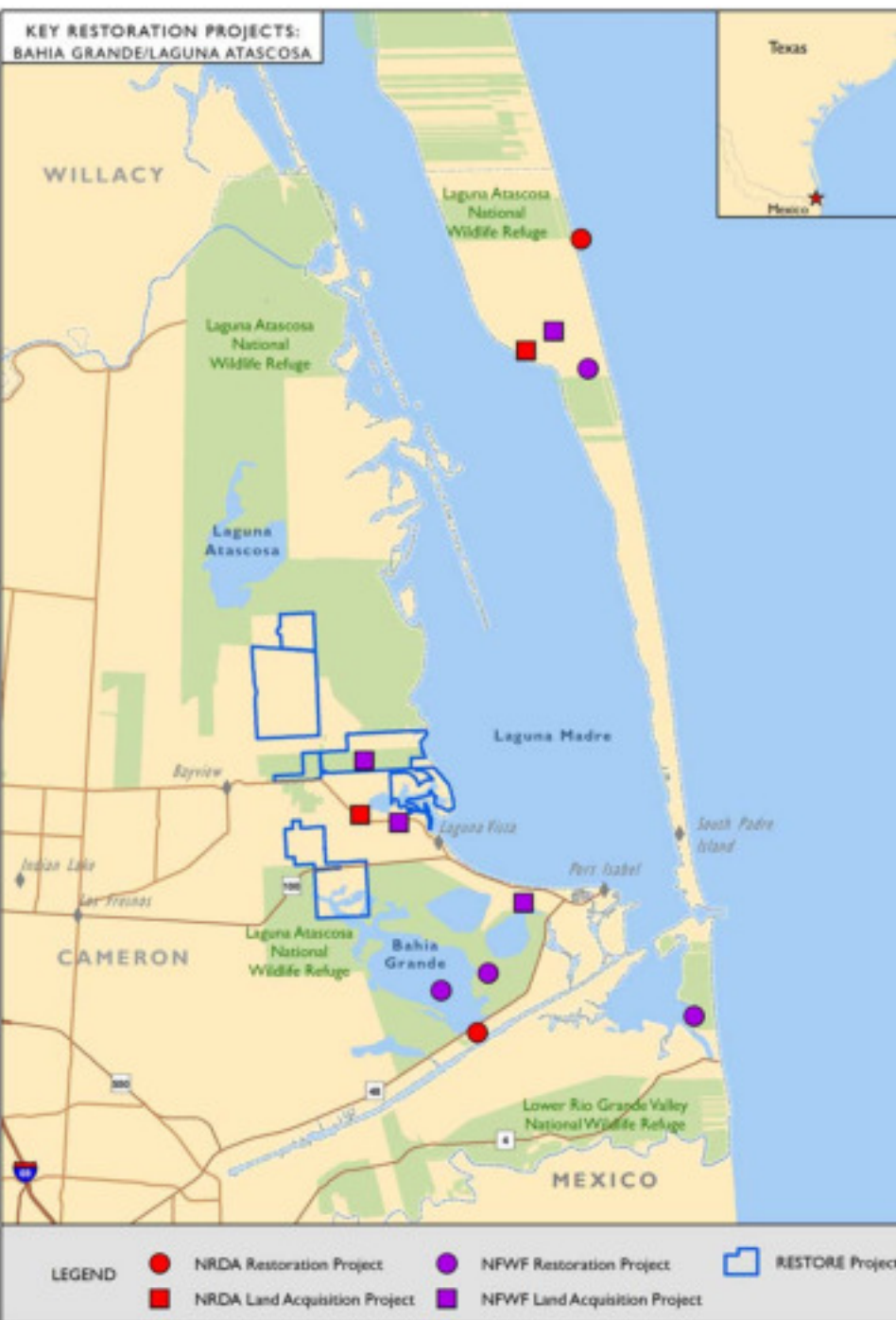
- (1) The cost to carry out the alternative;
- (2) The extent to which each alternative is expected to meet the trustees' goals and objectives in returning the injured natural resources and services to baseline and/or compensating for interim losses;
- (3) The likelihood of success of each alternative;
- (4) The extent to which each alternative will prevent future injury as a result of the incident, and avoid collateral injury as a result of implementing the alternative;
- (5) **The extent to which each alternative benefits more than one natural resource and/or service;** and
- (6) The effect of each alternative on public health and safety.

# Restoration Project Selection Criteria

## **NRDA: Texas Trustee Implementation Group Final 2017 Restoration Plan/Environmental Assessment: Restoration of Wetlands, Coastal, and Nearshore Habitats; and Oysters – Additional Criteria**

- Project is not already required by existing regulations
- Project complies with applicable laws and regulations
- **Project supports existing regional or local conservation efforts or plans**
- Project has not already been funded
- Project is anticipated to provide ecological or public benefits within a reasonable/acceptable amount of time
- Project is capable of providing long-term, sustainable ecological or public benefits
- Project is time critical
- **Project offers opportunities for external funding and/or collaboration**





# Lower Laguna Madre and Bahia Grande

- Land Acquisition
- Wetlands Construction and Enhancement
- Hydrology
- Sea Turtles
- Birds

# Sea Turtles

Project Goal: To address major threats to sea turtles on nesting beaches and in the marine environment

Four project components:

- Kemp's Ridley Sea Turtle Nest Detection and Enhancement in Texas and Mexico (DOI and TX)
- Enhancement of the Sea Turtle Stranding and Salvage Network and Development of an Emergency Response Program (NOAA and TX)
- Texas Enhanced Fisheries Bycatch Enforcement (TX)
- Gulf of Mexico Shrimp Trawl Sea Turtle Bycatch Reduction (NOAA)



# Sea Turtles



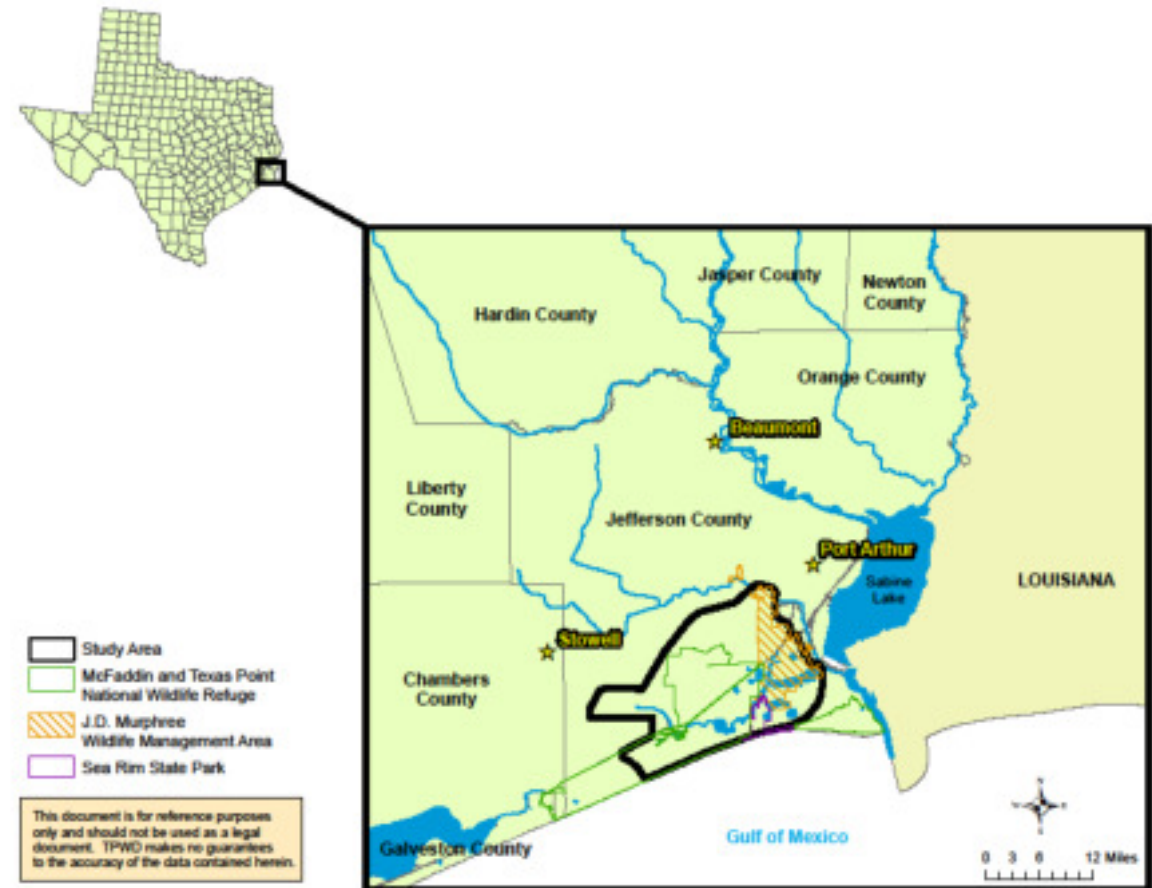


# Sea Turtles



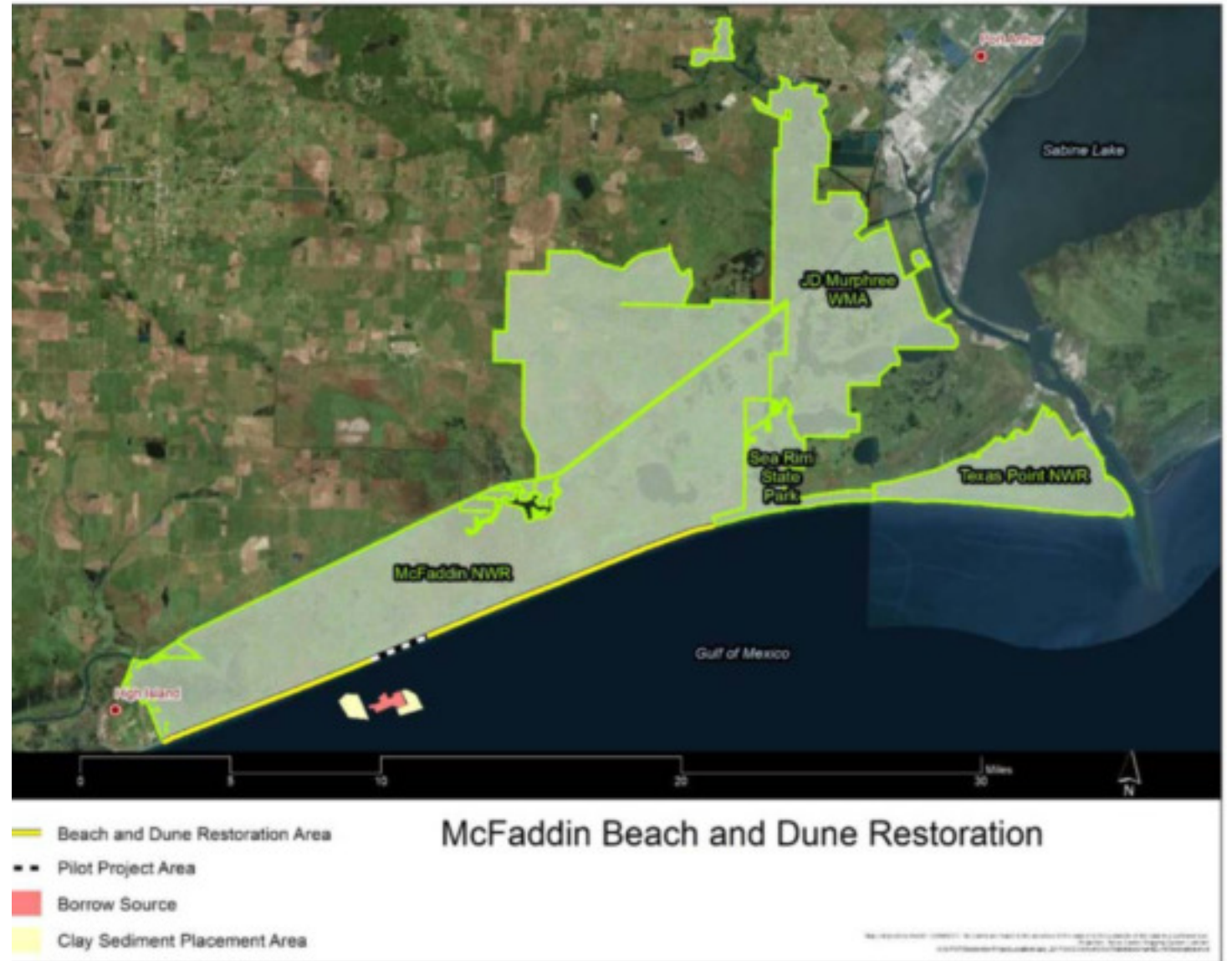
# Salt Bayou Watershed and Chenier Plain

- Beach and Dune Construction and Nourishment
- Land Acquisition
- Wetlands Construction and Enhancement
- Hydrology



# McFaddin Beach and Dune Ridge

- Identify Sediment Borrow Area
- Sculpt Dunes
- Nourish Beach
- Plant Native Vegetation
- Coordinate Multiple Funding Sources and Stakeholders





# Salt Bayou Watershed Project Funding Reaches Over \$114 Million

## Funding Sources:

- Deepwater Horizon
- Recoveries for Hurricanes Harvey and Ike
- GOMESA
- CIAP
- CEPRA
- NAWCA
- Jefferson County
- CWA 404 Wetlands Mitigation
- Ducks Unlimited
- Texas Parks and Wildlife Foundation and Private Donors

### Keith Lake Fish Pass

County contribution from Semptra	\$625,000
County contribution from Golden Pass	\$625,000
Texas Parks and Wildlife Foundation	\$522,898
CEPRA	\$1,041,226
	<b>\$2,814,124</b>

### Freshwater Siphons

County	\$700,000
NFWF	<b>\$4,500,000</b>
NAWCA (2 DU grants of \$750,000)	\$1,500,000
Texas Parks and Wildlife Foundation	\$363,820
	<b>\$7,063,820</b>

### Clay Berm

U.S. Fish & Wildlife Service	\$3,000,000
GLO – CEPRA	\$2,000,000
Jefferson County – CIAP	\$400,000
Ducks Unlimited original berm	\$900,000
Hurricane Ike Disaster Recovery	\$2,500,000
	<b>\$8,100,000</b>

### McFaddin Beach and Dune Ridge

GLO + Jefferson County CEPRA, CIAP (3 miles)	\$9,500,000
NFWF Engineering	<b>\$1,500,000</b>
NFWF Construction	<b>\$26,500,000</b>
NRDA	<b>\$15,800,000</b>
RESTORE Bucket 1	<b>\$10,400,000</b>
Hurricane Harvey Supplemental	<b>\$14,000,000</b>
GOMESA	\$8,500,000
	<b>\$86,200,000</b>

### GIWW Breakwaters

Hurricane Harvey Supplemental	<b>\$10,000,000</b>
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<b>Total (Deepwater Horizon &amp; Harvey)</b>	<b>\$82,700,000</b>
<b>Total (all funds)</b>	<b>\$114,100,000</b>

# Status of Funds for Deepwater Horizon



Commitment of Restoration Funds

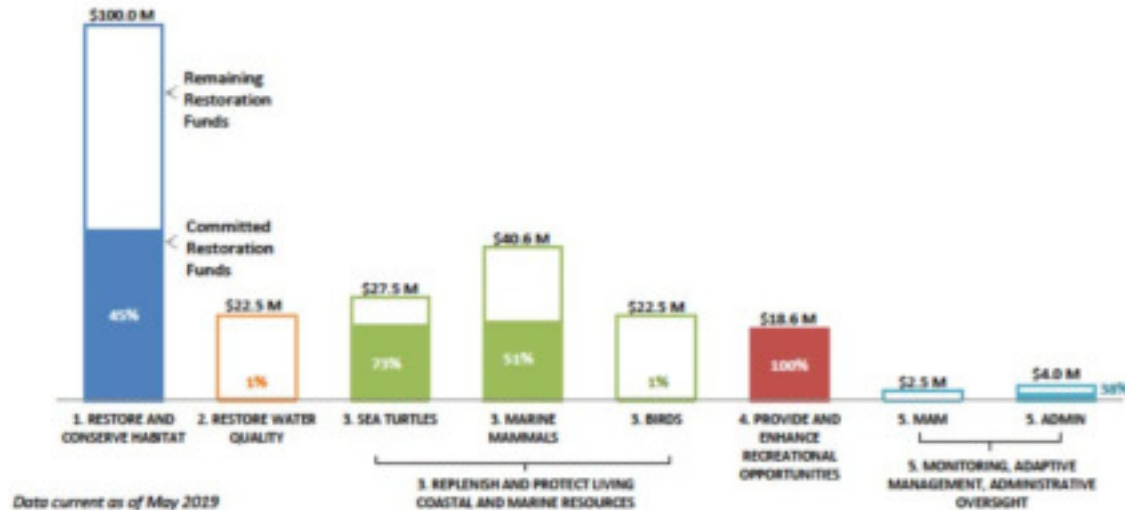


Table 2. Funding allocations from three major funding streams (RESTORE, NRDA, NFWF) by year—showing funding per year from 2011-2031.

YEAR	TRUST FUND-80%	NRDA	NFWF	Annual Total
2011-2015	\$816,078,466	\$1,000,000,000**	\$850,000,000	\$2,666,078,466
2016	\$127,763,485		\$300,000,000	\$427,763,485
2017	\$303,448,276	\$489,655,172	\$500,000,000	\$1,293,103,448
2018	\$151,724,138	\$244,827,586	\$894,000,000	\$1,290,551,724
2019	\$303,448,276	\$489,655,172		\$793,103,448
2020	\$303,448,276	\$489,655,172		\$793,103,448
2021	\$303,448,276	\$489,655,172		\$793,103,448
2022	\$303,448,276	\$489,655,172		\$793,103,448
2023	\$303,448,276	\$489,655,172		\$793,103,448
2024	\$303,448,276	\$489,655,172		\$793,103,448
2025	\$303,448,276	\$489,655,172		\$793,103,448
2026	\$303,448,276	\$489,655,172		\$793,103,448
2027	\$303,448,276	\$489,655,172		\$793,103,448
2028	\$303,448,276	\$489,655,172		\$793,103,448
2029	\$303,448,276	\$489,655,172		\$793,103,448
2030	\$303,448,276	\$489,655,172		\$793,103,448
2031	\$303,448,274	\$489,655,178		\$793,103,452
	\$5,343,841,951*	\$8,100,000,000***	\$2,544,000,000	\$15,987,841,951



# Threats to the Gulf

## **RESTORE: Council Selected (Bucket 2) Priority Criteria, Gulf Coast Ecosystem Restoration Council, Comprehensive Plan Update 2016**

Successfully combating all of the ecological stressors in the Gulf is a complex challenge that **greatly exceeds existing and expected restoration funding**. The Council is committed to maximizing the effectiveness of funds within its purview, while also trying to help identify and leverage new sources of funding to support current and future restoration work.

Plans commonly identify:

- Human development
- Hurricanes and weather
- Pollution
- Hypoxia
- Overfishing and bycatch
- Land loss and subsidence
- Alteration of hydrology
- Sea level rise
- Climate change

# Optimizing Restoration



# Optimizing Restoration

- Land and Water Conservation Fund Act

- 16 U.S.C. §§ 460l-4 to l-11: Regulates admission and special recreation user fees at certain recreational areas and establishes a fund to subsidize state and federal acquisition of lands and waters for recreational and conservation purposes.

- Federal Aid in Wildlife Restoration Act (Pittman-Robertson)

- 16 U.S.C. §§ 669-669j: Provides federal funds to states for management and restoration of wildlife through an excise tax on sporting arms and ammunition.

- Federal Aid in Sport Fish Restoration Act (Dingell-Johnson)

- 16 U.S.C. §§ 777-777k: Provides federal funds to states for management and restoration of fish, education, wetlands restoration, boat safety, and clean vessel sanitation devices, through an excise tax on certain fishing equipment, import duties, and a portion of the motorboat fuel tax.

- North American Wetlands Conservation Act (NAWCA)

- 16 U.S.C. §§ 4401-4414: Provides matching grants for wetlands conservation projects in the United States, Canada, and Mexico.

- Gulf of Mexico Energy Security Act of 2006 (GOMESA)

- 43 U.S.C. § 1331: Shares leasing revenues with Gulf producing states and the Land and Water Conservation Fund for coastal conservation, restoration, and hurricane protection.

- National Estuary Program

- Clean Water Act, 33 U.S.C. § 1330
- Galveston Bay Estuary Program
- Coastal Bend and Bays Estuary Program

# Recent Legislation

- John D. Dingell Jr. Conservation, Management, and Recreation Act
  - Public Law No. 116-9 (2019): Permanently reauthorizes the Land and Water Conservation Fund.
- Agricultural Improvement Act of 2018 (Farm Bill)
  - Public Law No. 115-334 (2018): Provides grants for conservation of farm and ranch lands and wetlands through the Agricultural Conservation Easement Program. Important source of matching funds for the Texas Farm and Ranch Lands Conservation Program.
- Recovering America's Wildlife Act recently reintroduced
  - HR3742: Would provide more than \$1.3 billion per year nationally and over \$50 million in Texas each year to recover imperiled fish and wildlife and restore natural habitats.

# Recent Legislation

- Texas Senate Bill 7 and House Joint Resolution 4
  - Voters to consider use of the rainy day fund to create a flood infrastructure fund for grants and loans for flood control and mitigation projects, including nature-based solutions: “construction and implementation of nonstructural projects, including projects that use nature-based features to protect, mitigate, or reduce flood risk.”
- Texas Senate Bill 26 and Senate Joint Resolution 24
  - Voters to consider a constitutional amendment permanently appropriating TPWD’s share of the sporting goods sales tax.

An aerial photograph of a coastal landscape. In the foreground, there is a large area of green marshland with several sandy paths or dunes winding through it. The water is a deep blue, and the horizon is visible in the distance under a sky with scattered white clouds. The text "Questions?" is centered in the middle of the image.

Questions?

Thank You!

Bob Stokes is a 1990 graduate of Yale University and a 1994 graduate of the University of Texas School of Law. After 10 years of practicing law, in June 2004, Bob left the Harris County Attorney's Office to become President of the Galveston Bay Foundation. The Galveston Bay Foundation's mission is to preserve, protect, and enhance the natural resources of Galveston Bay and its tributaries. Bob had served on the board of the Foundation for five years prior to taking over as President and had served as the board's chair for the previous two years.

Bob is a current member of the Board of Directors of the Texas Land Trust Council. Bob has also served on the Board of Directors for Restore America's Estuaries since 2004 and on the Governing Board of EarthShare of Texas since 2007. He was awarded the "Environmental Professional of the Year" award in 2011 by the Texas Association of Environmental Professionals.

Short Biography  
Thomas O. McGarity

Thomas O. McGarity holds the Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law at the University of Texas School of Law. He has taught Environmental Law, Administrative Law and Torts at UT Law school since 1980. Prior to that he taught at the University of Kansas School of Law.

After clerking for Judge William E. Doyle of the Federal Court of Appeals for the Tenth Circuit in Denver, Colorado, Professor McGarity served as an attorney-advisor in the Office of General Counsel of the Environmental Protection Agency in Washington, D.C.

Professor McGarity has written widely in the areas of Environmental Law and Administrative Law. His book *Bending Science: How Special Interests Corrupt Public Health Research* (co-authored with his University of Texas colleague Wendy Wagner) was published in May 2008 by Harvard University Press. The Yale University Press published *The Preemption War: When Federal Bureaucracies Trump Local Jurie* in October 2008. His most recent book, also published by Yale University Press in 2013, is *Freedom to Harm: The Lasting Legacy of the Laissez Faire Revival*.

Professor McGarity is a past president and a member of the Board of Directors of the Center for Progressive Reform, a nonprofit organization consisting of scholars who are committed to developing and sharing knowledge and information, with the ultimate aim of preserving the fundamental value of the life and health of human beings and the natural environment.

Professor McGarity lives in Austin with his wife Cathleen.



**Pollution, Politics and Power:  
The Struggle for Sustainable Electricity**  
Thomas O. McGarity  
Environmental Superconference  
Austin, Texas  
August 1, 2019

## **The Transformation of the Electric Power Industry.**

### **Evidence of Transformation.**

Decline of Coal.

Ascent of Gas.

Greater Role for Renewables.

Slower Growth in Demand.

Lower Electricity Prices.

Merchant Generators Suffer.

Fewer Jobs in the Coal and Electric Power Industries.

Devastated Communities.

Job Growth in the Renewable Energy and Energy Efficiency Industries.

Environmental Improvement.

### **Reasons for the Transformation.**

Reduced Demand for Electricity

An Aging Coal-Fired Fleet.

The Dash to Gas.

Less Expensive Renewable Power.

Public Support for Renewables.

Government Support for Renewables.

Changing Patterns of Capital Investment.

Competition in a Deregulated Environment.

Environmental Regulation.

Environmental Group Opposition.

Changing Attitudes in Some Public Utility Commissions.

A Combination of Factors.

## **Toward a Sustainable Energy Future.**

### **End-Use Efficiency.**

### **Transforming the Grid.**

A New Business Model.

A New Regulatory Model.

*Decoupling.*

*Encouraging Demand Reduction.*

*Managing Distributed Resources.*

*Encouraging Distributed Generation.*

*Discouraging Polluting Distributed Resources.*

*Cybersecurity.*

*Privacy.*

### **The Future Role for Renewable Energy.**

Eliminating Cost Differentials.

State and Local Procurement Programs.

Municipal Utilities and Renewable Power.

A New Business Model.

Creating a Robust Transmission Infrastructure.

The Storage Solution.

Renewable Portfolio Standards.

Local Renewable Energy Programs.

Reducing Legal Impediments to Renewable Development.

Reasonable Use of Biomass.

**The Future Role for Coal.**

**The Future Role for Natural Gas.**

**The Future Role for Nuclear Power.**

**Ensuring a Reliable and Resilient Grid.**

Shifting National Goals.

Beyond Baseload.

**Making Environmental Regulation More Effective.**

Preventing Backsliding.

Moving Forward.

*A Pollution Tax.*

*A Cap-and-Trade System.*

*Technology-Based Standards.*

*Deadlines and Hammers.*

*Increasing Transparency in EPA Rulemaking*

*Better Estimates of the Impacts of Environmental Regulations.*

*Addressing Coal Ash.*

*Judicial Review..*

*Prospects for Future Legislation.*

**Assisting Displaced Workers and Rebuilding Damaged Communities.**

**Helping Low Income Consumers.**



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Cindy Smiley has enjoyed a variety of roles in a legal career that began with graduation from The University of Texas School of Law in 1981 -- starting as an in-house counsel for a major corporation in Houston, followed by work as an attorney for the Texas environmental agency in Austin, and by years of work in law firms as an attorney in the Austin Offices of Jones Day, Baker Botts, and Kelly Hart & Hallman. She served as the Chair of the Environmental & Natural Resources Law Section of the State Bar of Texas from 2011-2012 and has been recognized by "Best Lawyers" in the fields of environmental law and water law since 2008. In May 2018, she was honored to receive the "Outstanding Achievement Award" from the Travis County Women Lawyers' Association.

In February 2012, Ms. Smiley ventured into the solo/small firm world with the formation of Smiley Law Firm, where she continues to practice environmental law and water law for a wide array of clients, including individuals, associations, and businesses. In addition, inspired by her experience as a volunteer puppy-raiser for Guide Dogs for the Blind, Cindy has become very interested in legal issues associated with service dogs and the importance of their work for people who depend upon these amazing animals, along with other issues associated with animals in public places.

As a side note, Cindy wishes to express her appreciation and admiration for Jeff Civins and his colleagues at Haynes & Boone for their tireless and inspiring efforts to make the Texas Environmental Superconference a truly Super Conference. And she is forever grateful to her talented husband, Scott, for his efforts in engineering many of the Superconference props that have been used in the "skits" through the years.

Anne Idsal is the Acting Assistant Administrator for the Office of Air and Radiation (OAR). Most recently, she served as the Principal Deputy Assistant Administrator for OAR, and before that as EPA's Region 6 Administrator. Prior to joining EPA, Anne spent her career working for Texas state government and helped shape environmental policy for the state.

Anne's state experience includes service as the general counsel for the Texas Commission on Environmental Quality. She also served as the first female Chief Clerk and Deputy Land Commissioner for the Texas General Land Office.

# Texas Superconference – Speaker Bio

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## Shannon Broome

### Partner

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Shannon is the managing partner of Hunton Andrews Kurth LLP's San Francisco office and leads the firm's California environmental practice. Her prior experience as a chemical engineer in the oil and gas industry affords her unparalleled insights into the development of regulations and counsel on environmental, health and safety issues. Shannon's practice focuses on permitting, enforcement, environmental incident response, and regulatory advocacy and litigation.

A nationally recognized figure on Clean Air Act matters with more than 25 years of experience addressing all aspects of the act, Shannon represents clients in a variety of manufacturing and energy sectors, including oil and gas, chemical, paper, automotive, power generation and utilities. Shannon also advises companies in preparing for and responding to environmental incidents and in regard to federal and state process safety management and risk management plan regulations.

Highly regarded for her litigation practice challenging and defending EPA and California regulations, in 2018, she was named to The National Law Journal's list of "Energy & Environmental Trailblazers." She is also lauded for her deep knowledge of environmental enforcement matters and is respected by her Fortune 100 clients for her solid advice on compliance advocacy.

Shannon is admitted in the Supreme Court of California; US District Court, Eastern District of California; and US Courts of Appeals for the District of Columbia, Fifth, Ninth and Tenth Circuits.

**STREAMLINING CLEAN AIR ACT REGULATIONS:  
A REVIEW OF KEY EPA ACTIONS FROM 2017 TO 2019**

Shannon S. Broome, Office Managing Partner, San Francisco, and Head of California  
Environmental Practice

Alexandra Hamilton, Associate, Washington, DC

Hunton Andrews Kurth LLP

Texas Environmental Superconference  
Texas State Bar, ENRLS  
August 1 and 2, 2019

Shortly after taking office in 2017, President Trump declared “the policy of the United States,” in an Executive Order to be “to alleviate unnecessary regulatory burdens placed on the American people.”<sup>1</sup> Since then, the U.S. Environmental Protection Agency (“EPA” or “the Agency”) has sought to heed that early-days directive through selected regulatory reforms under the Clean Air Act (“CAA” or “the Act”), while acting consistent with the twin goals that Congress established under the Act of promoting: (1) the public health and welfare and (2) the productive capacity of the population.<sup>2</sup> To achieve this careful balance, EPA has made efforts to streamline and reform existing regulatory programs to concentrate its efforts on achieving greater human health and environmental benefits.

In implementing the Act over the past two years, EPA has expressed its aim to secure the greatest benefit without extraneous burden; to do what makes sense without mandating mountains of pointless paperwork; and finally, to improve regulatory compliance and achieve results by making regulation more understandable. This paper identifies of EPA’s recent regulatory reform actions under the Act, explains their purpose and effect, and outlines the current status, given that most are being challenged in court.

The CAA encompasses a broad range of programs focused on particular types of emissions (*e.g.*, criteria pollutants, hazardous air pollutants, ozone-depleting substances) and particular mechanisms to address those emissions (*e.g.*, state implementation plans, construction permit programs, operating permit programs, federal technology standards) from a range of sources (*e.g.*, stationary sources, mobile sources, non-road sources).

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<sup>1</sup> Exec. Order 13777, *Enforcing the Regulatory Reform Agenda*, § 1 (Feb. 24, 2017), *reprinted at* 82 Fed. Reg. 12,285 (Mar. 1, 2017).

<sup>2</sup> 42 U.S.C. § 7401(b)(1).



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### **I. New Source Review Reform in the Trump Administration**

The process of obtaining a pre-construction permit (whether nonattainment New Source Review (“NNSR”) or Prevention of Significant Deterioration (“PSD”)) is time consuming, expensive, and uncertain. Key steps include project design, permit applicability determinations, identification of potential air pollution controls, detailed technical engineering and cost analyses, air quality modeling, and the review of literally hundreds of guidance documents by legal and technical teams. In our experience, 9 months is the typical minimum time required for permit issuance once a complete application has been submitted, but the complete permitting process including the pre-permit submission work, can take as long as 3 years, if not longer. This timeframe does not, however, include the many months and sometimes years a company may spend in developing its applications, nor does it include the time needed for possible permit appeals or other such delays. Even for minor New Source Review (“NSR”) permits—*i.e.*, those that do not reach the emission increase levels for major modifications—the timeline for processing can be 6 to 18 months, also not including time for potential permit appeals or other delays. This delay severely hampers the ability of companies to adopt innovations and compete effectively in world markets.

Determining whether or not a permit is required is itself a significant source of delay and an obstacle for expanding production in the U.S. The initial determination of whether NNSR or PSD has been triggered may entail numerous hours of engineering and legal evaluation and review. EPA and its state counterparts have generated hundreds of guidance documents interpreting these provisions. Understanding and applying this material—particularly with respect to individual

applicability determinations—is estimated by some as the most time-consuming aspect of the permitting process.

To address these concerns, EPA has undertaken several reform efforts, some of which originated in the Bush Administration, but were put on hold by the Obama Administration and never implemented. We highlight below two of the recent reforms.

### **A. NSR Project Aggregation**

**Why It Matters:** NSR is triggered by a physical change or change in the method of operation of a major stationary source that results in a significant increase in emissions of a regulated NSR pollutant. EPA has established significance levels for various pollutants, depending in part on the attainment status of the area. In the 1980s when NSR was first being implemented, EPA took the position that companies could not artificially divide a project that would otherwise be significant into multiple projects that themselves would fall below the significance thresholds. This was called “circumvention.” Later, EPA articulated the prohibition in a memorandum to 3M Corporation, and over time, the policy and its implementation became inconsistent and confusing.<sup>3</sup> In the waning days of President Bush’s Administration in 2009, EPA sought to resolve some of this confusion by issuing a final interpretive rule establishing a “substantial relationship” test for determining if activities are part of the same project and creating a rebuttable presumption the activities separated by more than 3 years are not substantially related.<sup>4</sup> Clarity in this area will allow companies to analyze projects and properly document decisionmaking or otherwise to comply with major NSR when it applies.

**What EPA Has Done So Far:** Although the Obama EPA had granted a Natural Resources Defense Council (“NRDC”) reconsideration petition on February 13, 2009,<sup>5</sup> the Agency failed to complete the reconsideration process during President Obama’s two terms. Instead, EPA put the 2009 interpretive rule on hold, issuing rulemaking stays of the rule and putting the litigation that NRDC filed in March 2009 in abeyance pending completion of the reconsideration process.<sup>6</sup> In November 2018, EPA was able to conclude the reconsideration process, and it issued a determination that denied NRDC’s petition.<sup>7</sup> In that denial, EPA made clear that it is the source in the first instance that determines the scope of its project and that the circumvention policy is intended only to address those situations where a source intentionally and artificially divides a project into multiple projects for the purposes of avoiding NSR that would otherwise apply.<sup>8</sup>

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<sup>3</sup> See Mem. from John B. Rasnic, Dir., Stationary Source Compliance Div., Office of Air Quality Planning & Standards (“OAQPS”), to George T. Czerniak, Chief, Air Enforcement Branch, EPA Region 5, *Applicability of New Source Review Circumvention Guidance to 3M—Maplewood, Minnesota* (June 17, 1993).

<sup>4</sup> EPA, *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation and Project Netting; Final Rule*, 74 Fed. Reg. 2376 (Jan. 15, 2009).

<sup>5</sup> EPA, *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation; Notice of Reconsideration*, 74 Fed. Reg. 7193 (Feb. 13, 2009).

<sup>6</sup> Pet. for Review, *NRDC v. EPA*, No. 09-1103 (D.C. Cir. Mar. 16, 2009); Order, *NRDC v. EPA*, No. 09-1103 (D.C. Cir. May 5, 2009).

<sup>7</sup> EPA, *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Aggregation; Reconsideration*, 83 Fed. Reg. 57,324 (Nov. 15, 2018).

<sup>8</sup> 83 Fed. Reg. at 57,331.

**Current Status:** The D.C. Circuit consolidated the NRDC challenges to the 2009 interpretive rule and to the denial of reconsideration.<sup>9</sup> Preliminary filings were made by NRDC but then in June 2019, NRDC voluntarily dismissed both cases.<sup>10</sup>

## **B. NSR Project Emissions Accounting**

**Why It Matters:** A physical change or change in the method of operation of a major stationary source must *result in* a significant emissions increase and a significant net emissions increase to trigger major NSR permitting requirements.<sup>11</sup> Over the years, there has been both confusion and inconsistency in implementation in evaluating the effect of a project. Determining a project's effect on emissions, and if an NSR preconstruction permit is required, is a two-step process. Step 1 asks if the proposed project will result in a significant increase in emissions on its own. If it will not, then NSR does not apply. If the project will result in a significant increase, NSR will not apply if after considering all contemporaneous (generally over the last 5 years) increases and decreases, the “net emissions increase” is less than the significance level. This contemporaneous period evaluation is referred to as “Step 2” of the applicability analysis. Previously, EPA had taken the position that under the 2002 NSR Reform rules, only “increases” in emissions can be counted at Step 1, even if part of the project includes a decrease in emissions. Because Step 2 netting is a complicated process, particularly at a large chemical or manufacturing plant, if decreases could not be counted at Step 1, companies might not undertake projects that would increase productivity because they could not count decreases that would be associated with that project. By clarifying that reductions can be counted at Step 1 under the existing regulations, EPA would encourage companies to undertake emissions reducing projects and projects that increase productivity and efficiency (*e.g.*, those that reduce energy consumption, criteria pollutant, and greenhouse gas (“GHG”) emissions).

**What EPA Has Done So Far and What's Next:** In March 2018, EPA issued its Project Emissions Accounting (“PEA”) guidance memorandum interpreting the Step 1 NSR regulatory provisions, clarifying that at Step 1, companies may consider both project emission increases and decreases to determine if a “significant emissions increase” will result.<sup>12</sup> In the PEA memo, EPA also stated that companies should not be prevented from considering decreases at Step 1 under a notion that decreases need to be “integral” to the project. EPA reinforced that point in its reconsideration denial for the Project Aggregation rule discussed above, stating that, “we take the opportunity there to clarify that, as a general matter, it is neither necessary nor appropriate to take into consideration such matters as whether emission decreases attributable to a particular activity are ‘integral’ to the overall project, as had once been proposed by a petroleum refinery to the EPA.”<sup>13</sup> EPA noted its view that by allowing sources to define their projects to include reductions at Step 1, “sources could potentially be incentivized to seek out emission reductions that might

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<sup>9</sup> Pet. for Review, *NRDC v. EPA*, 19-1007 (D.C. Cir. Jan. 14, 2019).

<sup>10</sup> Unopposed Mot. For Voluntary Dismissal, *NRDC v. EPA*, Nos. 09-1103, 19-1007 (D.C. Cir. June 25, 2019); Order, *NRDC v. EPA*, Nos. 09-1103, 19-1007 (D.C. Cir. June 27, 2019).

<sup>11</sup> 40 C.F.R. § 52.21(b)(2)(i).

<sup>12</sup> Mem. from E. Scott Pruitt, Adm'r, EPA to Reg'l Adm'rs, *Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program*, (Mar. 13, 2018).

<sup>13</sup> 83 Fed. Reg. at 57,331.

otherwise be foregone entirely—*e.g.*, because of perceived complexity with contemporaneous netting under Step 2 of the NSR applicability analysis.”<sup>14</sup>

In May 2018, a number of environmental advocacy groups<sup>15</sup> petitioned for judicial review of the PEA Memo, claiming it was a final agency action, but almost immediately moved the court to put the case on hold since EPA had announced its intent to conduct rulemaking to codify the clarification in the regulations.<sup>16</sup>

**Current Status:** In March 2019, EPA transmitted a draft proposed rule to the White House Office of Management and Budget’s Office of Information and Regulatory Affairs (“OIRA”). At this time, the proposed rule remains at OIRA.<sup>17</sup>

## II. Greenhouse Gas Regulations

### A. Methane and Volatile Organic Compounds (“VOC”) from Oil and Gas Sources

**Why It Matters:** In June 2016, EPA issued a final rule revising the New Source Performance Standards (“NSPS”) for the oil and natural gas industry. The 2016 rule, amended 40 C.F.R. Part 60, Subpart OOOO (“Quad O”) and added a new Subpart OOOOa (“Quad Oa”), to curb emissions of VOCs and methane, respectively, from new, reconstructed, and modified oil and gas sources.<sup>18</sup> Numerous parties filed petitions for review challenging the June 2016 action in the D.C. Circuit.<sup>19</sup>

**What EPA Has Done So Far and What’s Next:** In March 2017, President Trump issued an Executive Order directing executive departments and agencies to “review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law.”<sup>20</sup> The Executive Order also directed EPA to review the June 3, 2016 rule for consistency with this policy.<sup>21</sup> On April 4, 2017, EPA announced that it was “reviewing the 2016 Oil and Gas New Source Performance Standards and, if appropriate, will initiate reconsideration proceedings to suspend, revise or rescind this rule.”<sup>22</sup> Two weeks later, EPA granted petitions for

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<sup>14</sup> *Id.* at n.20.

<sup>15</sup> Including the Environmental Defense Fund, NRDC and Sierra Club.

<sup>16</sup> Pet. for Review, *Env’tl. Def. Fund v. EPA*, No. 18-1149 (D.C. Cir. May 29, 2018); Unopposed Mot. to Hold Case in Abeyance, *Env’tl. Def. Fund v. EPA*, No. 18-1149 (D.C. Cir. July 2, 2018).

<sup>17</sup> Status Report, *Env’tl. Def. Fund v. EPA*, No. 18-1149 (D.C. Cir. July 8, 2019).

<sup>18</sup> EPA, *Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Final Rule*, 81 Fed. Reg. 35,824 (June 3, 2016) (“Quad Oa Rule”).

<sup>19</sup> Pet. for Review, *North Dakota v. EPA*, No. 16-1242 (D.C. Cir. July 15, 2016).

<sup>20</sup> Exec. Order 13783, *Promoting Energy Independence and Economic Growth*, § 1 (Mar. 28, 2017), *reprinted at* 82 Fed. Reg. 16,093 (Mar. 31, 2017).

<sup>21</sup> *Id.* at § 1.

<sup>22</sup> EPA, *Review of the 2016 Oil and Gas New Source Performance Standards for New, Reconstructed, and Modified Sources; Announcement of review*, 82 Fed. Reg. 16,331 (Apr. 4, 2017).

reconsideration for certain issues,<sup>23</sup> and the lawsuits over the 2016 rule were placed in abeyance.<sup>24</sup> The 2016 regulations remain in effect pending EPA's rulemaking to reconsider and potentially revise the regulations.

In March 2018, EPA issued a final rule amending two narrow provisions of the Quad Oa Rule to address two of the "fugitive emissions" requirements in the 2016 rule for which compliance issues presented imminent concerns to regulated entities: (1) an amendment to the fugitive emissions monitoring schedule for well sites located on the Alaskan North Slope to accommodate that area's extreme weather condition; and (2) an amendment to the delay of repair requirement such that repair is not required during an unscheduled or emergency event.<sup>25</sup> In October 2018, EPA issued a proposed rule seeking comments on proposed amendments to the Quad Oa Rule to address a range of technical issues in response to administrative reconsideration petitions and to clarify certain requirements in the rule.<sup>26</sup> Comments were due on December 17, 2018.

**Current Status:** In a June 2019 court filing, EPA announced that it "continues to review the remainder of the 2016 NSPS Rule as required under the Executive Order and in response to the remaining administrative reconsideration petitions."<sup>27</sup> EPA is also expected to address reconsideration requests related to the endangerment finding for methane from oil and gas sources, including whether one is required. According to the EPA's latest regulatory agenda, the target date for the Agency "to propose amendments to address key policy issues, such as the regulation of greenhouse gases, in this sector" by May 2019 and a final rule by December 2019.<sup>28</sup>

## B. Clean Power Plan

**Why It Matters:** The signature environmental regulation of the Obama Administration, the Clean Power Plan ("CPP") established emission guidelines for GHGs from existing electric generating units ("EGUs") under Section 111(d) of the CAA. A core legal issue in the CPP was that it defined the "best system of emissions reduction" for a stationary source to encompass measures outside that source. Specifically, EPA looked at "systems" beyond a source in setting achievable standards. That approach diverged from how Section 111 rules have traditionally been established and by many, was viewed as beyond the EPA's authority under the Act. The CPP was challenged in the D.C. Circuit, and the Supreme Court stayed implementation of the CPP.

**What EPA Has Done So Far and What's Next:** In late 2017, EPA first proposed to repeal the CPP.<sup>29</sup> Then in 2018, EPA proposed another rule to replace the CPP, termed the "Affordable

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<sup>23</sup> Letter from Scott Pruitt, Adm'r, EPA, to Shannon S. Broome, Counsel for Texas Oil and Gas Association, *Convening a Proceeding for Reconsideration of Final Rule, "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed and Modified Sources," published June 3, 2016, 81 Fed. Reg. 35824* (Apr. 18, 2017).

<sup>24</sup> Order, *Am. Petroleum Inst. v. EPA*, No. 13-1108 (D.C. Cir. May 18, 2017).

<sup>25</sup> EPA, *Oil & Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Amendments; Final Rule*, 83 Fed. Reg. 10,628 (Mar. 12, 2018).

<sup>26</sup> EPA, *Oil & Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration; Proposed Rule*, 83 Fed. Reg. 52,056 (Oct. 15, 2018).

<sup>27</sup> Status Report, *Am. Petroleum Inst. v. EPA*, No. 13-1108 (D.C. Cir. June 10, 2019).

<sup>28</sup> See EPA, *Unified Agenda and Regulatory Plan*, Spring 2019, available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2060-AT90>.

<sup>29</sup> EPA, *Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Proposed Rule*, 82 Fed. Reg. 48,035 (Oct. 16, 2017).

Clean Energy” or “ACE” rule.<sup>30</sup> On July 8, 2019, EPA issued a final rule that 1) repealed the CPP—the Agency determined that the CPP exceeded statutory authority under the CAA; 2) finalized the ACE rule, establishing emission guidelines for GHG emissions from existing EGUs; and 3) finalized new state plan regulations under CAA Section 111(d) for EPA and state implementation of the ACE rule and any future emission guidelines.<sup>31</sup> Like the CPP, the ACE rule establishes emission guidelines for GHG emissions from existing electric generating facilities. In contrast to the CPP, however, EPA explained that the ACE rule focused on environmental policy rather than energy policy and, in doing so, promoted investment in coal to improve operations instead of calling for changing fuels and shuttering coal-fired plants. The ACE rule also returns to the more traditional inside-the-fence approach to establishing requirements.

**Current Status:** On the same day that the final CPP Repeal/ACE rule was published in the *Federal Register*, the American Lung Association and American Public Health Association sought judicial review of the rule in the D.C. Circuit.<sup>32</sup> The case is currently pending.

### III. Hazardous Air Pollutant Regulation under CAA Section 112

#### A. MACT Major to Area Source Policy and Rulemaking to Abandon MACT Once-In-Always-In Policy

**Why It Matters:** In a 1995 guidance memorandum, EPA adopted a policy that for major sources subject to maximum achievable control technology (“MACT”) standards under CAA Section 112, once a source is subject to a major source MACT standard and the first substantive compliance date has passed, that source must remain subject to the applicable MACT standard even if it later reduces its hazardous air pollutant (“HAP”) emissions to below the major source thresholds (10 tons per year of a single HAP, or 25 tons per year of any combination of HAPs), whether by undertaking pollution prevention measures, installing control devices, or curtailing production.<sup>33</sup> Section 112 of the CAA contains no language mandating this Once-In-Always-In policy. Moreover, the policy imposed significant burdens for companies to conduct monitoring or operate controls when emissions are below the thresholds that Congress intended to be regulated under Section 112(d). For instance, because “major sources” must obtain Title V permits, facilities subject to the policy lacked incentive to reduce emissions to eliminate requirements associated with Title V permitting. The policy also created disincentives for companies to reduce emissions when doing so will not allow them the benefit of the reduced regulatory burden from no longer being a major source.

**What EPA Has Done So Far and What’s Next:** In January 2018, then-Assistant Administrator for EPA’s Office of Air and Radiation, William L. Wehrum, signed a guidance memorandum

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<sup>30</sup> EPA, *Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program; Proposed Rule*, 83 Fed. Reg. 44,746 (Aug. 31, 2018).

<sup>31</sup> EPA, *Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations; Final Rule*, 84 Fed. Reg. 32,520 (July 8, 2019) (“CPP Repeal/ACE Rule”).

<sup>32</sup> Pet. for Review, *American Lung Ass’n v. EPA*, No. 19-1140 (D.C. Cir. July 8, 2019).

<sup>33</sup> See Mem. from John S. Seitz, Dir. Office of Air Quality Planning & Standards to EPA Reg’l Offices, *Potential to Emit for MACT Standards—Guidance on Timing Issues* (May 16, 1995).

reversing the Once-In-Always-In Policy based on EPA’s improved understanding of the CAA.<sup>34</sup> The memo stated that under a plain language analysis of the statute, mandating sources to become area sources before the first substantive compliance date of a MACT was inconsistent with the statute. Several environmental organizations<sup>35</sup> and the State of California<sup>36</sup> challenged the memorandum in the D.C. Circuit,<sup>37</sup> and industry groups intervened in support of EPA<sup>38</sup> and some sought *amicus curiae* status.<sup>39</sup> Oral argument was held on April 1, 2019. A decision in the case is anticipated sometime in Fall 2019. In the meantime, on June 25, 2019, EPA Administrator, Andrew R. Wheeler, signed a proposed rule to codify the Major MACT to Area Source policy in the General Provisions to 40 C.F.R. Part 63.<sup>40</sup>

## B. Mercury and Air Toxics Standards

**Why It Matters:** Under Section 112 of the CAA, EGUs are to be regulated if the Administrator determines that such regulation is “appropriate and necessary.”<sup>41</sup> EPA made the determination and added them to the list of Section 112 source categories in 2000,<sup>42</sup> but later reversed that finding and listing in 2005.<sup>43</sup> Following a challenge, the D.C. Circuit vacated EPA’s delisting decision.<sup>44</sup> Under the Obama Administration, EPA reaffirmed the appropriate and necessary finding and proposed standards for EGUs, called the Mercury and Air Toxics Standards (“MATS”).<sup>45</sup> Challenges to the MATS rule ultimately reached the Supreme Court in *Michigan v. EPA*, where Justice Scalia writing for the Court held that EPA’s interpretation of the term “appropriate and necessary” was impermissible because it failed to consider an important aspect of the problem—cost.<sup>46</sup> Indeed, he stated: “Against the backdrop of this established administrative practice, it is

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<sup>34</sup> Mem. from William L. Wehrum, Assistant Adm’r, EPA to Reg’l Air Div. Dirs., *Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act*, (Jan. 25, 2018)

<sup>35</sup> Including the California Communities Against Toxics, Environmental Defense Fund, Environmental Integrity Project, Louisiana Bucket Brigade, NRDC and Ohio Citizen Action and Sierra Club (Case No. 18-1085); Downwinders at Risk, Hoosier Environmental Council, Texas Environmental Justice Advocacy Services (Case No. 18-1095).

<sup>36</sup> State of California, by and through the California Air Resources Board and Xavier Becerra, Attorney General (Case No. 18-1096).

<sup>37</sup> *Cal. Communities Against Toxics, et al. v. EPA*, No. 18-1085 (consolidated with Nos. 18-1095 and 18-1096) (D.C. Cir.).

<sup>38</sup> Including the Air Permitting Forum, Auto Industry Forum, National Environmental Development Association’s Clean Air Project, and Utility Air Regulatory Group.

<sup>39</sup> Including the American Chemistry Council, American Petroleum Institute, American Wood Council, Chamber of Commerce of the United States of America, National Association of Manufacturers, and Council of Industrial Boiler Owners.

<sup>40</sup> EPA, *Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act; Proposed Rule* (signed June 25, 2019).

<sup>41</sup> 42 U.S.C. § 7412(n)(1)(A).

<sup>42</sup> EPA, *Regulatory Finding on the Emissions of Hazardous Air Pollutants From Electric Utility Steam Generating Units; Notice of regulatory finding*, 65 Fed. Reg. 79,825 (Dec. 20, 2000) (“2000 Finding”).

<sup>43</sup> EPA, *Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants From Electric Utility Steam Generating Units and the Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units From the Section 112(c) List; Final Rule*, 70 Fed. Reg. 15,994 (Mar. 29, 2005) (“2005 Delisting Rule”).

<sup>44</sup> *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008).

<sup>45</sup> EPA, *National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units; Final Rule*, 77 Fed. Reg. 9304 (Feb. 16, 2012).

<sup>46</sup> 135 S. Ct. 2699, 2707 (2015).

unreasonable to read an instruction to an administrative agency to determine whether ‘regulation is appropriate and necessary’ as an invitation to ignore cost.”<sup>47</sup> Unfortunately, by the time the Court made its decision, companies had already invested the money needed to achieve compliance with the now-invalidated rule. The MATS rule remained in effect on remand from the Supreme Court,<sup>48</sup> however, and EPA issued a supplemental finding in 2016 reaffirming its appropriate and necessary determination.<sup>49</sup>

**What EPA Has Done So Far and What’s Next:** In February 2019, EPA proposed a rule that would revise the 2016 supplemental finding issued under the final year of the Obama Administration.<sup>50</sup> EPA proposed to find that its earlier lack of meaningful consideration of costs in the context of the rule’s benefits failed to comply with its statutory duty to consider costs. After evaluating the cost of compliance relative to the benefits of reducing HAP emissions, EPA proposed to find that it is not appropriate and necessary to regulate coal- and oil-fired EGUs under CAA Section 112.<sup>51</sup>

**Current Status:** The public comment period closed in April 2019, and the next step will be for a final rule to issue.

### C. Section 112(r) Risk Management Plan Amendments

**Why It Matters:** Under CAA Section 112(r), Congress tasked EPA with issuing regulations to prevent and mitigate the accidental release of hazardous substances.<sup>52</sup> EPA issued comprehensive regulations in response to this mandate in 1996.<sup>53</sup> In the wake of an explosion at a West, Texas fertilizer warehouse and distribution facility in 2013, President Obama issued an Executive Order directing EPA to “expand, implement and enforce the Risk Management Program (“RMP”) to address any additional hazards,”<sup>54</sup> although the West, Texas plant was not subject to the RMP regulations (and EPA did not propose to change applicability in a way that would bring that plant into the program). Just before President Trump took office, EPA finalized the RMP Amendments adding a number of significant and costly provisions and requirements that EPA described as “enhancements” or “improvements” to similar provisions in the existing RMP Rule.<sup>55</sup> A number of industry groups<sup>56</sup> filed administrative petitions for reconsideration and judicial challenges to the

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<sup>47</sup> *Id.* at 2708.

<sup>48</sup> Order, *White Stallion Energy Center, LLC v. EPA*, No. 12-1100 (D.C. Cir. Dec. 15, 2015).

<sup>49</sup> EPA, *Supplemental Finding That It Is Appropriate and Necessary To Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units; Final Rule*, 81 Fed. Reg. 24,420 (Apr. 25, 2016).

<sup>50</sup> EPA, *National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Reconsideration of Supplemental Finding and Residual Risk and Technology Review; Proposed Rule*, 84 Fed. Reg. 2670 (Feb. 7, 2019).

<sup>51</sup> *Id.* at 2670.

<sup>52</sup> 42 U.S.C. § 7412(r)

<sup>53</sup> EPA, *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act Section 112(r)*, 61 Fed. Reg. 31,668 (June 20, 1996) (“RMP Rule”).

<sup>54</sup> Exec. Order 13650, *Improving Chemical Facility Safety and Security* (Aug. 1, 2013), reprinted at 78 Fed. Reg. 48,029 (Aug. 7, 2013).

<sup>55</sup> EPA, *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act*, 82 Fed. Reg. 4594, 4595-96 (Jan. 13, 2017) (“RMP Amendments”).

<sup>56</sup> Including American Chemistry Council, American Fuel & Petrochemical Manufacturers, American Petroleum Institute, Chamber of Commerce of the United States of America and the National Association of Manufacturers (Case No. 17-1085) and the Chemical Safety Advocacy Group (Case No. 17-1087).



RMP Amendments, arguing that the RMP Amendments failed to address the issues that had led to industrial accidents, were extremely costly, had not been demonstrated to improve process safety, and due to their failure to protect security sensitive information could threaten infrastructure by making information publicly available to persons who would seek to harm industrial facilities and the communities surrounding them.<sup>57</sup>

**What EPA Has Done So Far and What's Next:** In March 2017, EPA convened a proceeding to reconsider the RMP Amendments final rule and stayed its effective date for 90 days, from March 21, 2017, to June 19, 2017.<sup>58</sup> In April 2017, the D.C. Circuit issued an order holding the industry challenges in abeyance pending EPA's Reconsideration of the RMP Amendments final rule.<sup>59</sup>

In June 2017, EPA published a final rule delaying the effective date of the RMP Rule for an additional 20 months, to February 19, 2019.<sup>60</sup> A coalition of environmental groups<sup>61</sup> and a separate coalition of States<sup>62</sup> challenged EPA's rule delaying the effective date.<sup>63</sup> In August 2018, the D.C. Circuit issued an opinion vacating the Delay Rule.<sup>64</sup> In response, EPA issued a notice in the *Federal Register* announcing that the RMP Rule is in effect as of December 3, 2018.<sup>65</sup>

Following through on its grant of reconsideration, in May 2018, EPA proposed a rule to revoke in part and revise in part the RMP Amendments final rule.<sup>66</sup>

**Current Status:** Public comments were submitted by August 23, 2018 and EPA's Office of Land and Emergency Management is working on the final rule. Extensive comments were submitted by a range of stakeholders. EPA is in the process of evaluating the comments and is expected to issue a final rule by August 2019.<sup>67</sup>

## **D. Risk and Technology Review Deadlines**

**Why It Matters:** After initial promulgation of MACT standards, within 8 years, EPA is obligated under the CAA to conduct a "residual risk review," reevaluating whether those standards for a

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<sup>57</sup> *Am. Chemistry Council v. EPA*, No. 17-1085 (consolidated with 17-1087) (D.C. Cir.).

<sup>58</sup> EPA, *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effectiveness*, 82 Fed. Reg. 13,968 (Mar. 16, 2017).

<sup>59</sup> Order, *American Chemistry Council v. EPA*, No. 17-1085 (D.C. Cir. Apr. 4, 2017).

<sup>60</sup> EPA, *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date*, 82 Fed. Reg. 27,133 (June 14, 2017).

<sup>61</sup> Including Air Alliance Houston, California Communities Against Toxics, Clean Air Council, Coalition for a Safe Environment, Community In-Power & Development Association, Del Amo Action Committee, Environmental Integrity Project, Louisiana Bucket Brigade, Ohio Valley Environmental Coalition, Sierra Club, Texas Environmental Justice Advocacy Services, Union of Concerned Scientists, Utah Physicians for a Healthy Environment (Case No. 17-1155).

<sup>62</sup> Including the States of New York, Illinois, Iowa, Maine, Maryland, New Mexico, Oregon, Rhode Island, Vermont, Washington and the Commonwealth of Massachusetts (Case No. 17-1181).

<sup>63</sup> *Air Alliance Houston v. EPA*, No. 17-1155 (consolidated with 17-1181) (D.C. Cir.).

<sup>64</sup> *Air Alliance Houston v. EPA*, 906 F.3d 1049 (D.C. Cir. 2018).

<sup>65</sup> EPA, *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Final rule, announcement of effective date*, 83 Fed. Reg. 62,268 (Dec. 3, 2018).

<sup>66</sup> EPA, *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Proposed Rule*, 83 Fed. Reg. 24,850 (May 30, 2018).

<sup>67</sup> See EPA, *Unified Agenda and Regulatory Plan*, Spring 2019, available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2050-AG95>.

source category present acceptable risk and provide “an ample margin of safety to protect public health in accordance with this section.”<sup>68</sup> The Agency must also undertake a so-called “technology review,” to requiring it to “review, and revise as necessary (taking into account developments in practices, processes, and control technologies), emission standards promulgated” under CAA Section 112 every 8 years.<sup>69</sup> EPA has typically chosen to combine these reviews into “Risk and Technology Review” rulemakings, or “RTRs.” The Agency fell significantly behind schedule in conducting these reviews, however, as it devoted limited agency resources to pursuing other regulatory priorities (e.g., climate regulation) during the Obama Administration. This inaction in the RTR arena spurred a host of deadline suits by environmental organizations, which resulted in the imposition of numerous, aggressive court deadlines to complete RTR rulemakings for many source categories. These reviews of originally-promulgated standards are important to carry out the statute’s mandate to address residual risk.

A key issue in contention is whether EPA is also obligated during the technology review aspect of the RTR to revise standards to address court decisions that were issued after the original MACT was issued. The controversy arises out of a decision issued by the D.C. Circuit in *National Lime Ass’n v. EPA*, holding inconsistent with the Act EPA’s determination not to set emissions standards where no controls were applied to existing sources.<sup>70</sup> In *National Lime*, the court considered a challenge to the National Emission Standards for Hazardous Air Pollutants (“NESHAP”) for the Portland Cement Manufacturing source category, in which EPA had established emission floors of “no control” for hydrogen chloride, mercury, and total hydrocarbons (a surrogate for organic HAPs other than dioxin/furan) because the agency found no cement plants using control technologies for these pollutants and “if no control technology exists, then the worst foreseeable performance ‘could vary day by day’ and the standard must be no control.”<sup>71</sup> The court has since maintained that “no control” emission floors violate the Act.<sup>72</sup> Several MACT standards promulgated over the past two decades included “gaps” because they failed to address a particular type of source or hazardous air pollutant. EPA could take different approaches during an RTR when faced with a gap that would have been determined by a court to be impermissible had the original MACT been challenged by an environmental group, including (1) filling the gap by promulgating a MACT standard and (2) deciding not to address the gap during the RTR process because revisiting the original MACT and any perceived flaws is not part of the Section 112(d)(6) and (f)(2) RTR process. In a pending case before the D.C. Circuit, environmental groups are challenging EPA’s decision not to fill a gap in a MACT for the pulp and paper production source category.<sup>73</sup> Depending on how this case comes out, EPA could obtain certainty that gap-filling is not required or EPA could be compelled to address gaps in a host of MACT standards.

**What EPA Has Done So Far and What’s Next:** Since January 20, 2017, when the Trump Administration took office, EPA has finalized eleven RTR rulemakings,<sup>74</sup> and has proposed ten

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<sup>68</sup> 42 U.S.C. § 7412(f)(2).

<sup>69</sup> 42 U.S.C. § 7412(d)(6).

<sup>70</sup> 233 F.3d 625, 633 (D.C. Cir. 2000), *as amended on denial of reh’g* (Feb. 14, 2001).

<sup>71</sup> *Id.*

<sup>72</sup> See *Sierra Club v. EPA*, 479 F.3d 875, 883 (D.C. Cir. 2007) (declining to set floors for certain sources within the Brick Manufacturing source category that were not controlled with technology).

<sup>73</sup> *La. Envtl. Action Network, et al. v. EPA, et al.*, No. 17-1257 (consolidate with No. 18-1245) (D.C. Cir.).

<sup>74</sup> Including Friction Materials Manufacturing Facilities, 84 Fed. Reg. 2742 (Feb. 8, 2019); Leather Finishing Operations, 84 Fed. Reg. 3308 (Feb. 12, 2019); Wet-Formed Fiberglass Mat Production, 84 Fed. Reg. 6676 (Feb. 28,

RTR rulemakings.<sup>75</sup> The Agency faces a number of court-ordered deadlines to complete RTRs for twenty source categories by March 13, 2020,<sup>76</sup> thirteen other source categories by June 30, 2020<sup>77</sup> and nine source categories by October 1, 2021.<sup>78</sup>

**Current Status:** EPA is working steadily to put out RTR actions and those actions are being routinely challenged by environmental advocacy organizations. We can expect the D.C. Circuit to decide these cases over the next three years. The case over the pulp and paper production category RTR is expected to be decided by mid-2020.

#### IV. Preventing Use of Title V to Collaterally Attack Title I Permit Decisions

**Why It Matters:** Companies that have obtained construction permits, and undertaken significant investment in project construction, can face litigation when they apply to incorporate the construction permit terms into their operating permits due to the interplay between the NSR and Title V programs. Under both the CAA and the original Title V regulations, final construction permit decisions are not meant to be challenged at the operating permit stage. The Title V program was never intended to be a substantive program, but to provide stakeholders (companies, regulators, and the public) certainty as to the requirements that apply to a facility by listing those applicable requirements in a single permitting document. Uncertainty over whether a project will face challenges at the operating permit stage, as well as significant delays in state processing of

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2019); Surface Coating of Wood Building Products, 84 Fed. Reg. 7682 (Mar. 4, 2019); Surface Coating of Large Appliances; Printing, Coating, and Dyeing of Fabrics and Other Textiles; and Surface Coating of Metal Furniture, 84 Fed. Reg. 9590 (Mar. 15, 2019); Portland Cement Manufacturing Industry, 83 Fed. Reg. 35,122 (July 25, 2018); Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills, 82 Fed. Reg. 47,328 (Oct. 11, 2017); Nutritional Yeast Manufacturing, 82 Fed. Reg. 48,156 (Oct. 16, 2017) and Publicly Owned Treatment Works, 82 Fed. Reg. 49,513 (Oct. 26, 2017).

<sup>75</sup> Including Surface Coating of Metal Cans and Surface Coating of Metal Coil, 84 Fed. Reg. 25,904 (June 4, 2019); Boat Manufacturing and Reinforced Plastic Composites Production, 84 Fed. Reg. 22,642 (May 17, 2019); Asphalt Processing and Asphalt Roofing Manufacturing, 84 Fed. Reg. 18,926 (May 2, 2019); Engine Test Cells/Stands, 84 Fed. Reg. 20,208 (May 8, 2019); Stationary Combustion Turbines, 84 Fed. Reg. 15,046 (Apr. 12, 2019); Hydrochloric Acid Production, 84 Fed. Reg. 1570 (Feb. 4, 2019); Coal- and Oil-Fired Electric Utility Steam Generating Units, 84 Fed. Reg. 2670 (Feb. 7, 2019), and Portland Cement Manufacturing, 82 Fed. Reg. 44,254 (Sept. 21, 2017).

<sup>76</sup> *Cal. Cmty.s. Against Toxics v. EPA*, 241 F.Supp.3d 199 (D.D.C. Mar. 13, 2017) (Including Solvent Extraction for Vegetable Oil, Boat Manufacturing, Surface Coating of Metal Coil, Cellulose Products Manufacturing, Generic MACT II - Ethylene Production, Paper and Other Web Coating, Municipal Solid Waste Landfills, Hydrochloric Acid Production, Reinforced Plastic Composites Production, Asphalt Processing & Roofing Manufacturing, Integrated Iron & Steel Manufacturing, Engine Test Cells/ Stands, Site Remediation, Miscellaneous Organic Chemical Manufacturing, Surface Coating of Metal Cans, Surface Coating of Miscellaneous Metal Parts and Products, Organic Liquids Distribution, Stationary Combustion Turbines, Surface Coating of Plastic Parts and Products and Surface Coating of Automobiles & Light-Duty Trucks).

<sup>77</sup> *Blue Ridge Envtl. Def. League v. EPA*, 261 F.Supp.3d 53 (D.D.C. Mar. 22, 2017) (Including Leather Finishing Operations, Wet-Formed Fiberglass Mat Production, Rubber Tire Manufacturing, Surface Coating of Large Appliances, Friction Materials Manufacturing Facilities, Surface Coating of Metal Furniture, Surface Coating of Wood Building Products, Printing, Coating, and Dyeing of Fabrics and Other Textiles, Taconite Iron Ore Processing, Miscellaneous Coating Manufacturing, Lime Manufacturing Plants, Iron and Steel Foundries and Plywood and Compo-site Wood Products).

<sup>78</sup> *Community In-Power and Dev. Ass'n, Inc. v. EPA*, 304 F.Supp.3d 212 (D.D.C. Mar. 31, 2018) (Including Primary Copper Smelting, Generic MACT II – Carbon Black Production, Generic MACT II – Cyanide Chemicals Manufacturing, Generic MACT II – Spandex Production, Flexible Polyurethane Foam Fabrication Operations, Refractory Products Manufacturing, Semiconductor Manufacturing, Primary Magnesium Refining and Mercury Emissions from Mercury Cell Chlor-Alkali Plants).

Title V operating permit applications and EPA's response to objection petitions, present substantial obstacles to companies seeking to undertake new projects. Clarifying that Title V does not provide a second bite at the apple to challenge a project that was granted a construction permit would give companies much needed certainty to allow investment in new projects.

**What EPA Has Done So Far and What's Next:** Beginning in late 2017, EPA issued a series of denials of petitions to object to Title V permits, where the petitioner sought objection based on dissatisfaction with the construction permitting process (or lack thereof). One of those resulted in an EPA order denying a petition to object to a state operating permit for PacifiCorp Energy's Hunter Power Plant in Emery County, Utah.<sup>79</sup> The Hunter Order clarified that a Title V petition for objection is not the appropriate mechanism for seeking review of preconstruction permit terms, such as those contained in PSD permits and "that title V permitting is not intended to second-guess the results of state preconstruction permit program."<sup>80</sup> The Hunter Order explained that this reading of the regulations comports with the Agency's statements regarding the relationship between the CAA's preconstruction and operating permit requirements made when the Part 70 regulations were issued in 1992.<sup>81</sup> It acknowledged, however, that the Agency had shifted away from this understanding of Title V permitting in the late 1990s, during which time EPA interpreted its regulations to allow substantive review of the propriety of a state's prior construction permitting decisions during the Title V permitting process.<sup>82</sup> EPA articulated in the Hunter Order the Agency's "Approach Moving Forward," in which it will no longer undertake an in-depth reevaluation of states' case-specific Title I permitting decisions during the Title V process, thereby returning to its original conception of the proper scope of Title V review.<sup>83</sup>

In February 2018, the Sierra Club sought judicial review of the October 2017 Order in both the D.C. Circuit and the U.S. Court of Appeals for the Tenth Circuit (10th Circuit).<sup>84</sup> The substantive issue in the case was whether Sierra Club can force EPA to revisit during the Title V permitting process decisions made in the Title I permitting process, in particular prior determinations that major NSR did not apply to a particular project. The procedural issue in the case was whether an EPA decision applicable to a single facility located in a state in the 10th Circuit could be appealed in the D.C. Circuit, on the theory that in making that decision, EPA explained and announced its approach to analyzing the substantive issue and its intent to apply that approach in future adjudications. If the 10th Circuit is the right venue for deciding the case, then the D.C. Circuit would not decide the substantive issue. The 10th Circuit case was abated pending a decision by the D.C. Circuit in No. 18-1038 with regard to venue.<sup>85</sup>

**Current Status:** On June 14, 2019, a unanimous three-judge panel dismissed Sierra Club's petition for review because EPA's decision was neither a nationally applicable regulation nor determined by the EPA Administrator to have nationwide scope or effect. Thus, the Court held that CAA

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<sup>79</sup> EPA, Order Den. Pet. to Obj. to Permit, *In re PacifiCorp Energy – Hunter Power Plant (Emery County, Utah Permit No. 15001 01002)*, Petition No. VIII-20 16-4 (EPA Oct. 16, 2017) ("Hunter Order").

<sup>80</sup> *Id.* at 14.

<sup>81</sup> *Id.* at 11.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 13-19.

<sup>84</sup> Pet. for Review, *Sierra Club v. EPA*, No. 18-1038 (D.C. Cir. Feb. 5, 2018); Protective Pet. for Review, *Sierra Club v. EPA*, No. 18-9507 (10th Cir. Feb. 6, 2018).

<sup>85</sup> Order, *Sierra Club v. EPA*, No. 18-9507 (10th Cir. Aug. 22, 2018).

Section 307(b)(1) dictated that venue was proper only in the 10th Circuit.<sup>86</sup> As a result, the case moves to the 10th Circuit which will decide the substantive issues. Another case, *Environmental Integrity Project et al. v. EPA, et al.*, No. 18-60384 (5th Cir.), will address similar issues and a decision is expected any day.

## **V. Corporate Average Fuel Economy (“CAFE”) and Light-Duty Truck and Motor Vehicle Greenhouse Gas Emissions Standards**

**Why It Matters:** EPA sets emissions standards for new motor vehicles under CAA Section 202 authority,<sup>87</sup> and the Department of Transportation’s National Highway Transportation Safety Administration (“NHTSA”) sets CAFE standards for passenger cars and light duty trucks under mandates contained in the Energy Policy and Conservation Act of 1975 (“EPCA”). To ensure the uniform application of EPA’s new vehicle emission standards, CAA Section 209(a) prohibits states from adopting state-specific standards for motor vehicle emissions.<sup>88</sup> Because California had already begun its motor vehicle emissions program when Section 202 was first enacted, Congress included a provision to exempt California from this preemption of state emission standards for new motor vehicles. CAA Section 209(b) provides that the EPA Administrator shall, after notice and opportunity for public hearing, *waive* applicability of the general prohibition in CAA Section 209(a) for California’s state-specific standards if the State determines that its standards “will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.”<sup>89</sup> EPA is not to issue a waiver, however, if the Administrator makes any one of the following three findings: 1) the determination of the State is arbitrary and capricious; 2) the State does not *need* such State standards to *meet compelling and extraordinary conditions*; or 3) such State standards and accompanying enforcement procedures are not *consistent* with CAA Section 202(a).<sup>90</sup> Subsequently, Congress amended the statute to permit other states to “opt in” to the standards adopted by California, assuming the state adopts standards that are “identical to the California standards for which a waiver has been granted for such model year” and “California and [the state] adopt such standards at least two years before commencement of [the] model year.”<sup>91</sup>

Under EPCA, NHTSA is required “at least 18 months before the beginning of each model year” to “prescribe by regulation average fuel economy standards for automobiles manufactured by a manufacturer in that model year.”<sup>92</sup> Each standard is required to be the “maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year,” a determination to be guided by considerations of “technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy.”<sup>93</sup> “Fuel economy” is defined as “the average number of miles traveled by an automobile for each gallon of gasoline (or equivalent amount of

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<sup>86</sup> *Sierra Club v. EPA*, 926 F.3d 844 (D.C. Cir. 2019).

<sup>87</sup> 42 U.S.C. § 7521(a)(1).

<sup>88</sup> 42 U.S.C. § 7543(a).

<sup>89</sup> 42 U.S.C. § 7543(b)(1).

<sup>90</sup> 42 U.S.C. § 7543(b)(1)(A)-(C).

<sup>91</sup> 42 U.S.C. § 7507.

<sup>92</sup> 49 U.S.C. § 32902(a).

<sup>93</sup> 49 U.S.C. §§ 32902(a), (f).

other fuel) used.”<sup>94</sup> EPCA Section 509 contains an express preemption provision for state fuel economy standards, stating that:

When an average fuel economy prescribed under this chapter is in effect, a State or political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under [EPCA].<sup>95</sup>

EPA and NHTSA recently issued a joint proposal that would, among other things:

- (1) revoke a preemption waiver granted in 2013 (“2013 Waiver”) under the CAA Section 209 for California’s Advanced Clean Car (“ACC”) regulations setting GHG emissions standards for model year (“MY”) 2017-2025 passenger cars and light duty trucks; and
- (2) finalize a finding that California’s ACC program—in particular, its GHG and Zero-Emissions Vehicle (“ZEV”) requirements—is preempted under EPCA.

This joint agency proposal follows a long history of regulatory, judicial, and industry actions related to California’s ability to enforce state-specific GHG emissions standards, which other states may adopt under CAA Section 177. The current effort to revoke the 2013 Waiver and to finalize a preemption determination for California’s ACC program is essential to EPA’s and NHTSA’s efforts to ensure uniform, harmonized federal regulation of GHG emissions and fuel economy for passenger cars and light duty trucks.

The implications of the waiver decision and the EPCA preemption analysis include the ability of California to drive national standards for the automobile industry and advance its agenda for non-fossil fuel vehicles, not only in California but across the country. Over the years, EPA’s interpretation of federal preemption and the scope of the CAA Section 209 waiver have varied.

California has already expressed its intent to challenge the rule when it becomes final.<sup>96</sup> If and when that occurs, courts will decide whether the hurdles in EPCA and the CAA for California action on vehicle standards have teeth.

**What EPA Has Done So Far and What’s Next:** On August 24, 2018, EPA and NHTSA issued a joint proposal to amend certain existing CAFE and tailpipe carbon dioxide (“CO<sub>2</sub>”) emissions standards for passenger cars and light duty trucks and establish new standards for MY 2021 through 2026.<sup>97</sup> The proposal, if finalized, would make less stringent CAFE and CO<sub>2</sub> emissions standards for MY 2022-2025 that were preliminarily issued by NHTSA and EPA, respectively, in a 2012 joint rule.<sup>98</sup> In conjunction with these changes, EPA proposed to revoke a 2013 waiver of preemption under CAA Section 209, which allowed California to implement its ACC regulations

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<sup>94</sup> 49 U.S.C. § 32901(a)(11).

<sup>95</sup> 49 U.S.C. § 32919(a).

<sup>96</sup> Cal. Governor Gavin Newsom, Press Release, *California Files Suit Against Trump Administration for Withholding Data on Efforts to Weaken Vehicle Emission Regulations that Place the Health of Millions of Kids, Families and Communities at Risk* (Apr. 5, 2019).

<sup>97</sup> NHTSA/EPA, *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks; Notice of Proposed Rulemaking*, 83 Fed. Reg. 42,986 (Aug. 24, 2018) (“SAFE Vehicles Proposed Rule”).

<sup>98</sup> See 77 Fed. Reg. 62,624, 62,784 (Oct. 15, 2012); 40 CFR § 86.1818-12(h).

setting GHG emissions standards for MY 2017-2025. NHTSA proposed to finalize a finding that California's ACC program—in particular, its GHG and ZEV requirements—is preempted under EPCA. For its part, EPA proposed that if state standards are preempted under EPCA, EPA cannot issue a waiver of preemption under Section 209(b) and because GHGs are not subject to air quality standards under the statute, regardless of whether California could obtain a waiver, other states cannot opt into the California program.

In the SAFE Vehicles Proposed Rule, NHTSA and EPA proposed to take two actions with respect to California's state-specific GHG standards and ZEV mandate authorized under the 2013 Waiver. First, NHTSA proposed to finalize its determinations that (1) any state law or regulation that regulates or prohibits tailpipe CO<sub>2</sub> emissions “relates to” average fuel economy standards within the meaning of EPCA Section 509 and is thus expressly preempted; and (2) any state law or regulation regulating tailpipe CO<sub>2</sub> emissions from automobiles conflicts with fuel economy standards established by NHTSA under EPCA and is thus impliedly preempted.<sup>99</sup> NHTSA proposed to codify its preemption determinations in an appendix to be added to the parts of the Code of Federal Regulations setting forth the passenger car and light truck CAFE standards.<sup>100</sup> Second, EPA proposed to withdraw the 2013 Waiver for California's ACC program, ZEV mandate, and GHG standards that are applicable to new MY 2021-2025.<sup>101</sup>

NHTSA explained that “present circumstances require NHTSA to address the issue of preemption,” as “the automotive industry and U.S. consumers now face regulatory uncertainty and increased costs” due “in no small part [to] California's separate GHG emissions and ZEV program,” which have undermined attempts by NHTSA and EPA to harmonize their respective and related regulations.<sup>102</sup> Its rationale for finding express preemption of state tailpipe CO<sub>2</sub> emission regulations under EPCA was that “GHG emissions, and particularly CO<sub>2</sub> emissions, are mathematically linked to fuel economy; therefore, regulations limiting tailpipe CO<sub>2</sub> emissions are directly related to fuel economy.”<sup>103</sup> NHTSA summarized this relationship as follows:

[M]ost light vehicles are powered by gasoline internal combustion engines. The combustion of gasoline produces CO<sub>2</sub> in amounts that can be readily calculated. CO<sub>2</sub> emissions are always and directly linked to fuel consumption because CO<sub>2</sub> is a necessary and inevitable byproduct of burning gasoline. The more fuel a vehicle burns or consumes, the more CO<sub>2</sub> it emits. To the extent that light vehicles are not powered by internal combustion engines, their use generally involves some release of CO<sub>2</sub> or other GHG emissions, even if indirectly, associated with the vehicle performing its work of traveling down the road.<sup>104</sup>

According to NHTSA, state requirements limiting tailpipe CO<sub>2</sub> emissions are thus expressly preempted by EPCA because they have the direct effect of regulating fuel consumption.<sup>105</sup> Likewise, NHTSA explained that a “state law prohibiting *all* tailpipe emissions, carbon or

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<sup>99</sup> 83 Fed. Reg. at 43,486 (proposed Appendix B to Part 531).

<sup>100</sup> *Id.* at 43,239, 43,486 (proposed Appendix B to Part 531); 43,489 (proposed Appendix B to Part 533).

<sup>101</sup> *Id.* at 43,240.

<sup>102</sup> *Id.* at 43,233.

<sup>103</sup> *Id.* at 43,234.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

otherwise, from some or all vehicles sold in the state, would relate to fuel economy standards and be preempted by EPCA, since the majority of tailpipe emissions consist of CO<sub>2</sub>.”<sup>106</sup> In so stating, NHTSA recognized that “state programs, such as California’s ZEV mandate, that establish requirements that a portion of a vehicle’s fleet sold or purchased consist of vehicles that produce no tailpipe emissions” fall within the EPCA express preemption provision.<sup>107</sup>

NHTSA’s proposed rationale for finding implied preemption of state tailpipe CO<sub>2</sub> emissions regulations under EPCA was that such state standards would frustrate Congress’ objectives in establishing the CAFE program and would conflict with NHTSA’s efforts to implement the program in a manner consistent with EPCA. Specifically, NHTSA noted Congress’ directive that the Administration consider four factors<sup>108</sup> in establishing maximum feasible fuel economy standards and that NHTSA balance these factors to determine, through the CAFE program, the amount of energy the light-duty vehicle fleet should conserve.<sup>109</sup> A state-specific determination on how much energy should be conserved (in the same way that the CAFE program conserves energy) necessarily would frustrate NHTSA’s efforts to make that determination for the country as a whole “because it sends the industry into different directions in order to try to meet multiple standards at once rather than allowing industry to focus its resources and efforts on the path laid out at the Federal level.”<sup>110</sup>

NHTSA also explained that California’s ZEV mandates are impliedly preempted under EPCA because they are “intended to *force* the development and commercial deployment of ZEVs—regardless of the technological feasibility or economic practicability of doing so—putting the program entirely at odds with critical factors that Congress required NHTSA to consider in establishing fuel economy standards.”<sup>111</sup> This is so, according to NHTSA, even though the original intent of California’s ZEV mandate was to reduce smog-forming emissions, and not to address GHGs. NHTSA explained that:

[a]s California’s Low Emission Vehicle and EPA’s Tier 3 standards for criteria pollutant emissions have become increasingly stringent, the greater impact of California’s ZEV mandate is the reduction of tailpipe GHG emissions. In its latest iteration, the ZEV mandate no longer focuses on tailpipe smog forming emissions  
...<sup>112</sup>

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.* NHTSA noted, however, that “other GHG emissions requirements may not be preempted by EPCA,” to the extent that they have no relation to fuel economy and are therefore outside of the scope of EPCA preemption. Examples include state laws regulating or prohibiting refrigerant leakage from vehicle air conditioning units, as well as state safety requirements that have a merely incidental impact on fuel economy. *Id.* at 43,234-35.

<sup>108</sup> *E.g.*, technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy. 49 U.S.C. § 32902(a), (f).

<sup>109</sup> *Id.* at 43,237.

<sup>110</sup> *Id.* at 43,237-38 (also noting that “[t]his is particularly true when considering that when California sets standards, other states can choose to adopt those standards and thereby further increase the compliance complexity.”).

<sup>111</sup> *Id.* at 43,238.

<sup>112</sup> *Id.*



NHTSA thus proposed to conclude that California's ZEV mandate is impliedly preempted under EPCA because it is a state-imposed requirement that interferes with NHTSA's statutory obligation to make decisions about fuel economy.

For its part, in the SAFE Vehicles Proposed Rule, EPA cited several grounds as bases for its proposal to withdraw the 2013 Waiver, including the following:

- EPCA Preemption. EPA proposed a general conclusion that state standards preempted under EPCA, such as those authorized under the 2013 Waiver, cannot be afforded a valid waiver of preemption under CAA 209(b).<sup>113</sup>
- No Compelling and Extraordinary Conditions. EPA proposed a determination that California does not need its GHG and ZEV standards to meet compelling and extraordinary conditions (within the meaning of CAA Section 209(b)(1)(B)) because those standards address environmental problems that are not particular or unique to California, that are not caused by emissions or other factors particular or unique to California, and for which the standards will not provide any remedy particular or unique to California.<sup>114</sup>
- Inconsistency with CAA Section 202(a). EPA proposed a determination that California's GHG and ZEV standards are inconsistent with CAA Section 202(a) (within the meaning of CAA Section 209(b)(1)(C)) in that they provide insufficient lead time to permit the development of necessary technology, giving appropriate consideration to compliance costs.<sup>115</sup>

EPA proposed to make findings under CAA sections 209(b)(1)(B) and 209(b)(1)(C), either of which independently would bar EPA from granting a waiver. Further, EPA proposed to conclude that states may not adopt California's GHG standards pursuant to CAA Section 177 because "the text, context, and purpose of Section 177 support the conclusion that this provision is limited to providing [s]tates the ability, under certain circumstances and with certain conditions, to adopt and enforce standards designed to control criteria pollutants to address [National Ambient Air Quality Standards ("NAAQS") non-attainment."<sup>116</sup>

Almost immediately after the proposed rule was released, California initiated proceedings to revoke the regulatory provisions that it had agreed to for "one national program" for GHG emissions standards.<sup>117</sup>

**Current Status:** The public comment period closed on October 26, 2018, as of the writing of this paper, July 15, 2019, the final rule has not yet issued.

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<sup>113</sup> *Id.* at 43,240.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> Cal. Air Resources Board, *Notice of Public Hearing to Consider Proposed Amendments to the Low-Emission Vehicle III Greenhouse Gas Emission Regulation*, at 5 (Aug. 6, 2018), <https://www.arb.ca.gov/regact/2018/leviii2018/leviiinotice.pdf>.

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# **Not for the Squeamish or Faint of Heart!**

## **Clean Air Act Section 112(r)**

## **Chemical Accident Prevention**

Presented at:

State Bar of Texas  
31st Annual Texas Environmental Superconference  
August 1-2, 2019  
Austin, Texas

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# **Not for the Squeamish or Faint of Heart!**

## **Clean Air Act Section 112(r)**

### **Chemical Accident Prevention**

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#### **I.**

#### **Introduction**

Almost twenty-seven years ago, in the wake of devastating chemical accidents in the United States and worldwide, Congress amended the federal Clean Air Act (“CAA”) to create Section 112(r) - a chemical accident provision entitled “Prevention of Accidental Releases.” In 1999, under Section 112(r)(7)<sup>1</sup> of that authority, the U.S. Environmental Protection Agency (“EPA”) published a Risk Management Program (“RMP”) Rule<sup>2</sup> and guidance for facilities that produce, handle, process, distribute, or store over a threshold quantity of a listed extremely hazardous substance. Significant amendments to the RMP Rule were promulgated by the Obama-era EPA. However, with the change in administrations, an odyssey of legal strategies began that affect the implementation of the new, more stringent RMP Rule requirements. This paper will:

1. First, bring the reader up to speed on the strange journey of the Section 112(r) RMP Rule before and during the current White House administration;
2. Second, discuss the challenge presented to regulated industries by the fluctuating reality of the RMP Rule; and
3. Third, for those still reading and interested, provide substantive discussion of the statutory and regulatory background of Section 112(r), including the “General Duty Clause,” and EPA’s guidance, including the applicable penalty policy.

As the title of this paper suggests, you might not be able to look away!

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<sup>1</sup> CAA Section 112(r)(3), 42 USC §7212(r)(7).

<sup>2</sup> 40 C.F.R. Part 68.

## II. News

An explosion; an Obama Executive Order; EPA rulemaking activity; a new President; a White House memo; an EPA delay; a lawsuit and a pointed D.C. Circuit opinion and mandate; more EPA rulemaking activity. After plodding along, virtually unchanged for much of its existence, the last several years have seen a flurry of activity impacting, and relating to, the RMP Rule. Why?

A fascinating chronology of events sets the stage:

**April 2013** In the small Texas town of West, an explosion, caused by a fire that ignited ammonium nitrate, killed fifteen (15) people, eleven (11) of them firefighters, and wounded two-hundred and twenty-six (226). The reported monetary damage, including homes that literally were flattened, exceeded \$100 million. In the weeks and months that followed, the federal U.S. Chemical Safety Board concluded that the explosion was preventable and placed blame on, among others, government regulators.

**August 1, 2013** President Obama signed Executive Order 13650 (the “EO”) entitled “Improving Chemical Facility Safety and Security” as a direct result of the West, Texas explosion. This EO took direct aim at EPA’s RMP Rule and required EPA to determine if additional chemicals should be covered.<sup>3</sup>

**June 6, 2014** A consortium of federal agencies, including among others EPA, the Department of Homeland Security, and the Department of Labor (a/k/a the “Working Group”), issued a report to President Obama under the EO. The report, “Actions to Improve Chemical Facility Safety and Security – A Shared Commitment,” provided a status report to the President on the actions that had been implemented under the EO. These actions included meetings with first responders, launching a regional pilot project to coordinate preparedness planning and response activities, updating EPA online substance registries, and a request for public input from the Occupational Safety and Health Administration (“OSHA”) on its update of the agency’s Process Safety Management (“PSM”) standard.<sup>4</sup>

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<sup>3</sup> The EO also directed the federal government to (i) improve operational coordination with state and local partners, (ii) enhance federal agency coordination and information sharing, (iii) “modernize” policies, regulations and standards, and (iv) work with stakeholders to identify best practices. The EO is available at <https://obamawhitehouse.archives.gov/the-press-office/2013/08/01/executive-order-improving-chemical-facility-safety-and-security>.

<sup>4</sup> Note that OSHA’s PSM standard is the worker-safety analogue to EPA’s RMP Rule. In the wake of the explosion, OSHA found 24 violations of its regulations and assessed a fine of \$118,300.

**July 31, 2014** EPA published a Request for Information (“RFI”) seeking public comment on updating the RMP regulations.<sup>5</sup> EPA received 574 public comments to the RFI. As a provocative footnote to the West, Texas incident, two days before the public comment period on the proposed rules closed, federal investigators from the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) announced that the West, Texas fires that sparked the explosion had been deliberately set in a criminal act. The rule-evaluation exercise undertaken by EPA under the EO was not premised upon trying to thwart intentional, criminal acts.

**March 14, 2016** The Obama era EPA proposed significant revisions to the RMP regulations.<sup>6</sup>

**January 13, 2017** The Final Rule revising the RMP Rule (the “Final Rule”) was published with an effective date in March 2017. The Final Rule, which contained a series of staggered implementation deadlines, included some significant changes to the chemical accident prevention program requirements in several areas, including: (i) 3<sup>rd</sup> party compliance audits; (ii) incident investigations and root cause investigations for incidents and near misses; (iii) safer technology alternatives analysis for Program 3 facilities; (iv) increased coordination with local emergency response organizations; (v) emergency response exercises; and (vi) increased information sharing with LEPCs and the public.

**January 20, 2017** 12:00 pm EST, a new President took office. That same day, the administration issued a memorandum we’ll call the “White House Memo.”<sup>7</sup> The White House Memo temporarily postponed by 60 days the effective date of regulations – such as the Final Rule - published in the Federal Register that had not yet reached their effective date. The White House Memo based its authority on the obscure “Congressional Review Act” – used only 1 other time since 2001 – which allows Congress to pass disapproval resolutions, with simple majority votes in the House and Senate, to reverse discretionary rules promulgated within 60 legislative days of their actions. Using this authority, the White House stayed all rules enacted in the last days of the Obama administration.

**January 26, 2017** EPA published notice of its intention to delay the effective date of the Final Rule.

**March 16, 2017** EPA published a final rule delaying the effective date of the Final Rule to June 19, 2019.<sup>8</sup>

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<sup>5</sup> 79 Fed. Reg. 44,601 (July 31, 2014).

<sup>6</sup> 81 Fed. Reg. 13,638 (Mar. 14, 2016).

<sup>7</sup> <https://www.whitehouse.gov/presidential-actions/memorandum-heads-executive-departments-agencies/>.

<sup>8</sup> 82 Fed. Reg. 13,968 (Mar. 16, 2017).

**June 14, 2017** EPA publishes notice that it will further delay the Final Rule by 20 more months to February 19, 2019.<sup>9</sup>

**June 15, 2017** A coalition of community and environmental groups challenged the delay of the Final Rule in the D.C. Circuit.

**May 30, 2018** EPA proposed rescinding significant portions of the Final Rule, and subsequently extended the comment period to August 23, 2018 (the “RMP Reconsideration Rule”).<sup>10</sup> In this action, EPA proposed to rescind the Final Rule’s amendments relating to, among other things: (i) safer technology and alternatives analyses; (ii) 3rd-party audits; (iii) incident investigations; and (iv) information availability. EPA also proposed modifying amendments in the Final Rule relating to local emergency coordination, emergency exercises, public meetings, and to change the compliance dates for these provisions. EPA stated that these changes to the Final Rule were needed to address, among other things: (i) potential security risks associated with new information disclosure requirements introduced in the Final Rule; (ii) the reasonableness of regulatory costs compared to benefits of the Final Rule; (iii) concerns about maintaining consistency with the OSHA PSM standard; (iv) any impacts of the finding by the ATF that the West, Texas incident was caused by arson.

**August 17, 2018** The D.C. Circuit issued a blistering opinion vacating the 20-month delay on the effectiveness of the Final Rule.<sup>11</sup> Although the CAA allows for short delay of a rule when a reconsideration petition is received by EPA, the D.C. Circuit found that EPA’s delay “makes a mockery of the statute” with a rule “calculated to enable non-compliance.”

**September 21, 2018** The D.C. Circuit issued a mandate placing its order eliminating the delay of the Final Rule into effect immediately.

**December 3, 2018** EPA announced that the 2017 Final Rule – including its staggered implementation dates - was in effect (the “Effectiveness Notice”)<sup>12</sup> as mandated by the D.C. Circuit.

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<sup>9</sup> 82 Fed. Reg. 27,133 (June 14, 2017).

<sup>10</sup> 83 Fed. Reg. 24,850 (May 30, 2018). *See also* EPA’s *RMP Reconsideration Proposed Rule Fact Sheet* at: [https://www.epa.gov/sites/production/files/2018-06/documents/revised\\_rmp\\_reconsideration\\_rule\\_factsheet\\_6-13-18.pdf](https://www.epa.gov/sites/production/files/2018-06/documents/revised_rmp_reconsideration_rule_factsheet_6-13-18.pdf).

<sup>11</sup> *Air Alliance Houston, et al. v EPA*, No. 17-1155 (D.C. Cir. 2018).

<sup>12</sup> 83 Fed. Reg. 62268 (Dec. 3, 2018).



### **III. The Challenge for Regulated Entities**

What does EPA’s Effectiveness Notice action mean for the regulated community in the face of the phased-in implementation deadlines in the Final Rule? What is EPA’s stance?

#### **A. National Compliance Initiative**

Every three years, EPA sets national compliance initiatives (formerly called national enforcement initiatives) (“NCIs”) as a method of focusing, among other things, its enforcement priorities and resources. On July 7, 2019, EPA issued its NCIs for FY 2020-2023.<sup>13</sup> NCI number 6, “Reducing Risks of Accidental Releases at Industrial and Chemical Facilities,” was continued from the prior NCI cycle. The FY 2020-2023 update provides the following explanation:

OECA is selecting Reducing Risks of Accidental Releases at Industrial and Chemical Facilities as an NCI to continue in the next cycle. This NCI was introduced in the last cycle and the NCI Federal Register notice proposed to extend this NCI. We found that many regulated facilities are neither managing adequately the risks they pose nor ensuring the safety of their facilities to protect surrounding communities as required under CAA Section 112(r). This NCI will continue in FY 2020-2023. The EPA has found that many regulated facilities are neither managing adequately the risks they pose nor ensuring the safety of their facilities to protect surrounding communities as required under CAA § 112(r).

EPA’s NCI states that increased compliance with Section 112(r) is a metric for whether this initiative is “successful.”

#### **B. The Effectiveness Notice**

The Effectiveness Notice officially served as EPA’s acknowledgment of the D.C. Circuit vacatur of agency’s stay of the Final Rule. In the Effectiveness Notice, EPA called the rulemaking announcement a “ministerial act.” As required by the D.C. Circuit, EPA adopted the Final Rule amendments into the RMP Rule regulations in 40 CFR Part 68. Due to the long delay in the effectiveness of the Final Rule, some of the new amendments to the 40 CFR Part 68 rules

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<sup>13</sup> <https://www.epa.gov/sites/production/files/2019-06/documents/2020-2023ncimemo.pdf>. On June 11, 2019, EPA published its response to public comments on the NCIs: <https://www.epa.gov/sites/production/files/2019-06/documents/nciresponsetocomment.pdf>.

became effective immediately upon the December 3<sup>rd</sup> publication of the Effectiveness Notice. Other new provisions will become effective as time passes.

However, recall from the chronology above that EPA issued a Proposed Reconsideration Rule in May 2018 *that is still pending*. This pending rule proposed to rescind many of the RMP Rule requirements with future effective dates. This pending rule can still, and is expected to, be adopted. The effect of such adoption would be to remove from 40 CFR Part 68 most or all of the amendments that were made when EPA was forced by the D.C. Circuit to incorporate the Final Rule's amendments into 40 CFR Part 68. For now, this means there is no certainty that many of the Final Rule provision, in fact, will become effective. It is equally uncertain that the amended version of 40 CFR Part 68 – even as to those requirements that became effective on December 3<sup>rd</sup> - of 40 CFR Part 68 will remain in the current form. This means significant uncertainty for the regulated community when decisions must be made, and resources must be devoted to, 40 CFR Part 68 compliance.

### **C. EPA Compliance Information**

Following the D.C. Circuit decision, EPA issued some compliance information in a document entitled “RMP Amendments Compliance Information” (the “RMP Compliance Information”).<sup>14</sup> In this document, EPA notes that the compliance schedule in the Final Rule, now adopted by EPA pursuant to the D.C. Circuit mandate, does create current compliance obligations for some parts of the rule. The RMP Compliance Information then identifies the new amendments to 40 CFR Part 68 that have current compliance obligations, i.e. effective immediately when EPA complied with the D.C. Circuit mandate, and those for which compliance will be due in the future.

The list of requirements that have current compliance obligations is lengthy but, for the most part, underscores that the immediately effective rules primarily beef up existing rules – such as added contents of investigation reports - rather than create entire new obligations.

As to the new amendments with future compliance obligation (most of which are the provisions in the current administration's crosshairs) EPA identifies the following requirements that require compliance by March 15, 2021:

- Third-party audit provisions in §§ 68.58(f), 68.58(g), 68.58(h), 68.59, 68.79(f), 68.79(g), 68.79(h), and 68.80.
- Incident investigation root cause analysis provisions in §§ 68.60(d)(7) and 68.81(d)(7).

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<sup>14</sup>[https://www.epa.gov/sites/production/files/2018-09/documents/rmp\\_emergency\\_coordination\\_minor\\_provisions\\_compliance\\_info\\_9-24-18\\_final.pdf](https://www.epa.gov/sites/production/files/2018-09/documents/rmp_emergency_coordination_minor_provisions_compliance_info_9-24-18_final.pdf)

- Safer technology and alternatives analysis in § 68.67(c)(8).
- Emergency response exercise provisions in § 68.96.
- Providing chemical hazard information or community preparedness information to the public and conducting a public meeting 90 days after an RMP accident in § 68.210 (b) – (e).

EPA also notes that facilities are required to update their Risk Management Plans to comply with new or revised provisions by March 14, 2022.

EPA does not editorialize, or offer any comfort to facilities that would seek to delay implementation of any portion of the new Part 68 amendments. The RMP Compliance Information seems to be, facially, simply a list of the new Part 68 obligations and their respective compliance dates. However, looking more closely at the introductory paragraph to the document, and perhaps over-reading into EPA's statements, it appears possible that EPA's intended path is to rescind those requirements with future compliance dates, and potentially claw back those that already have become effective. Much of this is a matter of timing, with the potential for a new administration in 2020 creating the possibility for EPA's current path to evaporate.

#### **IV.**

#### **Section 112(r): RMP Rule and General Duty Clause Applicability**

Now that we have set the stage for the current regulatory status of the RMP Rule, we will look at the legal context for the CAA's Chemical Accident Prevent program arising from Section 112(r). Section 112(r) contains separate and distinct regulatory and statutory chemical accident programs.

1. **Regulatory Program:** Section 112(r)(7) directs EPA to develop a program designed to prevent accidental releases of substances that may cause death, injury, or serious adverse effects to human health or the environment. EPA's implementing regulations are the RMP Rule in 40 CFR Part 68 that is the subject of the preceding discussions.
2. **Statutory Program.** The statutory program appears in Section 112(r)(1)'s purpose statement and establishes a prescribed general duty for certain owners and operators of stationary sources (commonly referred to as the "General Duty Clause").

The applicability of these two distinct chemical accident programs under CAA Section 112(r) is discussed below.

## **A. Section 112(r)(7) - Part 68 Risk Management Program Rule**

EPA's RMP Rule requires certain owners and operators of stationary sources to develop and submit to EPA a Risk Management Plan. The RMP Rule is based largely upon existing industry codes and standards.

A stationary source will be subject to the RMP Rule if it manufactures, uses, stores, or otherwise handles more than a threshold quantity of a listed "regulated substance" in a covered "process."

- A "process" is defined by the RMP Rule as any activity involving a listed regulated substance. Such activities include, among other things, onsite movement, use, storage, manufacturing and handling.
- The list of "regulated substances" and their threshold quantities appear in four Tables at 40 CFR Section 68.130. By statute, in the development of the list of regulated substances, EPA was required to use, at a minimum, the list of extremely hazardous substances published under the Emergency Planning Community Right-to-Know Act ("EPCRA"). There are a few significant statutory exemptions from the list including pollutants for which a national primary ambient air quality standard has been established.<sup>15</sup>

The requirements applicable to a process that uses a regulated substance in excess of the threshold quantity are tailored depending upon the size of the process and the risks it poses. EPA has classified RMP processes into three Program Levels with Program Level 1 carrying the least stringent requirements. Briefly, the Program Levels are:

- Program Level 1 which applies to processes that would not affect the public in situations of a worst case release and with no accidents with specific offsite consequences in the past five years;
- Program Level 2 which is a default level for processes that are not eligible for Program 1 or subject to Program 3; and
- Program 3 which applies to processes that are not eligible for Program 1, and either are subject to OSHA's Process Safety Management standard<sup>16</sup> or fall into one of ten specified NAICS codes, including pulp mills, certain chemical manufacturers, and petroleum refineries.

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<sup>15</sup> CAA Section 112(r)(3), 42 USC §7212(r)(3).

<sup>16</sup> 29 CFR §1910.119.

The Program Levels are applicable process-by-process so a single stationary source may have different requirements for different processes. The eligibility of one process for a particular Program Level does not affect eligibility of other processes. However, if a process consists of multiple production or operating units or storage vessels, the highest Program level that applies to any segment of the process applies to all parts.

A Risk Management Plan under the RMP Rules contains three elements: (i) a hazard assessment; (ii) an accident prevention program; and (iii) an emergency response program. For Program Level 1 processes, only limited hazardous assessment, and minimal accident prevention and emergency response requirements apply. For the Program Level 2 and 3 processes, all three of the elements must be addressed in full.<sup>17</sup>

## **B. Section 112(r)(1) – The General Duty Clause**

The opening clause in Section 112(r)(1) entitled “Purpose and General Duty,” the General Duty Clause, creates a self-implementing statutory obligation that is used by EPA as a stand-alone basis for enforcement.

### **1. The Statutory Provision**

The General Duty Clause in Section 112(r)(1), in effect and enforceable since November 15, 1990, states:

Purpose and General Duty – It shall be the objective of the regulations and programs authorized under [subsection 112(r)] to prevent the accidental release and to minimize the consequences of any such release of any substance listed pursuant to paragraph (3) or any other extremely hazardous substance. The owners and operators of stationary sources producing, processing, handling or storing such substances have a general duty, in the same manner and to the same extent as section 654, title 29 of the United States Code,<sup>18</sup> to identify hazards which may result from such releases using appropriate hazard

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<sup>17</sup> Note that emergency response program development and implementation is only required for Program Levels 2 or 3 processes if facility employees will respond to releases of regulated substances as opposed to public responders.

<sup>18</sup> That duty, described in the Occupational Safety and Health chapter of the Labor code, states that “(a) Each employer (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; (2) shall comply with occupational safety and health standards promulgated under this chapter. (b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct.

assessment techniques, to design and maintain a safe facility taking such steps as are necessary to prevent releases, and to minimize the consequences of accidental releases which do occur.

There are no separate EPA regulations establishing how a regulated entity can demonstrate compliance with the mandate at any particular time. In fact, one of EPA's own summaries of the General Duty Clause cautions that "It is important to understand that the General Duty Clause is not a regulation and compliance cannot be checked against a regulation or submission of data."<sup>19</sup>

## **2. General Duty Clause-Specific Guidance**

In 2000, EPA issued "Guidance for Implementation of the General Duty Clause Clean Air Action Section 112(r)(1)"<sup>20</sup> (the "Guidance"). The Guidance notes EPA's position that the General Duty Clause does not require the promulgation of regulations defining how to meet the general obligations established by the Clause; however, the Guidance offers EPA's thoughts about what might constitute compliance. The Guidance explains that EPA believes the General Duty Clause imposes three primary obligations:

1. Identify hazards which may result from accidental releases using appropriate hazards assessment techniques;
2. Design and maintain a safe facility taking such steps as are necessary to prevent releases; and
3. Minimize the consequences of accidental releases which do occur.

The Guidance states that the General Duty Clause is a performance-based authority recognizing that owners and operators have primary responsibility in prevention of chemical accidents.

With respect to applicability of the General Duty Clause, the Guidance discusses the meaning of "stationary source" and "accidental release," two terms defined in Section 112(r)(2)(A) and (C). Together, those defined terms tell us that accidental releases are unanticipated releases of "regulated substances" or "*any other extremely hazardous substance*" into the ambient air from a stationary source. The list of "regulated substances" appears in the RMP Rule, as required by Section 112(r). However, the term "extremely hazardous substance," a crucial term in compliance with, and enforcement of, the General Duty Clause, is undefined in

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<sup>19</sup> OSWER, EPA 550-F-09-002 (March 2009); [www.epa.gov/emergencies](http://www.epa.gov/emergencies).

<sup>20</sup> OSWER, EPA 550-B00-002 (May 200); [www.epa.gov/ceppo/](http://www.epa.gov/ceppo/).

Section 112(r).<sup>21</sup> EPA believes - and not without support – that an undefined universe of substances is potentially subject to the General Duty Clause.<sup>22</sup>

## V.

### Section 112(r) Enforcement Policy and Penalty Calculation

If your facility is subject to an EPA enforcement action under Section 112(r) of the Clean Air Act, the following policy document will be used to determine the enforcement path and the calculation of penalties.

#### A. The Policy

On June 20, 2012, the Director of EPA’s Waste and Chemical Enforcement Division transmitted to all Regional Division Directors a “Final Combined Enforcement Policy for Clean Air Act Sections 112(r)(1), 112(r)(7) and 40 C.F.R. Part 68” (the “Policy”). The Policy describes EPA’s range of enforcement options including: administrative compliance orders, notices of noncompliance, civil administrative penalty orders, civil judicial referrals, and criminal sanctions. Of these options, a civil administrative penalty order is identified as the typical appropriate response to Section 112(r) violations.<sup>23</sup>

#### B. Penalties

The Policy provides EPA with specific direction on how to penalize Section 112(r) violations. The Policy is largely consistent with other EPA penalty policies in terms of the penalty formula (i.e. Economic Benefit + Gravity Component + Duration + Size of Violator ± Adjustment Factors) and process.

A penalty under the Policy is calculated pursuant to factors identified in CAA Section 113.<sup>24</sup> These will be familiar to anyone who has explored EPA’s penalty policies under other

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<sup>21</sup> The Guidance states that that the General Duty Clause itself does not require the development of a list of chemicals subject to Section 112(r)(1).

<sup>22</sup> Recommended reading is Susan L. Biro’s fascinating June 2, 2011 Order on Respondent’s Motion to Dismiss in *In the Matter of American Acryl, N.A., LLC.*, Docket No. CAA-06-2011-3302, a single count General Duty Clause case initiated by EPA Region 6 involving a fire and a toluene release.

<sup>23</sup> For historical, Region 6-specific, enforcement context, see *Attachment 1*, which contains an excerpt from this author’s paper, *Heavy Duty: Section 112(r) Enforcement*, presented at the “26<sup>th</sup> Annual Texas Environmental Superconference.”

<sup>24</sup> CAA Section 113, 42 U.S.C §7414.



federal environmental statutes. The factors are: economic benefit of noncompliance, seriousness of the violation, duration of the violation as established by any credible evidence, size of the business, compliance history, good faith efforts to comply, economic impact of the penalty, payment of penalties previously assessed for the same violation, and other factors as justice may require. The Policy divides these factors into two components of the penalty: the economic benefit component and the gravity component.

The Policy recognizes the RMP Rule and the General Duty Clause as two separate and distinct obligations imposed on sources. Accordingly, the Policy establishes two sets of tables for determining the seriousness of the violation factor (which is a crucial part of the gravity component). Each table uses guidelines to identify whether (i) the potential for harm associated with a violation, and (ii) the extent of deviation from the requirements are Major, Moderate, or Minor. Those determinations lead to a cell in the appropriate penalty table, or matrix, that contains a penalty amount.

One unique aspect of the Policy is a discretionary multiplier that EPA can use to increase the base penalty amount where actual damage caused by the violation is so severe that the gravity component alone is not a sufficient deterrent. If EPA determines that this is the case, it can increase the penalty amount using an Extent of Damages Matrix that assigns a multiplier factor. Generally this could happen in the case of a fire, explosion or other significant event. The Extent of Damages Matrix consists of a list of incident consequences contained in Appendix B of the Policy. Each consequence has a number of points associated with it. Consequences carrying the highest points include such things as: (i) creation of a plume large enough to migrate off site and reach into populated areas and impact more than one county or more than 50 to 100 miles, (ii) deaths or potential deaths (multiplied by each person), (iii) closure of air space or closure of businesses more than 5 days, (iv) releases of substances in high amounts, the worst being over 10,000,000 pounds, and (v) releases involving high toxicity substances.

As with other penalty policies, the Policy includes a separate table for the duration of the violation if the violation lasts for greater than one day. Unlike some other penalty policies, the Duration of a Violation table in the Penalty contains relatively modest numbers. For example a violation that lasts between 0 and 12 months will increase the penalty by \$750 per month. EPA has discretion to reduce the duration component to no less than the gravity amount if the additional duration component amount seems to be disproportionately high.

This author's long experience in penalty negotiations in EPA Section 112(r) enforcement actions underscores that penalty calculation is highly dependent upon the appropriate and defensible selection of the values of the variables in the Penalty's formula. Numerous considerations can affect practically every number used to derive a final penalty. In an enforcement negotiation, there are almost always legitimate methods of calculating several different supportable penalties, and penalty components, while strictly applying EPA's Policy.



## **VI. Final Thoughts**

The RMP Rule, although currently effective with the Obama-era amendments in the Final Rule, is caught in a political tug-of-war. The D.C. Circuit has forced implementation of amendments to the RMP Rule that EPA already is in the process of rescinding. The long-standing RMP Rule requirements will not be going anywhere, anytime soon. However, the Final Rule amendments have risen, and can fall, based on White House philosophy and a change of administration. The regulated community is largely an observer to this show, but has no choice other than to watch carefully as the implementation schedule of new requirements drive RMP Rule compliance. Indeed, this is “Not for the Squeamish or Faint of Heart.”

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**Excerpt from Section III, *Heavy Duty: Section 112(r) Enforcement*,  
Flores, Jean M. (2014), paper presented at the  
“26<sup>th</sup> Annual Texas Environmental Superconference.”**

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**III.  
EPA Enforcement**

**A. Reasons for Ramped-up Enforcement**

A combination of factors have kept Section 112(r) enforcement in the spotlight. In November 2007, EPA’s Office of the Inspector General (“OIG”) commenced a nationwide evaluation of EPA’s implementation of the CAA Section 112(r) Risk Management Program. On February 10, 2009, OIG issued its Evaluation Report on that assessment.<sup>25</sup> The report was fairly critical of EPA’s program management and oversight. In particular, the report noted that EPA had not established national procedures for identifying covered facilities that had not submitted Risk Management Plans and, of 1,516 facilities identified by EPA in 2005 as being past their due date for re-submitting a Risk Management Plan, 452 (nearly one-third) had not been resolved. The report recommended that EPA strengthen its inspection process, implement additional management controls to identify facilities with regulated chemicals that have not filed Risk Management Plans, and develop inspection requirements to target higher-priority facilities for inspection and track its progress in completing inspections of those facilities. EPA concurred with all of the recommendations. The findings were repeated pointedly by OIG in its April 28, 2009 EPA’s Key Management Challenges For Fiscal Year 2009 memorandum to EPA’s Administrator Lisa P. Jackson. The same general concerns were incorporated into OIG’s 2010 Fiscal Year Challenges memo.

This round of scrutiny was followed by Fiscal Year EPA Strategy Plans that specifically identified “Reduce Chemical Risks at Facilities” as an objective that could be achieved by continuing to maintain the Risk Management Plan program and reducing by 10 percent the number of accidents at RMP facilities, using a baseline of 190/annually between 2005 and 2009.

**B. Region 6**

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<sup>25</sup> EPA-OIG Report, “EPA Can Improve Implementation of the Risk Management Program for Airborne Chemical Risk,” Report No. 09-P-0092 (February 10, 2009).

While no Region was completely spared from Evaluation Report's conclusions, Region 6 received quite a bit of individual attention. Highlights (or lowlights) included being one of the top Regions by number of RMP facilities (over 2,300) while posting the lowest percentage of inspections/audits at facilities that reported accidents in their Risk Management Plans. The Evaluation Report also included this note immediately prior to its conclusion:

We noted that accidents occurred at two RMP facilities in Region 6 after we began our evaluation, and neither facility was ever inspected/audited by the Risk Management Program office. One of these facilities was on OEM's list of Tier 1 facilities. These accidents resulted in one worker death, multiple injuries, and significant on-site monetary damage. In a worst-case scenario, over 35,000 people could have been impacted by each of these accidents.

Region 6 has embraced the findings for a number of reasons that do not simply stem from national policy. Those include the facts that Region 6 has 18% of the national total of RMP facilities, 35% of the national total of high risk facilities, 382 large complete Title V facilities (70% in Environmental Justice communities), and a surprisingly large number of monthly accidental releases that are reported to the National Response Center. As a result, the Region's current enforcement initiatives give special focus to both the Section 112(r)(7) RMP Rule and the Section 112(r)(1) General Duty Clause. Based on the number of enforcement actions in the last two years, Region 6 is the nation's leader in enforcement of Section 112(r).

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### Biography

Peter K. Wahl's practice spans a broad range of environmental, health and safety matters. Pete's involvement with regulatory matters includes counseling regarding federal and state laws, regulations, and permits and their impact on industrial operations. Pete's regulatory work includes a good deal of involvement with projects related to the remediation and redevelopment of contaminated property. Pete is also involved with the regulation of chemicals and other products under the federal Toxic Substances Control Act and other laws and also the development of programs necessary for American chemicals and other products to comply with the regulations of the European Union and other foreign jurisdictions.

Pete is also regularly involved with transactional matters, including the acquisition and divestiture of steelmaking, electric generation, and oil and gas assets. He is also involved in resolving and managing liability and litigation for clients dealing with sites across the country that have been listed on state and federal Superfund lists or otherwise subject to liability. Pete has also assisted with environmental aspects of several large bankruptcy reorganizations in the steel, chemical, manufacturing, and agriculture industries.

### Practice Experience

#### Regulatory Matters:

- Representation of a fertilizer manufacturer in federal and state enforcement proceedings relating to a significant ammonia release.
- Representation of a chemical manufacturer in an OSHA investigation relating to a plant explosion and resulting injuries.
- Representation of refining, chemical and steel facilities in obtaining and modifying regulatory authorizations for air emission, waste generation, and stormwater and wastewater discharge.
- Representation of a former owner of a pesticide facility and its investigation, remediation, and regulatory closure.



### Practice Areas

- Environment & Natural Resources

### Experience

- Air & Water Quality
- Electric Power
- Energy Litigation
- Environmental Compliance
- Environmental Due Diligence
- Environmental | Energy
- Product Liability
- Project Development & Permitting
- Remediation & Property Redevelopment
- Renewable Energy
- Superfund & Waste

### Education

B.A., *magna cum laude*, Gustavus Adolphus College

M.S., University of Queensland (AUS)

J.D., *magna cum laude*, University of Minnesota Law School

### Bar Admissions

Texas, 2000

Minnesota, 2002

### Court Admissions

U.S. District Court for the Northern, Southern, Eastern and Western Districts of Texas

#### Environmental Litigation Matters:

- Representation of a major oil company in a lawsuit filed by the neighbor of a former gasoline service station.
- Representation of a chemical manufacturer in a lawsuit it filed against a former waste broker for contribution under the federal Superfund law and Texas Solid Waste Disposal Act.
- Representation of a number of dairy operators in a lawsuit filed by a local municipality relating to alleged contamination of its drinking water supply.
- Representation of an environmental laboratory manager in a multi-defendant, seven-week federal jury trial involving a 77-count fraud indictment.

#### Transactional Matters:

- Representation of a private equity firm in its acquisition of a landfill and waste transfer stations.
- Representation of a steelmaker in its acquisition of a large steel mill and numerous other facilities used in the production of oilfield pipe.
- Representation of a major upstream oil and gas company in its simultaneous merger with two other oil and gas companies.
- Representation of clients in the resolution of environmental claims and bankruptcy reorganization of manufacturing and chemical companies.

#### Recognition & Accolades

- *Who's Who Legal: Texas*, Environment, 2016, 2019
- *The Best Lawyers in America* (Woodward/White Inc.)
  - Environmental Law, 2013-2019
  - Lawyer of the Year, Environmental Law, 2013
- Best Lawyers in Dallas, *D Magazine*, 2015-2016, 2018-2019
- Rising Star, Thomson Reuters, 2009-2012
- 40 Under 40, *Dallas Business Journal*, 2010
- Best Lawyers in Dallas Under 40, *D Magazine*, 2006

#### Community Involvement

- Dallas Bar Association – Environmental Law Section
  - Chairperson, 2010
  - Executive Council, 2002-2010
- State Bar of Texas Environmental and Natural Resources Law Section, Executive Committee
- American Bar Association's Section of Environment, Energy, and Resources
- Dallas Bar Foundation, Fellow
- Texas Bar Foundation, Fellow
- Dallas Chamber of Commerce Leadership Dallas Class, 2014
- North Texas Business for Culture and the Arts' Leadership Arts Class, 2009
- USA Film Festival, Board of Directors
- Northridge Presbyterian Church, Ruling Elder

# Summary of the Affordable Clean Energy (ACE) Rule

*by Peter K. Wahl, Jackson Walker LLP*

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## A. Background

The federal Clean Power Plan (CPP) established a three-pronged approach, deemed “building blocks,” to satisfy the federal Clean Air Act’s (CAA) § 111(d) requirement that the United States Environmental Protection Agency (EPA) establish a “best system of emission reduction” or “BSER” for greenhouse gas emission from existing fossil fuel-fired power plants. Those building blocks consisted of:

- (1) heat-rate / energy efficiency improvements to individual units;
- (2) shifting of electricity generation from coal-fired to natural gas-fired power plants; and
- (3) shifting of electricity generation from fossil fuel-fired power plants to renewable energy sources such as wind and solar.<sup>1</sup>

The Clean Power Plan was stayed pending completion of all judicial review in an order issued by the U.S. Supreme Court in February 2016. The D.C. Circuit then ordered expedited briefing on the merits in the spring of 2016 and oral argument was held in September 2016. Following the inauguration of President Trump in January 2017, EPA moved to place the case in abeyance. The D.C. Circuit granted that motion and the case continues to remain in abeyance.

In March 2017, President Trump issued Executive Order (EO) 13873, which directed EPA to reconsider the Clean Power Plan.<sup>2</sup> In response, EPA proposed to repeal the CPP and published an Advance Notice of Proposed Rulemaking in December 2017 soliciting comment on what EPA should include in a new existing source regulation under Clean Air Act § 111(d) for electric generating units (EGUs).<sup>3</sup> Informed by the approximately 270,000 comments to the ANPRM, EPA published its Affordable Clean Energy (ACE) proposal in August 2018.<sup>4</sup>

On June 19, 2019, EPA Administrator Wheeler signed a Final Rule containing three independent agency actions: (1) repeal of the CPP; (2) promulgation of ACE; and (3) promulgation of new “implementing regulations” to guide further regulatory work under the ACE rule and other § 111(d) rulemakings.<sup>5</sup> Notably, the final ACE rule deferred until a later time finalizing proposals for revisions to the new source review (“NSR”) program intended to aid in implementing efficiency projects at fossil fuel-fired power plants.

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<sup>1</sup> See 80 Fed. Reg. 64,510, 64,707 (Oct. 23, 2015).

<sup>2</sup> Exec. Order No. 13783, Promoting Energy Independence and Economic Growth (Mar. 28, 2017).

<sup>3</sup> 82 Fed. Reg. 61,507 (Dec. 28, 2017).

<sup>4</sup> 83 Fed. Reg. 44,746 (Aug. 31, 2018).

<sup>5</sup> “Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations” (June 19, 2019) (pre-publication version).

## B. The Affordable Clean Energy (ACE) Rule

### 1. EPA Rejection of the Clean Power Plan

The ACE rule preamble explains that the CPP exceeded EPA’s authority under the plain meaning of section 111 of the CAA and that “EPA is obliged to repeal the CPP to avoid acting unlawfully.”<sup>6</sup> EPA arrived at this conclusion through a textual analysis of the Clean Air Act “new source performance standard” section that can apply to certain existing sources. This section of the CAA, with the most salient terms underlined, is as follows:

The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.<sup>7</sup>

The phrase “standard of performance” is defined in this section as follows:

[A] standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.<sup>8</sup>

The fundamental legal issue regarding permissibility of the CPP is whether these definitions allow for emission reduction systems that go “outside the fenceline” of a source (such as CPP generation-shifting), as opposed to those that operate entirely “inside the fenceline” (such as plant improvements). EPA’s most recent analysis begins with the statutory term “application” and concludes that the CPP improperly equated the term with “implementation.”<sup>9</sup> EPA reasons that the term “application” requires “an owner/operator [to] apply a system *to* another object (*i.e.*, the source)” and the CPP’s use of “implementation” as a stand-in for “application” allowed EPA to reach beyond the source itself. EPA reasons that the CAA’s use of “implementation” elsewhere in the Act means that “application” must mean something different—and more limited—in the

<sup>6</sup> See 84 FED. REG. 32,520, 32,532 (July 8, 2019).

<sup>7</sup> 42 U.S.C. § 7411(d) (emphasis added).

<sup>8</sup> *Id.* § 7411(a)(1) (emphasis added).

<sup>9</sup> See 84 FED. REG. at 32,526-32,527.



context of determining the “best system of emission reduction.”<sup>10</sup> Turning to the “system” that must be applied to the source, EPA concludes that it is “unambiguously” limited to measures that can be applied “to the designated facility” itself and “cannot be premised on a system of emission reduction that is implementable only through the combined activities of sources or non-sources.”<sup>11</sup>

In a section titled “Legal Basis for Repeal of the Clean Power Plan,” the ACE rule preamble notes that:

The CPP departed from the EPA’s traditional understanding of its authority under section 111 of the CAA and promulgated a rule in excess of its statutory authority. Because the CPP significantly exceeded the Agency’s authority, it must be repealed. Fundamentally, the CPP read the statutory term “best system of emission reduction” so broadly as to encompass measures the EPA had never before envisioned in promulgating performance standards under CAA section 111. In contrast to its traditional regulations that set performance standards based on the application of equipment and practices at the level of an individual facility, the EPA in the CPP set standards that could only be achieved by a shift in the energy generation mix at the grid level, requiring a shift from one type of fossil-fuel-fired generation to another, and from fossil-fuel-fired generation as a whole towards renewable sources of energy. The text of the CAA is inconsistent with that interpretation, and the context, structure, and legislative history confirm that the statutory interpretation underlying the CPP was not a permissible construction of the Act.<sup>12</sup>

## **2. Applicability of ACE to Designated Facilities**

While ACE requirements are actually imposed upon states to take further action directed at EGUs, this further regulatory action is to be directed towards those steam generating units that commenced construction on or before January 8, 2014 and that:

- (1) serve a generator connected to a utility power distribution system with a nameplate capacity greater than 25 MW-net (i.e., capable of selling greater than 25 MW of electricity);
- (2) has a base load rating (i.e., design heat input capacity) greater than 260 GJ/hr (250 MMBtu/hr) heat input of fossil fuel (either alone or combined with any other fuel); and
- (3) is an electric utility steam generating unit that burns coal for more than 10.0 percent of the average annual heat input during the 3 previous calendar years.<sup>13</sup>

ACE contains a number of exclusions, the most notable of which include:

- (1) those units that are already subject to greenhouse gas emission limits under 40 C.F.R. Part 60 Subpart TTTT as a result of commencing construction, reconstruction or modification after the subpart TTTT applicability date;

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<sup>10</sup> See *id.* at 32,523-32,526.

<sup>11</sup> See *id.*

<sup>12</sup> *Id.* at 32,523.

<sup>13</sup> 40 C.F.R. § 60.5775a.

- (2) a steam generating unit that is subject to a federally enforceable permit limiting annual net-electric sales to one-third or less of its potential electric output, or 219,000 MWh or less;
- (3) a stationary combustion turbine that meets the definition of a simple cycle stationary combustion turbine, a combined cycle stationary combustion turbine, or a combined heat and power combustion turbine;
- (4) an integrated gasification combined cycle unit;
- (5) a non-fossil unit (i.e., a unit that is capable of combusting 50 percent or more non-fossil fuel) that has always limited the use of fossil fuels to 10 percent or less of the annual capacity factor or is subject to a federally enforceable permit limiting fossil fuel use to 10 percent or less of the annual capacity factor;
- (6) an EGU that serves a generator along with other steam generating unit(s), IGCC(s), or stationary combustion turbine(s) where the effective generation capacity (determined based on a prorated output of the base load rating of each steam generating unit, IGCC, or stationary combustion turbine) is 25 MW or less;
- (7) an EGU that is a municipal waste combustor unit that is subject to subpart Eb of this part;
- (8) an EGU that is a commercial or industrial solid waste incineration unit that is subject to subpart CCCC of this part; or
- (9) a steam generating unit that fires more than 50 percent non-fossil fuels.<sup>14</sup>

### 3. “Inside the Fenceline” Heat Rate Improvement

ACE makes clear that EPA’s new determination of the “best system of emission reduction” or “BSER” and the consequent state development of more specific performance standards must remain “inside the fenceline.” In particular, the ACE Rule preamble notes that:

*The CAA limits “standards of performance” to systems that can be applied at and to a stationary source (i.e., as opposed to off-site measures that are implemented by an owner or operator, such as subsidizing lower-emitting sources) and that lead to continuous emission reductions (i.e., are not intermittent control techniques). Such systems include add-on controls and lower-emitting processes/practices/designs that can be applied to a designated facility, i.e. a building, structure, facility, or installation regulated under CAA section 111.*<sup>15</sup>

Given the interpretation of section 111 outlined in the CPP repeal, EPA was limited in determining BSER elements to choosing among only inside-the-fenceline measures and only measures that can be “applied to” an EGU directly. EPA thus concluded that “BSER for CO<sub>2</sub> emissions from existing coal-fired EGUs is [heat rate improvements], in the form of a specific set of technologies and operating and maintenance practices that can be applied at and to certain existing coal-fired EGUs.”<sup>16</sup> Heat rate improvements or “HRIs” reduce emissions by reducing the

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<sup>14</sup> *Id.* § 60.5780a.

<sup>15</sup> 84 FED. REG. at 32,534 (citing 42 U.S.C. § 7411(a)(3) definition of “stationary source”).

<sup>16</sup> *Id.* at 32,532.

amount of coal combusted to produce a given amount of electricity, *i.e.*, by making the EGU more efficient.

#### 4. HRI “Candidate Technologies”

In promulgating ACE, EPA clearly notes that “[i]n this action, after consideration of public comments, the EPA is finalizing its proposed determination that HRI is the BSER.”<sup>17</sup> States are not required to evaluate the myriad potential HRI measures for every regulated facility in its state; rather, “[t]he EPA stated in the proposal that it believed that requiring a state in developing its plan to evaluate the applicability to each of its sources of the entire list of potential HRI options – including those with limited applicability and with negligible benefits – would be overly burdensome to the states.”<sup>18</sup> ACE identifies those HRI measures it considers to be the “most impactful” with associated “HRI Potential” as follows:<sup>19</sup>

HRI Measure	<200 MW		200–500 MW		>500 MW	
	Min	Max	Min	Max	Min	Max
Neural Network/Intelligent Sootblowers ...	0.5	1.4	0.3	1.0	0.3	0.9
Boiler Feed Pumps .....	0.2	0.5	0.2	0.5	0.2	0.5
Air Heater & Duct Leakage Control .....	0.1	0.4	0.1	0.4	0.1	0.4
Variable Frequency Drives .....	0.2	0.9	0.2	1.0	0.2	1.0
Blade Path Upgrade (Steam Turbine) .....	0.9	2.7	1.0	2.9	1.0	2.9
Redesign/Replace Economizer .....	0.5	0.9	0.5	1.0	0.5	1.0
Improved Operating and Maintenance (O&M) Practices .....	Can range from 0 to >2.0% depending on the unit's historical O&M practices.					

EPA also concludes in the final ACE rule that certain suggested HRI such as natural gas repowering, natural gas co-firing, and refueling, cannot be BSER. EPA considers repowering to effectively create a new source, and as such it cannot be BSER for an existing source.<sup>20</sup> With regard to co-firing and refueling, EPA does not reject the measures as contrary to the statute, but does not believe that they can qualify as BSER for reasons including cost, non-air quality health and environmental impacts, and energy requirements.<sup>21</sup> EPA also rejected biomass co-firing in the final ACE rule as BSER because recognizing CO<sub>2</sub> reductions associated with such co-firing would require “accounting for activities not applied at and largely not under the control of” the source.<sup>22</sup> Biomass co-firing would thus be contrary to the precepts of the ACE Rule—namely, that the reductions occur at the unit itself and that they be measureable and reportable at the unit. With regard to carbon capture and storage (CCS), EPA concludes it is not a viable option as BSER, largely because of cost.<sup>23</sup>

<sup>17</sup> See 84 FED. REG. at 32,535; see also 40 C.F.R. § 5735a(a)(2) (noting that “[e]ach standard of performance must reflect the degree of emission limitation achievable through application of the heat rate improvements described in § 60.5740a”).

<sup>18</sup> See 84 FED. REG. at 32,536.

<sup>19</sup> See *id.* at 32,537 Table 1.

<sup>20</sup> *Id.* at 32,543–32,544.

<sup>21</sup> *Id.* at 32,544–32,546.

<sup>22</sup> *Id.* at 32,546–32,547.

<sup>23</sup> *Id.* at 32,547–32,550.

## 5. Remaining Useful Life and “Other Factors”

Section 111(d) of the CAA specifically allows any standard of performance issued thereunder “to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.”<sup>24</sup> ACE makes federal regulations consistent with this Clean Air Act provision by allowing “other factors” to be considered in performance standards “provided that the State demonstrates with respect to each such facility (or classes of facilities):

- (a) Unreasonable cost of control resulting from plant age, location, or basic process design;
- (b) Physical impossibility of installing necessary control equipment; or
- (c) Other factors specific to the facility (or class of facilities) that make application of a less stringent standard or final compliance time significantly more reasonable.<sup>25</sup>

The ACE preamble further explains that “[a]fter a state applies the candidate technologies to a designated facility (*i.e.*, step one), it can consider the remaining useful life and other factors associated with the source and determine whether it is cost-reasonable to actually implement that technology at the source (*i.e.*, step two).”<sup>26</sup>

EPA in the ACE Rule preamble justifies the use of “other factors” in performance standard formulation as follows:

*As the EPA described in the proposal and as commenters have verified, the fleet of coal-fired EGUs is diverse and each EGU has been designed and engineered uniquely to fit the need at the time of construction. Because each coal-fired steam boiler subject to this rule has been designed, maintained, utilized, and upgraded uniquely, each designated facility has a unique set of circumstances with a set of source-specific factors governing its use. The outgrowth of the abundance of source-specific factors has led the EPA to determine that a tailored standard of performance (developed by states) that considers those factors can achieve emission reductions in the fleet without making broad assumptions about the fleet that may not be applicable to a particular unit. The source-specific circumstances at each EGU causes considerable variation in average emission rates across the fleet. If a single standard of performance (*i.e.*, a single degree of emission limitation resulting from a particular technology or fixed set of technologies) were to be applied to the entire fleet, the result could be either that a large portion of the fleet would not be required to achieve any meaningful emission reductions, or a large portion of the fleet would face overly stringent requirements. The goal of these emission guidelines is not to burden or shut down coal-fired EGUs – which could compromise the stability of the power sector and thus energy reliability to consumers, concerns which the EPA expresses, informed by, among other factors, Congress’s direction to take into account energy requirements in determining*

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<sup>24</sup> 42 U.S.C. § 7411(d)(1).

<sup>25</sup> 40 C.F.R. § 60.24a(e).

<sup>26</sup> 84 FED. REG. at 32,551.

*BSER – as coal-fired EGUs still have considerable viability as part of the power sector.*<sup>27</sup>

The ACE Rule preamble cites numerous specific examples of “other factors” that may be at issue in ACE regulation. Most obviously, the preamble notes that an EGU that has previously implemented an HRI would not be required to do so again simply to comply with ACE.<sup>28</sup> Other examples of “other factors” that could affect a performance standard are cost and timing issues, spacing or physical constraints, interactions among and between different HRI technologies, and potential triggering of New Source Review requirements.<sup>29</sup>

## **6. Cooperative Federalism – Expanded State Role**

Perhaps what will prove to be the most notable aspect of ACE is both the obligations and deference that it appears to give to individual states. ACE requires that all states either: (1) declare to EPA that the state does not contain any affected EGUs; or (2) submit to EPA “a State plan ... that implements the emission guidelines contained in [the ACE rule] (hereinafter “State Plan”).<sup>30</sup> In the formulation of State Plans, the preamble to the proposed ACE rule noted that:

*EPA believes it is appropriate in this proposal to provide considerable flexibility for states to set standards of performance for units and also allow states to have considerable latitude for implementing measures and standards for affected EGUs.*<sup>31</sup>

In the final ACE rule EPA reiterates that EPA’s principal authority under CAA section 111 is to identify the technologies that constitute BSER, and that it is for the states to decide how best to implement that BSER as a standard of performance for an individual EGU in light of the unique circumstances and source-specific factors confronting individual EGUs within each State’s borders.<sup>32</sup> EPA suggests in the final ACE rule—but does not require—that States undertake a two-step analysis to establish a standard of performance: (1) identify the emission limitations achievable through BSER/HRI application, and (2) at the State’s discretion, evaluate remaining useful life and other source-specific factors.<sup>33</sup> EPA also notes that States must provide EPA with sufficient data and documentation to allow EPA to analyze the states’ conclusions regarding BSER and how states intend to ensure compliance.<sup>34</sup>

Within this process, EPA recognizes that states have flexibility to establish standards of performance that account for variability in emission performance at individual sources.<sup>35</sup>

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<sup>27</sup> *Id.* at 32,554.

<sup>28</sup> *See id.* at 32,554; *see also id.* at 32,540 (noting that “[j]ust as an EGU that has recently installed new or reconstructed boiler feed pumps would not be expected to replace those pumps, a source that already has an effective HRI training program in place would not be expected to implement a new HRI training program”).

<sup>29</sup> *See id.* at 32,553-32,555.

<sup>30</sup> *See* 40 C.F.R. § 60.5710a.

<sup>31</sup> *See* 83 FED. REG. 44,746, 44,765 (Aug. 31, 2018).

<sup>32</sup> 84 FED. REG. at 32,549-32,550.

<sup>33</sup> *See id.*

<sup>34</sup> *See id.* at 32,558-32,559.

<sup>35</sup> *See id.* at 32,549.



Additionally, states have flexibility in terms of the compliance deadlines set for individual sources.<sup>36</sup>

States appear to have ample authority under the final ACE rule to evaluate units source-by-source to determine which elements of BSER can reasonably be implemented, which cannot due to considerations of remaining useful life, unreasonable cost, feasibility, and other source-specific factors, and the timeframes on which any measures must be implemented.

State also appear to have markedly increased responsibility to evaluate and ensure compliance with BSER. Section 111(d) states that EPA “shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the [EPA] a plan which ... (A) establishes standards of performance ...; and (B) provides for the implementation and enforcement of such standards of performance.”<sup>37</sup> Although such plans are usually included in state regulations, EPA commonly approves agreed administrative orders as an element of such a plan.<sup>38</sup> ACE specifically allows for orders and other administrative alternatives to form the basis for a State Plan in requiring: “Evidence that the State has adopted the plan in the state code or body of regulations; or *issued the permit, order, consent agreement* (hereafter “document”) in final form.”<sup>39</sup>

## 7. Operator Involvement in State Plan Design

ACE specifically allows for EGU operators to work with state regulators in developing State Plans. Such cooperation appears necessary considering ACE’s focus on source-specific rules. ACE specifically allows for such involvement and coordination between EGU operators and states in developing State Plans. In particular, EPA in the ACE rule preamble notes that:

*Some large utilities have internal groups that can perform on-site evaluations of heat rate performance improvement opportunities. Outside (i.e., third-party) groups can also provide site-specific/unit-specific evaluations to identify opportunities for HRI. Commenters stated that the benefits of on-site appraisals are variable, speculative, and site-specific. Commenters stated that no state should determine what opportunities a coal-fired EGU might find during an on-site appraisal, and, therefore, that states should not be required to evaluate the applicability of on-site appraisals when developing their plans and establishing standards of performance for existing sources within their jurisdiction. The EPA agrees that the benefits of on-site appraisals will be variable and site-specific. As with other BSER measures, it will be up to each state to determine the extent of this requirement. States may require that the owner/operator perform an on-site*

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<sup>36</sup> See *id.* at 32,552-32,553.

<sup>37</sup> See 42 U.S.C. § 7411(d).

<sup>38</sup> See, e.g., 82 FED. REG. 60,520 (Dec. 21, 2017) (EPA approval of Louisiana SIP for Regional Haze based in part on requirements of Agreed Orders on Consent related to four non-EGU facilities and 12 EGU facilities); 83 FED. REG. 56,770 (Nov. 14, 2018) (EPA approval of Texas SIP for NO<sub>x</sub> RACT based on limitations in Agreed Order between Texas Commission on Environmental Quality and TXI Operations, LP).

<sup>39</sup> See 40 C.F.R. § 60.27a(g)(2)(ii) (emphasis added).

*appraisal to identify areas for HRI or the state may choose to have a third party conduct an on-site HRI appraisal.*<sup>40</sup>

In numerous ACE comments, EGU operators described the ways in which HR considerations are incorporated into their fleet-wide operations and maintenance practices. Some also outlined existing HR monitoring and improvement programs that have proven to keep HR as low as possible. These projects include many that EPA has focused on, including condenser cleanings, installation of digital control systems, and like-kind replacements of degraded equipment.

## **8. Compliance Monitoring**

ACE gives the states considerable discretion in formulating compliance monitoring programs. ACE broadly requires that State Plans must include a monitoring plan consistent with 40 C.F.R. Part 75 (related to continuous emission monitoring) or an “alternative monitoring, recordkeeping, and reporting program” that consists of certain enumerated elements.<sup>41</sup> ACE provides that State Plan performance standards must simply be “quantifiable, permanent, verifiable, and enforceable.”<sup>42</sup> The ACE preamble further notes that:

*Each state will have the flexibility to design a compliance monitoring program for assessing compliance with the standards of performance identified in the plan. To the extent that designated facilities or states already monitor and report relevant data to the EPA, states are encouraged to use these existing systems to efficiently monitor and report ACE compliance. For example, most potentially affected coal-fired EGUs already continuously monitor CO<sub>2</sub> emissions, heat input, and gross electric output and report hourly data to the EPA under 40 CFR part 75. Accordingly, if a state plan establishes a standard of performance for a unit’s CO<sub>2</sub> emissions rate (e.g., lb/MWh), states may use data collected by the EPA under 40 CFR part 75 to meet the required monitoring, reporting, and recordkeeping requirements under these emission guidelines.*<sup>43</sup>

One of the most complicated aspects of monitoring EGU heat rate and HRI is that it fluctuates continuously and relatively widely, commonly based on factors that are outside an EGU operator’s control. Factors affecting HR include load, fuel quality, maintenance, and ambient and seasonal conditions. Further complicating measurement is relatively large measurement uncertainty in determining HR. By way of example, EPA Clean Air Markets Division data are based upon Relative Accuracy Test Audits (RATA), which allow up to about 7.5% error. This error band in HR measurement will make it difficult to directly measure HRI that is expected to individually, and possibly collectively, have less than a 7.5% impact.

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<sup>40</sup> See *id.* at 32,540.

<sup>41</sup> See 40 C.F.R. § 60.5785a.

<sup>42</sup> See *id.* § 60.5740a(a)(3).

<sup>43</sup> See 84 FED. REG. at 32,559.

ACE allows flexibility for a monitoring program to account for this inherent variability and uncertainty. In particular, EPA notes that:

*[S]tandards of performance should reflect variability in emission performance at an individual designated facility due to changes in operating conditions. Specifically, the agency believes it would be appropriate for states to identify key factors that influence unit-level emission performance (e.g., load, maintenance schedules, and weather) and to establish emission standards that vary in accordance with those factors. In other words, states could establish standards of performance for an individual EGU that vary (i.e., differ) as factors underlying emission performance vary. For example, states could identify load segments (ranges of EGU load operation) that reflect consistent emission performance within the segment and varying emission performance between segments. States could then establish standards of performance for an EGU that differ by load segment.*

*Another possible option to account for variable emissions is to set standards of performance based on a standard set of conditions. A state could establish a baseline of performance of a unit at specific load and operational conditions and then set a standard against those conditions via the application of the BSER. Compliance for the unit could be demonstrated annually (or by another increment of time if appropriate based on the level of stringency of the standard of performance set for the unit) at those same conditions. In the interim, between the demonstration of compliance under standardized conditions, a state could allow for the maintenance and demonstration of fully operational candidate technologies to be a method to demonstrate compliance as the standard of performance must apply at all times.<sup>44</sup>*

EPA states that it believes it is appropriate that a “state establish tailored compliance deadlines for its sources” and that states also have discretion to determine the compliance period for each source.<sup>45</sup> However, if a state elects to provide more than two years for compliance, the plan must also include “legally enforceable increments of progress for that source.”<sup>46</sup>

### **C. Revised Section 111(d) Implementing Regulations**

EPA also finalized new regulations regarding implementation of CAA § 111(d) rules that are applicable to “emission guidelines that are finalized either concurrently with or subsequently to final promulgation of the new implementing regulations, as well as to state plans or federal plans associated with such emission guidelines.”<sup>47</sup> EPA retained regulations applicable to previously promulgated guidelines and plans.

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<sup>44</sup> *Id.* at 32,552.

<sup>45</sup> *See id.*

<sup>46</sup> *See id.* at 32,552-32,553 (citing 40 C.F.R. § 60.24a(d)).

<sup>47</sup> *Id.* at 32,564.



The new implementing regulations can be summarized as follows:

(1) Definition of “emission guideline:” EPA promulgated a final definition of “emission guideline” which intends to convey that EPA’s determination of BSER under section 111(d) is not a “presumptive emission standard.”<sup>48</sup>

(2) Changing of timing requirements: The final ACE rule changes the previous timeframes for submitting and acting on State Plans, as well as promulgating federal plans, to make them consistent with the process for state submission of implementation plans under the National Ambient Air Quality Standards.<sup>49</sup> These new timelines provide the states more time to implement a section 111(d) standard following its promulgation. The below table compares the previous requirements with those in the final ACE rule:

Requirement	Previous Rule	New Rule
<b>State § 111 Submissions</b>	9 months after EPA promulgates final guidelines	3 years after EPA promulgates final guidelines
<b>EPA Action on State Submissions</b>	4 months after state submittal deadline	12 months after determination of completeness
<b>EPA Federal Plan Promulgation</b>	6 months after submittal deadline	Any time within 2 years after failure to submit complete plan or disapproval of state plan
<b>Increments of Progress</b>	Required if compliance schedule for state plan exceeds 12 months after plan due date	Required if compliance schedule for state plan exceeds 24 months after plan due date

(3) Definition of “Standard of Performance:” As part of the 1977 amendments to the CAA, Congress replaced the term “emissions standard” in section 111(d) with “standard of performance.” EPA did not revise the implementing regulations accordingly. EPA is now replacing the existing definition of “emissions standard” with a definition of “standard of performance” that tracks the definition in CAA § 111(a)(1). EPA suggested that this is more than just a nomenclature issue in explaining that the new term makes it clear that states are permitted to include “design, equipment, work practice, or operational standards” when establishing a standard of performance for an individual unit or a group of units.<sup>50</sup>

<sup>48</sup> *Id.* at 32,537, 32,567.

<sup>49</sup> *See id.* at 32,567-32,569.

<sup>50</sup> *Id.* at 32,565 Table 8.

## **D. New Source Review Implications**

ACE as proposed included modifications to New Source Review (NSR) regulations that were aimed at reducing the likelihood of ACE HRI projects triggering NSR. The preamble to the final ACE rule notes that “[t]his notice does not include any final action concerning the New Source Review (NSR) reforms the EPA proposed in conjunction with the ACE proposal; the EPA intends to take final action on the proposed NSR reforms in a separate final action at a later date.”<sup>51</sup>

EPA also notes that if NSR reforms are not completed, it is likely to affect a state’s consideration of “candidate technologies.” In particular, blade path upgrades and economizer redesign/replacement are BSER candidate technologies that are reportedly most susceptible to triggering existing NSR rules. Thus, EPA notes that applicability of NSR to these two technologies may make them “less appropriate for application to a particular source or sources than the EPA anticipated would be when it proposed the ACE Rule.”<sup>52</sup> In this regard, EPA indicates that it may be permissible for a state to determine that a measure should not be included in calculating a source’s standard of performance if the costs of implementing the measure, including costs associated with NSR, exceed what would be reasonable given the remaining useful life of the unit.<sup>53</sup> EPA reports to have adjusted its modeling to account for lower expected HRI without NSR reform and higher HRI with future NSR reform.

## **E. An Uncertain Future**

### **1. Inevitability of Further Litigation**

Upon publication of the final ACE rule on July 8, 2019, the 60-day clock for petitions for review began to run.<sup>54</sup> Many groups are expected to challenge the ACE rule, including states and environmental groups. Some industry groups otherwise supportive of the final ACE rule, but concerned about certain elements of it, i.e. no allowance for averaging and trading and other “outside-the-fenceline” methods, could also petition for review.

As was done in a challenge to the CPP, it appears possible that motions by environmental groups or others seeking a stay of the ACE rule pending completion of judicial review are a possibility. To establish entitlement to a stay pending review, the movant must establish: (1) a likelihood of success on the merits of its claims; (2) that it will suffer irreparable harm absent a stay; (3) whether other parties in the proceeding would be substantially harmed by issuance of a

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<sup>51</sup> See *id.* at 32,521.

<sup>52</sup> See *id.* at 32,537.

<sup>53</sup> See *id.*

<sup>54</sup> 42 U.S.C. § 7607(b)(1); see also 84 FED. REG. at 32,521 (noting that judicial review of these final actions is available only by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) by September 6, 2019).

stay; and (4) whether a stay is in the public interest.<sup>55</sup> Irreparable harm absent a stay would pose an obvious challenge to an environmental group seeking a stay as it would further delay environmental regulations meant to reduce greenhouse gas emission.

## 2. Legal “Durability” of ACE Rulemaking

EPA went to great lengths in its recent rulemaking to note that the three components were separate rulemaking actions. Thus, if problems were to be found in its repeal of the CPP, ACE and changes to section 111(d) implementing regulations could remain. In particular, EPA noted that:

Because the EPA exceeded its statutory authority when it promulgated the CPP, the EPA’s repeal of that rule will remain valid even if a future reviewing court were to find fault with the separate and distinct legal interpretations and record-based findings underpinning the ACE rule (see Section III) or the new implementing regulations (see Section IV). The EPA today repeals the CPP as a separate action, distinct from its promulgation of the ACE rule and of revisions to its regulations implementing section 111(d). The EPA would repeal the CPP today even if it were not yet prepared to promulgate these other regulations, or indeed if it knew that those other regulations would not survive judicial review.<sup>56</sup>

The manner in which EPA supported the repeal of the CPP is expected to have significant consequences in future judicial review of ACE. Judicial review of federal rulemaking under a “Chevron deference” analysis provides that when the language of a statute is clear, that clear language must govern and that there is no room for agency interpretation.<sup>57</sup> In addressing this issue in its CPP repeal, EPA noted that:

The definition of “standard of performance,” and the scope of the “best system of emission reduction” contained within, confers considerable discretion on the EPA to interpret the statute and make reasonable policy choices pursuant to Chevron step two as to what is the best system to reduce emissions of a particular pollutant from a particular type of source. However, by making clear that the “application” of the BSER must be to the source, Congress spoke directly in Chevron step one terms to the question of whether the BSER may contain measures other than those that can be put into operation at a particular source: It may not. The approach to BSER in the CPP is thus unlawful and the CPP must be repealed.<sup>58</sup>

EPA further notes that:

The EPA does not deny that, if it were validly within the Agency’s authority under the statute, regulations that can only be complied with through widespread

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<sup>55</sup> See *Washington Metropolitan Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

<sup>56</sup> 84 FED. REG. at 32,532.

<sup>57</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>58</sup> 84 FED. REG. at 32,532.

implementation of generation shifting might be a workable policy for achieving sector-wide carbon intensity reduction goals. But what is not legal cannot be workable. The CPP's reliance on generation shifting as the basis of the BSER is simply not within the grant of statutory authority to the Agency. The text of CAA section 111 is clear, leaving no interpretive room on which the EPA could seek deference for the CPP's grid-wide management approach. Accordingly, EPA is obliged to repeal the CPP to avoid acting unlawfully.<sup>59</sup>

Because EPA determines that the statute is unambiguous, EPA argues that the matter is therefore resolved under Step I of the *Chevron* deference analysis. EPA has now adopted a much narrower reading of its authority under the CAA both in terms of what measures it may require as part of BSER and where it may require they be applied. Consistent with this analysis, EPA does not analyze whether it would reach the same conclusions about what is BSER if the statute were indeed found by a court to be broad enough to allow outside-the-fenceline measures such as generation-shifting.

Such an approach appears to create a situation in which a court could disagree with EPA's statutory interpretation and find that CAA § 111(d) is prone to some ambiguity and alternative readings. Because EPA has posited in the final ACE rule that the statute is clear on its face and can bear only the reading that EPA now gives to it, and because EPA has not offered a *Chevron* Step II analysis as a backup, the only way EPA can prevail against challenges to the CPP repeal is by persuading the court that the statute is in fact clear under *Chevron* Step I. If the court disagrees with EPA on this point, the court is not able to uphold the CPP repeal under an alternative Step II analysis. A federal court is not expected to uphold a rule on a basis that was not offered by EPA in the final ACE rule. Accordingly, rejection of EPA's Step I argument will necessarily result in invalidation of the final CPP repeal and a remand to EPA for a determination of whether it would read the statute as it does even though it is ambiguous.

If the D.C. Circuit and possibly the U.S. Supreme Court were to agree with EPA that CAA § 111(d) is unambiguous, it could provide more "durability" for ACE. That is, its focus on "inside the fenceline" controls would be required of future governmental administrations unless and until the "clear" language of § 111(d) were changed by Congress.

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<sup>59</sup> *Id.*



## **Pamela M. Giblin**

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Pam Giblin spent 24 years as a Partner at Baker Botts, L.L.P, where she provided strategic counsel on a broad array of environmental issues, particularly in the areas of air quality and climate. With her deep historical knowledge of the Clean Air Act, Ms. Giblin has repeatedly supported multi-stakeholder advocacy efforts to achieve a number of challenging public policy objectives.

Ms. Giblin has served as past president of the American College of Environmental Lawyers, and on the Clean Air Act Advisory Committee, a senior-level policy committee established by Congress to advise EPA on issues related to implementing the Clean Air Act. She currently serves on the Board of Directors of the Environmental Law Institute.

Early in her career, Ms. Giblin served as General Counsel of the Texas Air Control Board. She is a frequent speaker at seminars and conferences on environmental law issues, and she is the first woman to receive the Distinguished Lawyer Award from the Travis County Bar Association. Ms. Giblin received her bachelor's degree from the University of Texas, and her J.D. from The University of Texas School of Law.

**CIRQUE DU SOLEIL**

**(CLIMATE CHANGE)**

Pam Giblin  
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**31<sup>st</sup> Annual Texas Environmental Superconference**

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# **CIRQUE DU SOLEIL**

## **(CLIMATE CHANGE)**

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### **31<sup>st</sup> Annual Texas Environmental Superconference**

#### **The Business Case for Bipartisan Climate Action**

America's business leaders are growing more vocal about the need to break the current climate impasse. Companies in a wide range of sectors want to improve their environmental impacts; and increasingly, their customers, workers, and shareholders expect and sometimes demand this. Companies understand that mounting climate risks, if left unaddressed, will harm their businesses.

In the absence of a federal climate solution, many companies are taking action on their own to shrink their carbon footprints. These include 553 companies who have set science-based corporate emissions targets in line with limiting global warming to below 2 degrees Celsius;<sup>i</sup> 1,400 companies that factor an internal carbon price into their business plans,<sup>ii</sup> and 175 companies who have committed to using 100% renewable energy.<sup>iii</sup> These efforts are encouraging and commendable, but the only way to achieve emissions reductions at the scale and speed necessary to address our climate challenge is through a unified federal policy. Businesses understand this, and that's why more and more are supporting a climate breakthrough at the national level.

Beyond their commitments to sustainability, there are four other key factors driving the business community's desire for a federal climate solution: policy certainty, flexibility, competitiveness, and innovation. These factors are all interrelated, and together they serve as important criteria for lawmakers working on climate policy solutions.

***Policy Certainty:*** It would be much easier for companies to develop new technologies and make job-creating investments if they had a clear sense of the policy landscape going forward. Unfortunately, the current U.S. approach to addressing climate is not predictable and therefore does not serve the best interests of our shared environment. On the one hand, the Trump administration is initiating the slow and uncertain process of rolling back most Obama-era climate regulations.



Many of the administration's proposed rule changes are likely to be tied up in courts for years. Even if completed, a future administration may reverse course and impose new, more stringent regulations covering more sectors of the economy. In the absence of federal climate policy, many states and cities are attempting to fill the void by pursuing their own mandates, regulations and programs. This will result in an ever-growing patchwork of sub-national and likely conflicting regulations. Business interests and climate protection would both be better served by a uniform national policy that is predictable, durable and cost-effective.

***Flexibility:*** Once federal climate goals are set, companies want the flexibility to achieve them in the most efficient and cost-effective manner. A market-based approach allows companies to respond nimbly to new technologies and consumer demands as the economy transitions in a low-carbon direction. The alternative is to have the government pick winners and losers through regulations or subsidies, a more costly and less effective approach to cutting emissions. There is still a proper role for government support, such as in funding research into promising technologies or helping finance needed new infrastructure. And in some cases, government regulation is appropriate. But a solution centered on subsidies and mandates isn't going to transition us quickly enough, or cheaply enough, to a low-carbon future.

***Competitiveness:*** By not pursuing a national climate policy, the United States is missing an opportunity to promote the competitiveness of American firms. American companies are more carbon efficient than many of their overseas competitors, and they are more capable of responding quickly to changing market demands. An optimal climate policy would therefore benefit many American businesses, especially those that have already made substantial investments and progress to lower their emissions. That is why a key priority for businesses is adopting a climate solution that would level the international playing field and incentivize all producers to become more efficient. In other countries, competitiveness concerns have weakened climate policy efforts. But in the United States, the opportunity to enhance competitiveness while reducing emissions is driving the business community's call for action.

***Innovation:*** America's business and technology innovators want to be at the forefront of developing the clean energy technologies of the future. But this can only happen at the necessary scale and speed if we have the right policies in place to unlock our greatest asset: the power of American ingenuity. The opportunities for technological innovation are endless. In the energy sector alone, they include cheaper solar and wind, long-duration battery storage, next generation nuclear power, more efficient energy production and use, carbon capture and storage, and much more. Companies that deliver cleaner technologies at more affordable prices will set up a win-win for both consumers and industry. Business leaders know this,

which is why such a wide range of companies support a national climate solution that would harness, not suppress, American innovation. As former PepsiCo CEO Indra Nooyi put it, “Industry action must be supported by climate policy that creates clear price signals and incentives to accelerate clean technology and needed innovation.”<sup>iv</sup>

The Baker-Shultz Plan offers a free-market climate solution that is consistent with the conservative principles of limited government. It also offers an equitable and environmentally ambitious national climate solution. Moreover, it offers a pro-competitive U.S. climate solution that will ensure that other leading emitters, such as China and India, are compelled to do their part.

Any viable climate solution must be anchored in sound economic principles. Economists have long agreed that the most cost-effective way to reduce carbon emissions is to put a direct price on the carbon content of fossil fuels, generally referred to as a carbon fee.

To highlight the remarkable economic consensus behind this approach, the Climate Leadership Council recently organized the largest and most prominent public statement in the history of the economics profession (Attachment C). The Economists’ Statement on Carbon Dividends was first published in *The Wall Street Journal* on January 17, 2019.

Its original co-signatories include all four former chairs of the Federal Reserve, 27 U.S. Nobel laureates in economics and 15 former chairs of the President’s Council of Economic Advisers (CEA), representing the largest-ever number of signatories to a public statement in all three categories. More than 3,500 U.S. economists from all 50 states subsequently signed on, representing another record.<sup>v</sup> Most remarkable is the bipartisan nature of this statement: for example, the original co-signatories include all eight former Republican CEA chairs, alongside seven former Democratic CEA chairs.

This statement begins by affirming that “global climate change is a serious problem calling for immediate national action.” Markets have failed to account for the social and environmental costs of carbon emissions, and economists believe that this, above all else, is to blame for our current climate predicament. The statement identifies a revenue-neutral carbon fee as “the most cost-effective lever to reduce carbon emissions at the scale and speed that is necessary.” It continues: “By correcting a well-known market failure, a carbon tax will send a powerful price signal that harnesses the invisible hand of the marketplace to steer economic actors towards a low-carbon future.” The statement goes on to outline a carbon dividends framework similar to the Baker-Shultz Carbon Dividends Plan.

This bipartisan climate solution, underpinned by sound economic principles, has enabled the Climate Leadership Council to assemble the broadest coalition in U.S. history ever to advance a national climate solution.

The Founding Members of the Climate Leadership Council include top corporations (AECOM, Allianz, AT&T, General Motors, Johnson & Johnson, MetLife, Microsoft, Procter & Gamble, PepsiCo, Santander, Schneider Electric, and Unilever), energy industry leaders (BP, ConocoPhillips, Exelon, ExxonMobil, First Solar, Shell, and Total), top environmental groups (Conservation International, The Nature Conservancy, World Resources Institute, and World Wildlife Fund) and opinion leaders (Ben Bernanke, Steven Chu, Ray Dalio, Martin Feldstein, Stephen Hawking, N. Gregory Mankiw, Paul Polman, Klaus Schwab, Tom Stephenson, Lawrence Summers, Ratan Tata, Rob Walton, Christine Todd Whitman, and Janet Yellen).

The 19 corporate Founding Members of the Climate Leadership Council employ 2.2 million people and represent \$3.4 trillion in market capitalization. They include the largest U.S. oil company, auto manufacturer, utility, life insurer, solar company, food and beverage company as well as the world's largest telecom company, health care company, and technology company. As the remarkable diversity in this coalition suggests, America's business community wants a bipartisan climate solution that all sides can support. More so than ever, the time is ripe for federal legislation that is pro-environment, pro-business, pro-innovation, pro-American worker, and pro-competitiveness.

## **The Four Pillars of the Baker-Shultz Carbon Dividends Plan**

The corporate Founding Members of the Climate Leadership Council are working together with environmental NGOs and opinion leader Founding Members to develop the policy details of the Council's carbon dividends plan. While the Founding Members of the Climate Leadership Council do not necessarily agree on all policy details, they agree that "America needs a consensus climate solution that bridges partisan divides, strengthens our economy and protects our environment" They further agree that the Council's carbon dividends plan "offers an equitable, popular and politically viable way forward, paving the way for a much-needed bipartisan climate breakthrough."

The Climate Leadership Council's Baker-Shultz Carbon Dividends Plan is based on four, interdependent pillars.

***A Gradually Rising and Revenue-Neutral Carbon Fee.*** The first pillar of our plan is a gradually rising fee on carbon dioxide emissions, to be implemented where carbon-based fuels enter the economy. This pillar is grounded on the economic principle that a carbon price is the most cost-effective way to reduce carbon emissions. A sensible carbon fee should begin at \$40 a ton and increase steadily over time, sending a powerful signal to businesses and consumers, while generating revenue to reward Americans for decreasing their carbon footprint.

***Carbon Dividends for All Americans.*** The second pillar of our plan is to return all the money raised from a carbon fee directly to all Americans in the form of equal, quarterly payments. In the example above of a \$40/ton carbon fee, a family of four would receive approximately \$2,000 in “carbon dividend” payments. This amount would grow over time as the carbon fee per year increases, creating a positive feedback loop: the more the climate is protected, the greater the individual dividend payments to all Americans.

***Regulatory Simplification.*** The third pillar of our program is the streamlining of regulations that are no longer necessary upon the enactment of a robust and rising carbon fee, whose longevity is secured by the popularity of dividends. “Substituting a price signal for cumbersome regulations will promote economic growth and provide the regulatory certainty companies need for long-term investment in clean-energy alternatives,” according to the 3,500 signatories of the Economists’ Statement on Carbon Dividends.

***Border Carbon Adjustments.*** The fourth and final pillar of our program is a border carbon adjustment system to protect and enhance American competitiveness and push other nations to adopt similar carbon pricing of their own. Under a border carbon adjustment system, exports to countries without comparable carbon pricing systems would receive rebates for carbon fees paid, while imports from such countries would face fees on the carbon content of their products. This pillar of the plan is groundbreaking because it provides a whole new strategy to reach the necessary level of global climate ambition.

If the U.S. simply invests in clean-energy technology to reduce or eliminate reliance on fossil fuels, two things will happen: We will emit less carbon, and the rest of the world will emit more. If we stopped buying fossil fuels, the price of those fuels would fall. China, India, and other developing countries would exploit this cheap-energy bonanza, offsetting our emissions reductions. This “leakage problem” has proven one of the greatest obstacles to forging global climate cooperation.

A properly crafted carbon tax would mitigate leakage through “border adjustments” in the form of import tariffs. Carbon-based import tariffs are an essential

component of any carbon-tax plan for two reasons. First, tariffs ensure that a carbon tax would not unfairly penalize domestic U.S. industries. Second, the tariffs would be designed to exempt countries with a similar domestic carbon-tax regime. Foreign governments, eager to keep their exports competitive and not minding the extra tax revenue, would be incentivized to enact their own carbon taxes. If America led, the world would follow.

## **The Benefits of a Carbon Dividends Plan**

The reason this four-part framework is backed by the economic establishment and the broadest climate coalition in U.S. history is because it addresses the legitimate concerns of all key stakeholders in the climate debate and enables each to realize an important victory. That is why it offers the best hope for a bipartisan climate breakthrough.

Here is a summary of the benefits.

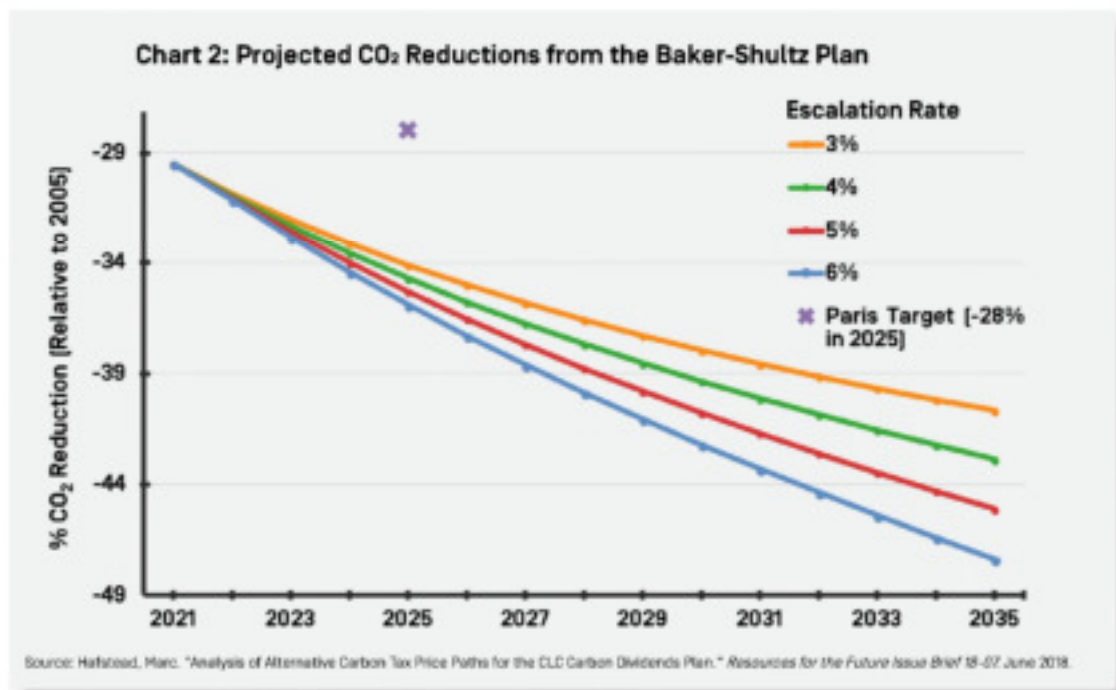
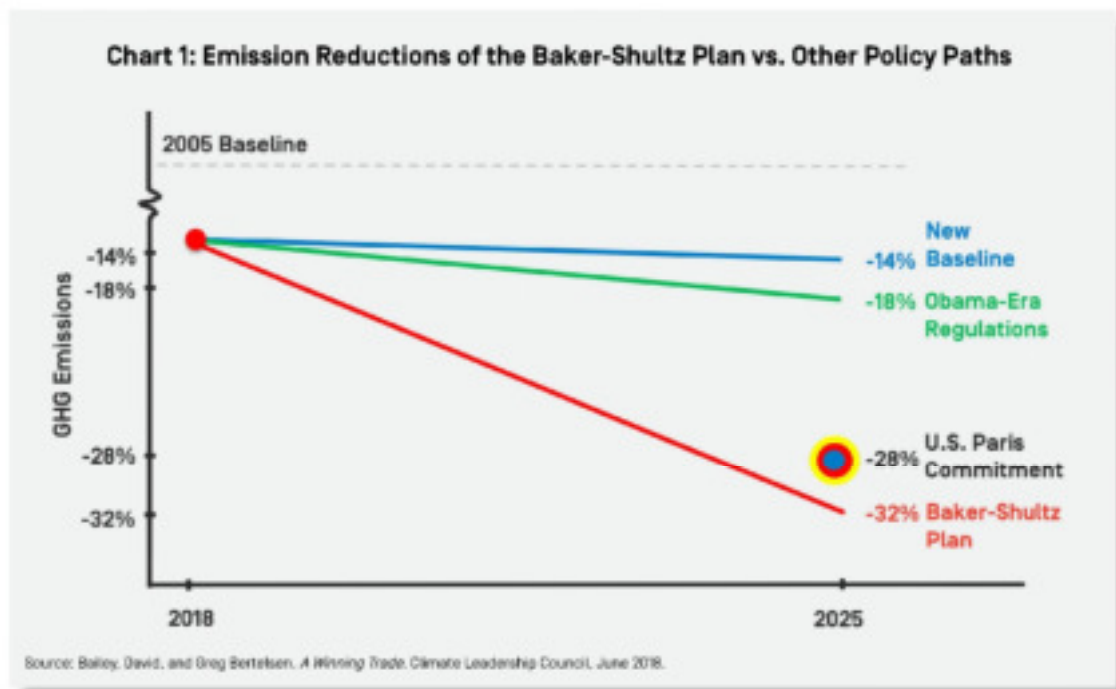
***Pro-Environment:*** A carbon fee starting at \$40 per ton would exceed the U.S. Paris commitment by a wide margin and achieve far greater emission reductions than all prior climate regulations combined.<sup>vi</sup> Indeed, the Baker-Shultz Carbon Dividends Plan would achieve 32% greenhouse gas emissions reductions (from a 2005 baseline) by 2025, far exceeding the 26%-28% reductions the United States agreed to in the Paris agreement. Based on recent modeling from Resources For the Future, the plan (if enacted in 2021 and as compared to a 2005 baseline) would achieve 47-53% energy-related CO<sub>2</sub> emissions reductions by 2035, depending on the carbon fee escalation rate chosen.<sup>vii</sup> It would also continue to reduce emissions well beyond that, putting the U.S. on a low-carbon pathway. To ensure that key climate benchmarks are met, an environmental assurance mechanism would increase the carbon fee escalation rate faster if emissions reductions fall short. The following two charts illustrate the emissions reductions that could reasonably be expected.

The first chart compares the Baker-Shultz plan to other domestic pathways for meeting the U.S. Paris commitment. Whereas all Obama- era climate regulations, had they remained in place, would have achieved approximately 18% in greenhouse gas reductions by 2025, the Baker-Shultz plan would achieve approximately 32% in reductions by 2025, thereby exceeding our Paris commitment by a wide margin. For additional detail on the projections underlying this chart, please see the accompanying analysis by the Climate Leadership Council.

The second chart summarizes modeling of the Baker-Shultz plan through 2035 undertaken by Resources for the Future.<sup>viii</sup> RFF modeled a carbon tax starting in

2021 at \$43 per ton, with a range of inflation-adjusted annual escalation rates from 3% to 6%. They found this would reduce U.S. energy-related CO<sub>2</sub> emissions to a level of 34-36% below 2005 by 2025, and to 41-47% below 2005 by 2035. RFF's technical analysis of this modeling appears in the final section of this report.

To ensure that intended emissions reductions are met, the Climate Leadership Council may add an Environmental Assurance Mechanism to its overall plan, under which the carbon fee would increase faster if key emissions reductions benchmarks are not met.



***Pro-Business:*** The plan’s environmental ambition justifies a “grand bargain” that trades a robust and rising carbon price for regulatory streamlining. This offers businesses the regulatory certainty they need to innovate and make long term investments in low-carbon technologies, as well as the flexibility to meet climate goals in the most cost-effective manner. Past efforts have often pitted climate activists against the business community, to no one’s benefit. Under the CLC plan, companies would be able to invest and innovate in a stable regulatory environment, while competing on a level international playing field, thereby boosting the competitiveness of energy-efficient American firms.

***Equitable:*** A common concern is that a carbon fee can be regressive, imposing a disproportionate burden on those who can least afford it. Pairing a carbon fee with dividends solves this problem and ensures that the vast majority of American families, including the most vulnerable, come out economically ahead. The U.S. Department of the Treasury found that the bottom seven income deciles, representing approximately 223 million Americans, would receive more in dividends than they would pay in any increased energy prices.<sup>ix</sup> This policy is also equitable in another way: since costs increase in direct proportion to one’s carbon footprint, and all Americans receive identical dividends, everyone is rewarded equally for reducing their carbon footprint. By putting the American people front and center in this policy design, the carbon dividends approach is distinct from past climate efforts and can unlock new levels of popularity. Indeed, polling shows that the most popular use of revenue from a carbon fee – by a ratio of 3 to 1 – is returning the proceeds directly to all Americans in the form of dividends.<sup>x</sup>

***Revenue Neutral:*** Another common concern is that solving climate change may be costly, requiring significant increases in taxes and deficits. The Baker-Shultz Plan, by contrast, is revenue neutral and would entail no increase in federal deficits, debt or the size of government. Many other climate plans require adding to the federal deficit or increasing the size of government. As history has shown, neither approach has been successful in generating sufficient bipartisan support. By contrast, the carbon dividends approach would “finance” the transition to a low-carbon economy by incentivizing individual and corporate behavior. This is why our revenue-neutral carbon fee was called the “most cost-effective lever” to reduce emissions by the more than 3,500 economist signatories of the Economists’ Statement on Carbon Dividends.

***Pro-Competitiveness:*** The border carbon adjustment component of the plan would level the economic playing field and end today’s implicit subsidization of dirty manufacturing overseas. It would do so by internalizing the cost of carbon emissions in traded goods and by properly accounting for the gains in efficiency and productivity made by American firms. Under a border carbon adjustment system, the United States would assess a fee on the carbon content of imported goods.

Economists overwhelmingly support such a border carbon adjustment approach. According to the Economists' Statement on Carbon Dividends: "The system would enhance the competitiveness of American firms that are more energy-efficient than their global competitors."

***Compels India and China to Act:*** CLC's carbon dividends plan would put America in the driver's seat of global climate policy and compel other leading emitters such as India and China to reduce their emissions. In the past, there have been legitimate concerns that U.S. efforts to act on climate change won't matter if China and India don't move to cut their own emissions. Our plan addresses this by applying market pressure on them to fall in line with a similar policy or face a loss of competitiveness. Economists agree this would push other countries to increase their carbon efficiency or adopt similar carbon pricing systems in order to maintain their competitiveness in the U.S. market. A border carbon adjustment system would "create an incentive for other nations to adopt similar carbon fees," according to the signatories of the largest public statement in the economics profession.

***Popular and Durable:*** No national climate policy in the United States has achieved sufficient popularity to become both politically viable and durable. Carbon dividends can buck this trend due to its popular appeal: more than two-thirds of American households would be financial winners. The Alaska Permanent Fund (APF) provides a compelling case study on the popularity and durability of dividends. This program was enacted in the 1970s to ensure Alaska residents receive a portion of the revenue from energy production. It remains in place to this day, with residents typically receiving more than \$1,000 per year. Just like the Alaska program, carbon dividends have great popular appeal. Recent polling reveals that Americans favor a carbon dividends plan by a 2 to 1 margin, including 3 to 1 support among Republican voters. Among 18-35-year-olds - the cohort that will determine the future of both parties - support reaches 4 to 1.<sup>xi</sup> For climate policy to be effective, it must be capable of withstanding the political test of time.

## **Vatican Statement on Carbon Pricing**

The environmental and climate challenge demands urgent action. Pope Francis has strongly acknowledged this in his encyclical *Laudato Si'* and in the Vatican Dialogues, 'The Energy Transition and Care for Our Common Home.'



A number of leaders in the energy sector met with the Pope and agreed to the following as a way to keep global warming below 2°C while advancing human and economic prosperity:

“Reliable and economically meaningful carbon pricing regimes, whether based on tax, trading mechanisms or other market-based measures, should be set by governments at a level that incentivizes business practices, consumer behavior, research, and investment to significantly advance the energy transition while minimizing the costs to vulnerable communities and supporting economic growth.

The combination of policies and carbon pricing mechanisms should be designed in a way that simultaneously delivers innovation and investment in low carbon solutions while assisting those who are least able to pay. This requires addressing the social, economic, and cross border impacts within the overall policy design.

Achieving government policy changes for effective carbon pricing requires transparency, the advocacy and ongoing engagement of the energy sector, the investment community, political leaders, energy consumers, and civil society.

Undeniably, the Earth is a single system and humanity is as a single whole. This requires a new level of cooperative leadership, trust building, and commitment. We embrace this challenge.”

## **Conclusion**

As the risks of climate change continue to mount, our national climate debate remains largely deadlocked, with Democrats and Republicans, environmentalists and industry, all too often pitted against one another. We need a bipartisan way forward that is pro-environment, pro-business and pro-American worker. In other words, we need a climate breakthrough where all sides can win.

The Baker-Shultz Carbon Dividends Plan offers just that. The reason the broadest climate coalition in U.S. history and the U.S. economic establishment are coalescing around this framework is because it offers a bipartisan pathway forward in the climate debate.

At the heart of the Baker-Shultz Plan is a “grand bargain” that trades a robust and rising carbon fee for regulatory streamlining, thereby appealing to both environmentalists and businesses. For environmentalists, this plan stands out for its environmental ambition, offering a politically viable way to exceed the U.S.

Paris commitment by a wide margin and achieve far greater emissions reductions than all prior climate regulations combined. For businesses, it offers regulatory streamlining and the certainty and flexibility they need to innovate and invest in the low-carbon technologies of the future.

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- <sup>i</sup> “Companies Taking Action.” <https://sciencebasedtargets.org/companies-taking-action>
- <sup>ii</sup> “Companies Are Moving Faster Than Governments on Carbon Pricing.” *The Economist*. January 11, 2018. <https://www.economist.com/business/2018/01/11/companies-are-moving-faster-than-many-governments-on-carbon-pricing>
- <sup>iii</sup> “Companies, RE100.” <http://there100.org/companies>
- <sup>iv</sup> “Founding Member Statements.” <https://www.clcouncil.org/statements>
- <sup>v</sup> “The Economists’ Statement on Carbon Dividends.” <https://www.clcouncil.org/economists-statement>
- <sup>vi</sup> “A Winning Trade.” The Climate Leadership Council. September 2018. <https://www.clcouncil.org/media/A-Winning-Trade-1.pdf>
- <sup>vii</sup> Marc Hafstead. “Analysis of Alternative Carbon Tax Price Paths for the Climate Leadership Council Carbon Dividends Plan. *Resources For the Future Issue Brief 18-07*. June 2018. <https://www.rff.org/publications/issue-briefs/analysis-of-alternative-carbon-tax-price-paths-for-the-climate-leadership-council-cic-carbon-dividends-plan>
- <sup>viii</sup> Marc Hafstead “Analysis of Alternative Carbon Tax Price Paths for the Climate Leadership Council Carbon Dividends Plan,” *Resources for the Future Issue Brief 18-07*. June 2018.
- <sup>ix</sup> Horowitz et al. “Working Paper 115: Methodology for Analyzing a Carbon Tax.” The Department of the Treasury, Office of Tax Analysis. January 2017. <https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/WP-115.pdf>
- <sup>x</sup> Horowitz et al. “Working Paper 115: Methodology for Analyzing a Carbon Tax.” The Department of the Treasury, Office of Tax Analysis. January 2017. <https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/WP-115.pdf>
- <sup>xi</sup> Ibid; “National Survey Results on the Baker-Shultz Carbon Dividends Plan.” Yale Program on Climate Change Communication, George Mason University Center for Climate Change Communication, Nexus Polling. October 2018. <https://www.cicouncil.org/media/YaleGMU-Poll-October-2018.pdf>

# **NATIONAL SURVEY RESULTS**

## **ON THE CLIMATE LEADERSHIP COUNCIL'S CARBON DIVIDENDS PLAN**

## SUMMARY

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- 1 Carbon Dividends Plan has **majority support across party lines** – including 4-1 support overall, 2-1 support from GOP voters and 75% support from Republicans under 40.
- 2 By a **margin of more than 8 to 1**, American voters are more worried about climate change now than they were just one year ago.
- 3 With concern about climate change increasing in both parties, **60% of voters want Congress to take a new approach**.
- 4 4 out of 5 of voters want Congress **to put politics aside and reach a bipartisan solution**.
- 5 **69% of GOP voters are worried** that their party's stance on climate change is hurting them with young voters.
- 6 60% of Democrats **are open to trading existing regulations for a market-based solution**.

# The Carbon Dividends Plan has majority support across party lines.

*Including 4-1 support overall, 2-1 GOP support and 75% support from Republicans under 40.*

Business and environmental leaders are proposing a bipartisan climate solution that charges fossil fuel companies for their carbon emissions and gives all the money directly to the American people through a quarterly check. This new climate solution is called "Carbon Dividends", because all households would receive a quarterly cash payment as part of an effort to solve climate change.

Would you support or oppose this plan?

	Total	GOP	Swing	DEM	GOP < 40 y.o.
<b>SUPPORT</b>	<b>66%</b>	<b>53%</b>	<b>64%</b>	<b>80%</b>	<b>75%</b>
Strongly support	34%	27%	28%	47%	45%
Somewhat support	32%	26%	36%	33%	30%
Neither support nor oppose	19%	22%	20%	15%	14%
Somewhat oppose	7%	9%	10%	3%	5%
Strongly oppose	8%	16%	6%	2%	6%
<b>OPPOSE</b>	<b>15%</b>	<b>25%</b>	<b>16%</b>	<b>5%</b>	<b>11%</b>
Support-Oppose	4-1	2-1	4-1	16-1	7-1



## 75% of voters want the government to limit carbon emissions.

Should the government take action to limit carbon emissions?

	Total	GOP	Swing	DEM
Yes	75%	55%	80%	89%
No	15%	31%	10%	3%
<i>I don't know</i>	11%	14%	11%	8%

## 4 out of 5 of voters want Congress to put politics aside and reach a *bipartisan* solution

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Is it important that any national climate solution be bipartisan?

	Total	GOP	Swing	DEM
Yes	80%	75%	83%	83%
No	20%	25%	17%	17%





## By a margin of more than 8 to 1, American voters are more worried about climate change now than they were one year ago

Over the past year, has your concern about climate change increased or decreased?

	Total	GOP	Swing	DEM	GOP <40
Increased	58%	43%	57%	74%	58%
Did not change	35%	47%	36%	23%	32%
Decreased	7%	11%	7%	3%	10%
Increase-Decrease	8-1	4-1	8-1	25-1	6-1

# With climate change concerns on the rise, 60% of voters want Congress to take a new approach

Do you think U.S. climate policy is generally headed in the right direction or is it on the wrong track?

	Total	GOP	Swing	DEM
Wrong track	60%	33%	62%	84%
Right direction	40%	67%	38%	16%

## 69% of Republicans are concerned that the party stance on climate change hurts the party with younger voters

How concerned are you that the current Republican position on climate change is hurting the party with younger voters? (Only asked of Republicans)

	GOP	GOP <40
<b>NET CONCERNED</b>	<b>69%</b>	<b>85%</b>
Extremely concerned	19%	37%
Very concerned	12%	18%
Somewhat concerned	22%	19%
A little concerned	15%	10%
Not at all concerned	31%	15%

## By 3-to-1, voters would support trading current regulations for a price on carbon — including 60% of Democrats.

Economists believe that putting a price on carbon offers a faster, less expensive, and more business-friendly way to reduce emissions than government regulations.  
Would you support replacing carbon regulations with a price on carbon?

	Total	GOP	Swing	DEM
Yes	53%	46%	53%	60%
No	17%	24%	16%	11%
I don't know	30%	30%	31%	30%



## And with the promise of results, more Democrats get on board with streamlining regulations

Economists believe that putting a price on carbon offers a faster, less expensive, and more business-friendly way to reduce emissions than government regulations. Would you support replacing carbon regulations with a price on carbon?  
*(Asked of entire sample)*

DEM
60%
11%
30%

Would you support regulatory streamlining that replaces carbon regulations with a price on carbon, if that can achieve more than twice the emissions reductions?  
*(Only asked of Democrats)*

DEM
Yes
No
<i>I don't know</i>
71%
9%
21%



## Voters favor candidates who support the Carbon Dividends Plan

And if a candidate for Congress or the Presidency supported the above plan, how would it impact your vote?

	Total	GOP	Swing	DEM	GOP <40
<b>MORE LIKELY (NET)</b>	65%	52%	65%	77%	76%
I would be <b>much more likely</b> to vote for the candidate	27%	21%	21%	38%	36%
I would be <b>somewhat more likely</b> to vote for the candidate	38%	32%	44%	39%	40%
I would be <b>somewhat less likely</b> to vote for the candidate	10%	12%	13%	5%	7%
I would be <b>much less likely</b> to vote for the candidate	8%	15%	5%	2%	9%
<b>LESS LIKELY (NET)</b>	18%	27%	18%	7%	16%
<i>Support – Oppose</i>	<b>4-1</b>	<b>2-1</b>	<b>4-1</b>	<b>11-1</b>	<b>5-1</b>
<i>I don't know</i>	<b>17%</b>	<b>20%</b>	<b>17%</b>	<b>15%</b>	<b>16%</b>

LUNTZ GLOBAL

## I METHODOLOGY

Luntz Global Partners LLC conducted an online poll of  $n=1,000$  nationwide voters from May 7-8, 2019 on behalf of the Climate Leadership Council. The sample is demographically representative of voters, with minor weights on age, gender, geographic region, and voting behavior. Results for the full sample have a margin of error of  $\pm 3.1\%$ , subgroups will be larger.

Results released May 20, 2019.



LUNTZGLOBAL



**CLIMATE  
LEADERSHIP  
COUNCIL**

**September 2018**

# **EXCEEDING PARIS**

**How The Baker-Shultz Carbon Dividends Plan Would  
Significantly Exceed the U.S. Paris Commitment**

**Foreword by**

**Ted Halstead**

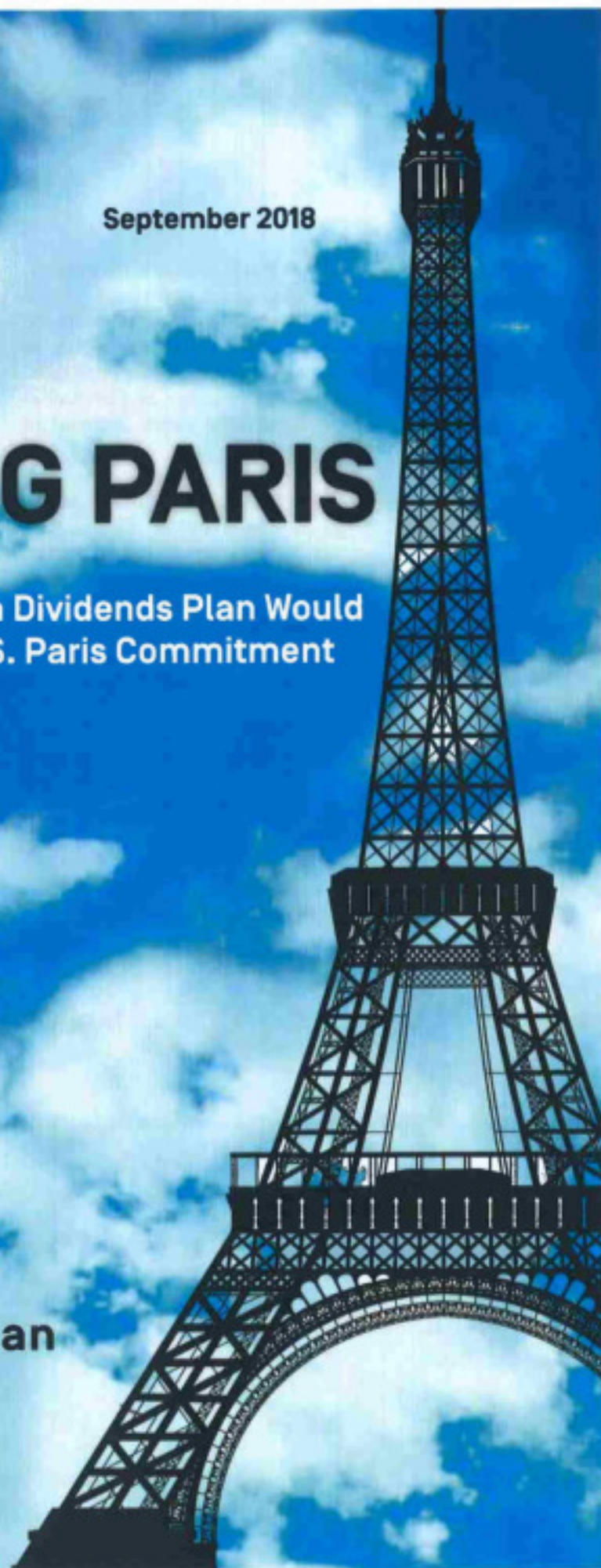
**George P. Shultz**

**Lawrence Summers**

**Rob Walton**

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### of Foreword



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**GEORGE P. SHULTZ** served as Secretary of State under President Ronald Reagan, and as Secretary of Treasury and Labor under President Nixon. He is the Thomas W. and Susan B. Ford Distinguished Fellow at the Hoover Institution.

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## FOREWORD

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By

**Ted Halstead**

**Rob Walton**

**George P. Shultz**

**Christine Todd Whitman**

**Lawrence Summers**

**Janet Yellen**

At the 2015 Paris Climate Conference, the United States committed to reduce its net greenhouse gas emissions by 26-28% below 2005 levels by 2025. Even though the Trump administration has announced its intention to withdraw from the Paris agreement, it remains the initial benchmark by which any U.S. climate plan is judged.

But it is only a starting point. Even if all nations meet their Paris commitments, the best studies<sup>1</sup> indicate that far greater emissions reductions will be necessary for the world to maintain global temperatures below the agreed-upon 2 degrees Celsius threshold. The goal of U.S. climate policy should therefore be to exceed Paris.

**The Baker-Shultz plan would achieve approximately 32% in greenhouse gas reductions by 2025, thereby exceeding our Paris commitment by a wide margin**

The Baker-Shultz Carbon Dividends Plan, based on a gradually rising carbon fee, stands out as the most politically-viable pathway to not only meet but exceed the U.S. Paris commitment. It would also be the most ambitious carbon price enacted by any major emitter nation<sup>2</sup>. The following two

charts illustrate the emissions reductions that could reasonably be expected.

The first chart compares the Baker-Shultz plan to other domestic pathways for meeting the U.S. Paris commitment. Whereas all Obama-era climate regulations, had they remained in place, would have achieved approximately 18% in greenhouse gas reductions by 2025, the Baker-Shultz plan would achieve approximately 32% in reductions by 2025, thereby exceeding our Paris commitment by a wide margin. For additional detail on the projections underlying this chart, please see the accompanying analysis by the Climate Leadership Council.

The second chart summarizes modeling of the Baker-Shultz plan through 2035 undertaken by Resources for the Future<sup>3</sup>. RFF modeled a carbon tax starting in 2021 at \$43 per ton, with a range of inflation-adjusted annual escalation rates from 3% to 6%. They found this would reduce U.S. energy-related CO<sub>2</sub> emissions to a level of 34-36% below 2005 by 2025<sup>4</sup>, and to 41-47% below 2005 by 2035. RFF's technical analysis of this modeling appears in the final section of this report.

To ensure that intended emissions reductions are met, the Climate Leadership Council may add an *Environmental Assurance Mechanism* to its overall plan, under which the carbon fee would increase faster if key emissions reductions benchmarks are not met.

## **The Baker-Shultz Carbon Dividends Plan is not only the most environmentally ambitious plan, but also the most politically-viable**

The Baker-Shultz Carbon Dividends Plan is not only the most environmentally ambitious plan, but also the most politically-viable. Why? Because it addresses the legitimate concerns of all key stakeholders in the climate debate and enables each to realize an important victory.

The plan would accomplish this through a series of grand bargains, including trading a robust and rising carbon price for regulatory relief, thereby appealing to environmentalists, businesses and conservatives at the same time. Just as important, it appeals to the American people by rebating all of the revenue raised directly to them. This would

allow the majority of American families to win economically from solving climate change.<sup>5,6</sup>

At the heart of this grand bargain is the environmental ambition of the Baker-Shultz plan, which unlocks the political viability of its other components. The plan's effectiveness in reducing emissions substantially raises the environmental bar, while its reliance on a market-based carbon tax makes it – according to economists of all stripes – the most cost-effective climate solution.

## **The majority of American families would win economically from solving climate change**

The encouraging conclusion is that there is a politically-viable path for the United States to exceed its Paris climate commitment and restore its position as a global climate leader.

<sup>1</sup> See, for instance, the UN Environment Emissions Gap Report 2017, which found that "The NDCs that form the foundation of the Paris Agreement cover only approximately one third of the emissions reductions needed to be on a least-cost pathway for the goal of staying well below 2 degrees C."

<sup>2</sup> World Bank and Ecofys. "State and Trends of Carbon Pricing 2018 (May)." World Bank, May 2018. DOI: 10.1596/978-1-4648-1292-7.

<sup>3</sup> Hafstead, Marc. "Analysis of Alternative Carbon Tax Price Paths for the Climate Leadership Council (CLC) Carbon Dividends Plan," *Resources for the Future Issue Brief 18-07*. June 2018.

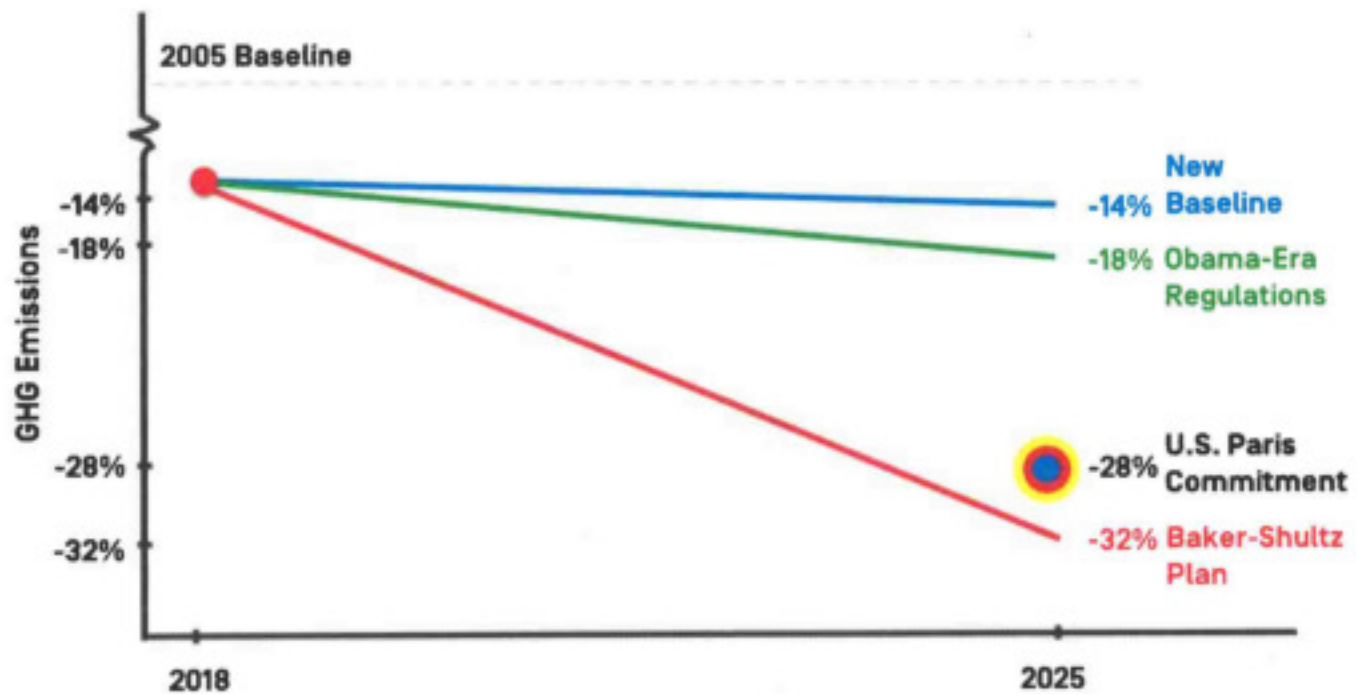
<sup>4</sup> The slight divergence between the 2025 results in the first and second charts is because the former includes all greenhouse gases whereas the latter includes only CO<sub>2</sub> emissions.

<sup>5</sup> Horowitz, John, Julie-Anne Cronin, Hannah Hawkins, Laura Konda, and Alex Yuskavage. *Methodology for Analyzing a Carbon Tax*. Working paper no. 115. Office of Tax Analysis, US Department of the Treasury. January 2017.

<sup>6</sup> Diamond, John W., and George R. Zodrow. *The Effects of Carbon Tax Policies on the US Economy and the Welfare of Households*. Report. Edited by Noah Kaufman. SIPA Center for Global Energy Policy, Columbia University. July 2018.

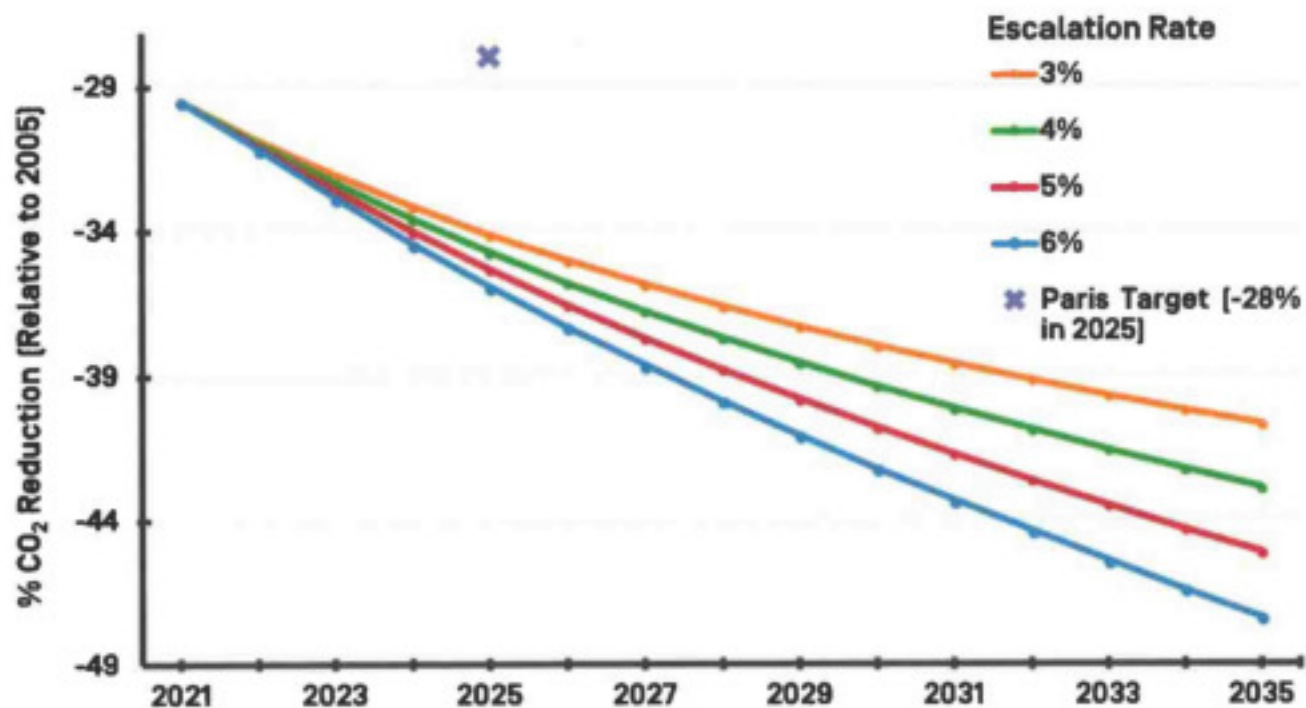
This report reflects the views of the Climate Leadership Council, and not necessarily those of its Founding Members. The Council has not decided upon a carbon tax escalation rate; the range included in this report is for illustration purposes only.

**Chart 1: Emission Reductions of the Baker-Shultz Plan vs. Other Policy Paths**



Source: Bailey, David, and Greg Bertelsen. *A Winning Trade*. Climate Leadership Council, June 2018.

**Chart 2: Projected CO<sub>2</sub> Reductions from the Baker-Shultz Plan**



Source: Halfstead, Marc. "Analysis of Alternative Carbon Tax Price Paths for the CLC Carbon Dividends Plan." *Resources for the Future Issue Brief 18-07* June 2018.



## ANALYSIS OF THE BAKER-SHULTZ PLAN VS. OTHER POLICY PATHWAYS THROUGH 2025

By David Bailey and Greg Bertelsen\*

### EXECUTIVE SUMMARY

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This report estimates the greenhouse gas (GHG) emission reductions of the carbon dividends plan put forward by the Climate Leadership Council compared to the reductions in 2025 that the U.S. committed to achieve under the Paris Agreement. It compares the Council's policy to two other policy paths: first, if all the Obama-era climate regulations had been left in place, and second, the current policies under President Trump, which assumes that most Obama-era regulations are repealed.

Based on the EIA's latest Energy Outlook, together with recent modeling by Resources for the Future (RFF) and the Rhodium Group, current policies would likely result in U.S. emissions being 14% below 2005 levels by 2025. This would represent a small reduction in current emission levels, which EPA estimated to be already 12.5% below 2005 levels in 2016.

Had all the policies in place at the end of the Obama administration been allowed to

continue, we estimate these reductions would have been around 18% below 2005 levels by 2025. Both of these policy outcomes fall short of the U.S. Paris commitment of a 26-28% reduction in emissions by 2025.

Assuming the Council's carbon dividends plan – also known as the Baker-Shultz plan – were implemented in 2021 with a starting carbon tax rate of \$40 per ton (2017\$), modeling shows that U.S. emissions could reasonably be around 32% below 2005 levels by 2025. As illustrated in the summary Chart 1, this is more than three times the emission reductions from 2016 onwards than the Obama policies would have achieved.

This also means that the Council's proposal, on its own, would exceed the high-end of the U.S. 2025 commitment under the Paris Agreement by a wide margin and would continue to generate substantial reductions beyond 2025.

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\*David Bailey is Research Director and Greg Bertelsen is Senior Vice President at the Climate Leadership Council. This analysis was first published as part of *A Winning Trade*, Climate Leadership Council, June 2018.

## The Climate Leadership Council Proposal

This study assumes that the Council's carbon dividends plan would be legislated in 2019 and implemented in 2021. It would start at the rate of \$43/ton CO<sub>2</sub> in 2021 (which equates to a 2017 rate of \$40 per ton, adjusted for expected inflation). From there, the carbon tax rate would increase annually based on a standard escalator rate plus inflation as measured by the Consumer Price Index (CPI).

For illustration purposes, the RFF modeling described here includes 3% and 5% real escalation rates, with the 4% mid-point used in Chart 1. The Council has not yet settled on a final escalation rate.

The carbon tax would apply to all domestic fossil fuels and non-fuel CO<sub>2</sub> emissions, as well as imported fossil fuels, fossil fuel products and imported energy-intensive manufactured products. The carbon tax would be rebated for exports of these fuels and goods. The proposal would return the revenue raised from the tax directly to households through flat-rate quarterly or monthly dividend checks, likely administered by the Social Security Administration. There would also be a significant phase-out of carbon regulations that are no longer necessary.

This analysis shows how the U.S. emission reductions arising from the Council's proposal compare to:

1. A 2025 current policy baseline, which assumes the repeal of many major Obama-era carbon regulations;
2. Our assessment of the 2025 outcome assuming all Obama-era policies had remained in place, including implementing the Clean Power Plan (CPP) as per EPA's original schedule; and
3. The U.S. Paris commitment of 26-28% reduction in net greenhouse gases from 2005 levels by 2025.

## Scope of Analysis

As described above, the Council's proposal would

tax CO<sub>2</sub> emissions only. While CO<sub>2</sub> emissions (mostly from burning fossil fuels) represent roughly 80% of greenhouse gas (GHG) emissions, for various reasons<sup>1</sup> a tax-based approach may not be as well suited or practical for the other gases such as methane and hydrofluorocarbons (HFCs). In this analysis we have sought to show how a range of assumptions about changes in the emission of the other GHG gases could affect the overall picture.

## Basis for Projections Through 2025

Our analysis draws on EIA's latest Energy Outlook (AEO 2018)<sup>2</sup> as well as modeling by Resources for the Future<sup>3</sup> and the Rhodium Group's 2017 Taking Stock study<sup>4</sup>. The RFF model is one of the most widely-respected in the field. Rhodium's study is valuable in that it models the expected changes in non-CO<sub>2</sub> GHGs and sinks in a way few other studies have attempted. An RFF Issue Brief on its model appears on page 10, and some technical background on the Rhodium model is described in Annex 2.

The most comprehensive listing of current and historical GHG emission performance is the EPA's annual Inventory of Greenhouse Gas Emissions, the latest version covering emissions in 2016<sup>5</sup>. The previous administration's expectations for 2025 were contained in the U.S. government's last biennial report to the United Nations Framework Convention on Climate Change<sup>6</sup>. We have updated those projections for this study. The most recent data are summarized in Table 1, together with our assessment of the outlook for 2025 based on Obama-era policies and on current policy.

## How Would the Council's Carbon Dividends Plan Reduce Emissions?

The carbon tax would increase the relative price of fossil fuels according to their CO<sub>2</sub> emissions. In 2021, bituminous coal without carbon capture technology, for example, would incur a tax of \$96 per ton of coal (around 200% of the average 2017 price); each thousand cubic feet (MCF) of natural gas would be taxed about \$2.28 (around 74% of the average 2017 Henry Hub wholesale price and around 20% of the average residential price); and

each barrel of crude oil taxed about \$18 (around 35% of the 2017 average U.S. crude price)<sup>7</sup>.

While some of these increased costs of the tax would be borne by the producers, most would likely be reflected in the prices paid by consumers (the 2021 \$43/ton carbon tax could translate to approximately 38 cents per gallon of gasoline). These are substantial impacts at the wholesale level, and they would have three main effects:

1. The overall cost of fossil energy would increase, thereby encouraging **more efficient usage**.
2. The tax would encourage **fuel switching**. It would immediately increase the relative attractiveness of natural gas to coal in the power sector, and nuclear and renewables to all fossil fuel sources.
3. Over time, the most significant impact would be **increased investments** to reduce energy use and to replace facilities using higher carbon fossil fuels with those using lower- or zero- carbon fuels.

The relationship between reductions in emissions and the carbon tax rate is not linear. As the tax rate increases the percentage reduction for each additional dollar of tax is lower – mainly because the existing capital base becomes a bigger factor in changing fuel sources the greater the amount of emissions reduced. In addition, a much higher tax rate is needed to secure significant emissions reductions in the transport sector.

## Impact on Emissions in 2025

To determine an indicative estimate of the impact of the Council's carbon dividends plan on emissions in 2025 (the Paris target year) we commissioned new modeling by RFF.

The RFF modeling covered a range of possible escalation rates for a \$43/ton CO<sub>2</sub> (\$40 2017\$) tax taking effect in 2021. RFF only modeled a tax on energy-related CO<sub>2</sub> emissions. We show in Table 2 the results for escalation rates 3%, 4% and 5% above inflation each year.

In Chart 1 and the tables we use the 4% escalation

rate emissions scenario as the basis for the overall assessment.

## Other Emissions

In order to estimate the full effect of the Council's plan on overall U.S. emissions it is necessary to make assumptions about what will happen to non-energy CO<sub>2</sub> emissions and to the emissions of other GHGs. We propose two alternate scenarios of what to expect in these areas through 2025, one based largely on Rhodium estimates (essentially assuming President Trump continues to emphasize rollback of the Obama programs) and the other on application of comparable policies to the Council carbon tax to non-energy CO<sub>2</sub> emissions and other GHGs.

## Non-Energy CO<sub>2</sub> Emissions

Rhodium forecast an increase in non-energy CO<sub>2</sub> emissions through 2025 from today's levels. In our first case in Table 3, we assumed these increases would occur.

The Council's carbon tax would also apply to non-energy CO<sub>2</sub> emissions. In our second case we therefore assumed that non-energy CO<sub>2</sub> emissions will be reduced from Rhodium's assumed higher 2025 levels at half of the rate of energy-related CO<sub>2</sub> reductions from 2016, reflecting pressure from both increased natural gas feedstock use and more expensive costs of emission reductions in this area.

## Other Greenhouse Gases

The Rhodium study also developed estimates for the impact of the continuing Trump administration policy on other greenhouse gases, which we regard as credible. These gases are not currently addressed by the Council's tax proposal. The Council expects eventually to propose measures to cover other greenhouse gases. The nature of those proposals, whether tax, regulation or other means, has not yet been decided, and it is possible that they might not be implemented in time to have much impact in 2025.

In our first case in Table 3 we adopted the Rhodium Group estimates for 2025 methane, nitrous oxide and fluorinated gas emissions. As a relatively



**Table 1: U.S. Greenhouse Gas Emissions, Actual and Projected**

	2005 Actual [baseline for U.S. Paris pledges] as updated in EPA 2018 GHG Inventory	2016 Actual	Obama Policy 2025 [assumes all Obama- era policies remained]	Current Policy 2025 [assumes most Obama-era policies are repealed]*
Energy-related CO <sub>2</sub>	5,747	4,966	4,922*	5,031
Non energy related CO <sub>2</sub>	385	345	332**	444
Methane	689	657	608**	632
Nitrous Oxide	358	370	345**	345
Fluorinated Gases	143	173	90**	90
Total Emissions	7,322	6,511	6,297	6,542
Sinks (Land Use, Land Use Change & Forestry Sequestration)	-699	-717	-870**	-870
Total Net Emissions	6,623	5,794	5,427	5,672
Change from 2005		-829	-1,164	-951
% Change from 2005	n/a	-12.5%	-18.1%	-14.4%

[All figures are in Millions of Metric Tons (MMT) CO<sub>2</sub>-equivalent.]

**Table 2: RFF Modeling of Energy-Related CO<sub>2</sub> Emissions from Council Plan**

Escalation Rate	3%	4%	5%
Energy-related CO <sub>2</sub> Emissions Reduction in 2025 (vs. 2005)	-34.1%	-34.7%	-35.3%

**Table 3: Comparisons and Conclusions**

The emissions “bottom lines” of these projections are summarized below.

	2025 Trump Baseline [Where We Are Headed]	Obama-Era Policies [Had They Remained]	Case 1: Council Plan <sup>14</sup> with Rhodium Non- Energy CO <sub>2</sub> and Other GHGs	Case 2: Council Plan <sup>15</sup> plus Council Non- Energy CO <sub>2</sub> Reductions and 10% Reduction in Other GHGs
Total Net 2025 Emissions	5,672	5,459	4,553	4,399
Change vs. 2005 Base	-14.4%	-18.1%	-31.3%	-33.6%
Change from 2016 Actual	-2.1%	-6.3%	-21.4%	-24.3%

Note - Sinks were standardized in each projection to the midpoint of the Rhodium estimates [see note 13]

conservative alternative, in the second case in Table 3 we assumed that the Council's proposal would reduce these other greenhouse gases by 10% of Rhodium's forecast values in 2025.

In our Findings and in Chart 1, we take the midpoint (roughly 32%) between these two cases - Council's plan with Rhodium's non-energy CO<sub>2</sub> assumptions and with the more aggressive impact on non-energy CO<sub>2</sub> and other gases. We believe this provides a reasonable estimate of what the Council's carbon dividends plan can achieve.

## Findings

The impact of a carbon tax at around these levels has been well studied<sup>15</sup>, making the findings of this report quite robust. The current analysis suggests that the effect of the Council's plan would be to deliver around a 32% reduction in overall emissions by 2025 from 2005 levels, well beyond the 28% high-end of the U.S. Paris commitment and more than three times what the regulatory policies as of the end of the Obama administration would have achieved from 2016 to 2025. It is also many times more than what can be expected under the Trump administration policies, even if several

of the Obama-era regulations on non-CO<sub>2</sub> GHGs are retained.

## Conclusions

Our analysis leads to the following conclusions:

1. If all Obama-era regulatory measures had remained in place, that would likely have resulted in an 18.1% reduction in greenhouse gas emissions from 2005 levels by 2025;
2. Current policies will likely result in a 14% reduction in emissions below 2005 levels by 2025;
3. Compared to 2016, emissions would be 2.1% lower in 2025 under the current policies approach and 6.3% lower under the Obama-era policies; and
4. The Council's plan - based on a \$43/ton carbon tax, implemented in 2021 - would reduce emissions by around 32% compared to 2005 and about 23% compared to 2016, meaning the United States would exceed the upper end of its 2025 Paris commitment.

## Notes

1. Some of these reasons are described in *Methodology for Analyzing a Carbon Tax*, Treasury OIA Working Paper 115, 2017, pp. 8-9.
2. <https://www.eia.gov/outlooks/eeo>
3. <http://www.rff.org/blog/2017/introducing-e3-carbon-tax-calculator-estimating-future-co2-emissions-and-revenues>
4. [http://efhg.com/wp-content/uploads/2017/06/RHG\\_ENR\\_Taking\\_Stock\\_24May2017.pdf](http://efhg.com/wp-content/uploads/2017/06/RHG_ENR_Taking_Stock_24May2017.pdf)
5. <https://epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks-1990-2016>
6. Our projection of the Obama policies starts from the *Second Biennial Report of the United States of America Under the United Nations Framework Convention on Climate Change*, U.S. Department of State, 2018; available at: [https://unfccc.int/files/national\\_reports/biennial\\_reports\\_and\\_submitted\\_biennial\\_reports/application/pdf/2016\\_second\\_biennial\\_report\\_of\\_the\\_united\\_states.pdf](https://unfccc.int/files/national_reports/biennial_reports_and_submitted_biennial_reports/application/pdf/2016_second_biennial_report_of_the_united_states.pdf)
7. Climate Leadership Council calculations, based on EIA data for carbon content at <https://www.eia.gov/tools/faqs/faq.php?id=736t+11> and 2017 average fuel prices for petroleum and gas at <https://www.eia.gov/outlooks/steo/>
8. The Trump baseline forecast is based on EIA AEO 2018 energy CO<sub>2</sub> estimates net of international bunker fuels (-116.6MT, the 2016 value) and U.S. territories (+41.4MT, the 2016 value). We also adjusted for the possible removal of the Federal 2022-2025 vehicle GHG standards (estimated at +54MT in 2025), discounting that reduction by 50% given the uncertainty of how this will turn out in practice. For all other sources we use Rhodium (2017).

9. Assumes energy CO<sub>2</sub> emissions in 2025 are in line with EIA AEO 2018 (including Clean Power Plan [CPP]) reference case, net of international bunker fuels (-116.6MT, the 2016 value) and U.S. territories (+41.4MT, the 2016 value).
10. Calculated from *Second Biennial Report* based on the split of total CO<sub>2</sub> between energy and non-energy sources in the latest data available when it was written, i.e. the 2014 EPA GHG inventory.
11. Rhodium (2017) forecast, reduced by expected impact of proposed Obama-era methane regulations (24MT)
12. We use the Rhodium (2017) numbers - which assume the Kigali Amendment and other HFC initiatives that remain in place will be effective. The Obama administration biennial report (in early 2016, pre-Kigali) expected a rapid increase in these emissions, to 284MTCO<sub>2</sub>e by 2025.
13. The 2016 biennial report used a 2025 range of -908 to -1201 MT. This does not seem plausible. We took the midpoint of the range estimated by Rhodium (786 to 963MT) and held it constant in all our comparisons so it does not impact the conclusions. We are skeptical of the higher end of even this range. Since 1990 the actual sink number has varied between 695 and 830 MT.
14. In each case using RFF modeling for the 4% real escalation factor. As mentioned above, the Council has not arrived at a final conclusion on the escalation factor.
15. For example, as cited in the original *A Winning Trade, Using a Carbon Tax to meet U.S. International Carbon Pledges*, Chen & Hafstead, RFF 2016; *Analysis of the American Opportunity Carbon Fee Act of 2015*, Hafstead & Kopp, RFF 2016 and Treasury op cit (2017).

## **Annex 1 - Important Assumptions**

### **2025**

We confined our analysis in this paper to the impact in one year – 2025 – because that is the year to which the U.S. Paris commitments apply.

### **Border Adjustments**

We also assumed for simplicity that the border adjustments in the Council's plan broadly negate each other in terms of emissions – i.e. emissions related to

U.S. exports for which the carbon tax is rebated are matched by emissions related to U.S. imports that are taxed when they enter the country.

**Acknowledgement:** Our thanks to Marc Hafstead and RFF for their help with the modeling in this paper. We also thank David Bookbinder of the Niskanen Center and Kevin Kennedy of the World Resources Institute for their peer review. Errors and omissions are ours alone.

## **Annex 2 - Note On Models**

### **RFF Model**

See following RFF Issue Brief on page 10.

### **Rhodium Model**

Rhodium models the impact of current policy on U.S. GHG emissions using RHG-NEMS, a modified version of the National Energy Modeling System used by EIA to produce its Annual Energy Outlooks augmented to project all GHG emissions, not just energy-related CO<sub>2</sub>. For the Taking Stock Baseline Scenario, Rhodium uses the macroeconomic and oil and gas price assumptions from the EIA's AEO 2017 reference case, with updates to account for recently announced coal and nuclear power plant

retirements. For renewable energy technology costs, Rhodium uses NREL's Annual Technology Baseline mid cost case.

For CO<sub>2</sub> emissions from sources other than fossil fuel combustion as well as all other GHG emissions contained in the baseline, Rhodium primarily relies on EPA best practice methods. Methane emission reductions from petroleum and natural gas systems from existing federal and state policy are derived from analysis conducted by the Clean Air Task Force. LULUCF sequestration projections are derived from the latest U.S. biennial report and calibrated to EPA's latest inventory.

## Analysis of Alternative Carbon Tax Price Paths for the Climate Leadership Council (CLC) Carbon Dividends Plan

Marc Hafstead\*

In February 2017, led by Ted Halstead and Republican statesmen George P. Shultz and James A. Baker III, the Climate Leadership Council (CLC) introduced "The Conservative Case for Carbon Dividends." In June 2017, the CLC announced its Founding Members, including economists Lawrence Summers, Martin Feldstein, and N. Gregory Mankiw, as well as business leaders such as Ratan Tata, Rob Walton, and Michael Bloomberg. Corporate Founding Members of CLC include oil companies BP, ExxonMobil, Shell, and Total; General Motors; consumer goods giants Johnson&Johnson, P&G, and Unilever; and other multinational firms. NGO Founding Members include The Nature Conservancy and Conservation International.

CLC's [Carbon Dividend Plan](#) rests on four pillars:

- **A Gradually Increasing Carbon Tax:** "A sensible carbon tax should begin at \$40 a ton and increase steadily over time."
- **Carbon Dividends for All Americans:** "All the proceeds from this carbon tax would be returned to the American people on an equal and monthly basis."
- **Border Carbon Adjustments:** "Border adjustments for the carbon content of both imports and exports would level the playing field and promote American competitiveness."
- **Regulatory Simplification:** "The elimination of regulations that are no longer necessary upon the enactment of a rising carbon tax."

The purpose of this analysis is to assess the impacts of alternative carbon tax paths on US energy-related carbon dioxide (CO<sub>2</sub>) emissions.<sup>1</sup> The sole focus is on the emissions impact of CLC's first pillar and this brief does not consider the impacts of any pillars on households or industry.

### Economic Model of Carbon Emissions

We utilize the Goulder-Hafstead Energy-Environment-Economy E3 CGE Model, an economy-wide model of the United States with international trade. Production is divided into 35 industries, with particular emphasis on energy-related industries such as crude oil extraction, natural gas extraction, coal mining, electric power (represented by four industries), petroleum refining, and natural gas distribution. The model is unique in its detailed tax treatment, which allows for interactions of environmental policy and preexisting taxes on capital and labor, and its attention to capital dynamics, which are important for analyzing how policies impact the economy over time. The model utilizes 2013 benchmark data and solves for impacts at one-year intervals beginning in 2013. Baseline technology and preference forecasts are calibrated to the 2016 *Annual Energy Outlook* (AEO) from the US Energy Information Administration (EIA).

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Resources for the Future (RFF) is an independent, nonprofit research institution in Washington, DC. Its mission is to improve environmental, energy, and natural resource decisions through impartial economic research and policy engagement. RFF is committed to being the most widely trusted source of research insights and policy solutions leading to a healthy environment and a thriving economy. RFF does not take positions on specific legislative proposals and this brief is not an endorsement of the Carbon Dividends Plan.

Financial support for this analysis was provided by the Climate Leadership Council. The Climate Leadership Council (CLC) is an international policy institute founded in collaboration with a who's who of business, opinion, and environmental leaders to promote a carbon dividends framework as the most cost-effective, equitable, and politically viable climate solution.

<sup>1</sup> This analysis uses the EIA definition of energy-related CO<sub>2</sub> emissions. The Environmental Protection Agency's Inventory of Greenhouse Gas Emissions and Sinks reports levels of energy-related CO<sub>2</sub> emissions that exclude emissions from international bunker fuels and includes emissions from US territories.



In *Confronting the Climate Challenge: US Policy Options*, published by Columbia University Press (coauthored by Lawrence Goulder of Stanford University), the E3 model is used to evaluate carbon taxes, cap-and-trade programs, clean energy standards, and increases in the federal gasoline tax. The model has also been featured in three peer-reviewed journal publications, and it participated in Stanford's Energy Modeling Forum (EMF) 32: Inter-model Comparison of US Greenhouse Gas Reduction Policy Options. For further analyses of a carbon tax using the E3 model, including a wider range of impact results, visit [www.rff.org/carbontax](http://www.rff.org/carbontax).

### Terms of Reference for the Analysis

The model analysis was structured by the specific elements below.

- The tax is imposed on all fossil fuels (coal, petroleum, and natural gas) combusted within the United States.
- The tax is based on the carbon content of these fuels.
- Only the effect of the tax on energy-related CO<sub>2</sub> emissions is modeled. Emissions of the other five greenhouse gases (methane, nitrous oxide, HFCs, PFCs, and SF<sub>6</sub>) and non-energy-related CO<sub>2</sub> emissions are not included in this analysis.
- The tax is initially imposed in 2021.
- The tax is applied at a rate of \$43 per ton (in \$2021) of CO<sub>2</sub> emitted through combustion. A fee of \$43 is an increase from the original CLC proposal of \$40 to account for inflation between 2018 and 2021.
- The tax increases annually at a rate of 3, 4, 5, or 6 percent above inflation.
- All of the proceeds from the carbon tax, net of reductions in preexisting taxes, are returned to the American people on an equal basis.
- Border adjustments are only considered in the model for imports and exports of secondary fossil fuels (such as gasoline).

### Results

Table 1a displays projected E3 energy-related CO<sub>2</sub> emissions through 2035 across the four alternative growth rates and a baseline scenario without a federal carbon tax.<sup>2</sup> Table 1b reports emissions relative to 2005 emissions. (See both tables on the next page.)

In the absence of carbon pricing or other regulations, energy-related CO<sub>2</sub> emissions are expected to remain relatively flat through 2035, with slight growth between 2035 and 2050. In 2021, with the initial CLC carbon price of \$43, emissions are projected to drop by about one billion metric tons, a 19 percent reduction relative to business as usual. Emissions after 2021 depend on the growth rate of the tax over time. In 2025, emissions vary between 3.8 and 3.9 billion metric tons (34–36 percent below 2005 energy-related CO<sub>2</sub> emissions).<sup>3</sup> By 2035, the difference in emissions levels across growth rates becomes more pronounced—a difference of 0.4 billion metric tons between the lowest and highest growth rate scenarios. Under the 5 percent growth rate, energy-related CO<sub>2</sub> emissions are 45 percent below 2005 levels in 2035.

Projections are not forecasts because they depend on values for a number of variables whose future values are uncertain. Projections in the E3 model represent central estimates of future outcomes conditional on a large number of parameter and model assumptions. Changes to any single assumption may alter projections. Key sources of uncertainty include both baseline forecasts and price elasticities. [Chen, Hafstead, and Goulder \(2018\)](#) evaluate the sensitivity of E3's projected emissions to baseline forecasts such as fossil fuel prices, economic growth and the rate of energy efficiency improvements in nonenergy sectors. In future work, we plan to evaluate the sensitivity of emissions to price elasticities to determine appropriate confidence intervals for long-run emissions projections.

<sup>2</sup> Emissions under the baseline scenario are derived from average rates of change in GDP and emissions intensity from EIA's AEO 2018. Emissions under the carbon tax are derived from multiplying the percentage change in emissions from the E3 model with a slightly different reference case to baseline emissions. As shown in [Chen, Goulder, and Hafstead \(2018\)](#), the percentage change in emissions from a carbon tax are approximately independent of reference case forecast assumptions.

<sup>3</sup> The Obama administration's US Paris Agreement commitment was to reduce net greenhouse gas emissions to 26–28% below 2005 levels. Energy-related CO<sub>2</sub> emissions account for about 78% of gross greenhouse gas emissions. Under conservative estimates for changes in non-energy-related CO<sub>2</sub> emissions, non-CO<sub>2</sub> greenhouse gas emissions, and forestry sequestration, energy-related CO<sub>2</sub> emissions need to be reduced by about 31% from 2005 levels to achieve the 2025 26% net greenhouse gas reduction target.

**Table 1a. Sensitivity of Energy-Related CO<sub>2</sub> Emissions to Different Rates of Growth of the Carbon Tax (billion metric tons)**

Year	Baseline Emissions	Growth Rate of Carbon Tax			
		3%	4%	5%	6%
2021	5.2	4.2	4.2	4.2	4.2
2022	5.2	4.1	4.1	4.1	4.1
2023	5.2	4.1	4.1	4.0	4.0
2024	5.2	4.0	4.0	4.0	3.9
2025	5.3	3.9	3.9	3.9	3.8
2026	5.3	3.9	3.8	3.8	3.8
2027	5.3	3.8	3.8	3.7	3.7
2028	5.3	3.8	3.7	3.7	3.6
2029	5.3	3.8	3.7	3.6	3.5
2030	5.3	3.7	3.6	3.5	3.5
2031	5.3	3.7	3.6	3.5	3.4
2032	5.3	3.6	3.5	3.4	3.3
2033	5.4	3.6	3.5	3.4	3.3
2034	5.4	3.6	3.5	3.3	3.2
2035	5.4	3.6	3.4	3.3	3.2

**Table 1b. Energy-Related CO<sub>2</sub> Emissions (below 2005 levels), by Carbon Tax Growth Rate**

Year	Growth Rate of Carbon Tax			
	3%	4%	5%	6%
2021	30%	29%	29%	29%
2022	31%	31%	31%	31%
2023	32%	32%	33%	33%
2024	33%	34%	34%	34%
2025	34%	35%	35%	36%
2026	35%	36%	37%	37%
2027	36%	37%	38%	39%
2028	37%	38%	39%	40%
2029	37%	39%	40%	41%
2030	38%	39%	41%	42%
2031	39%	40%	42%	43%
2032	39%	41%	43%	44%
2033	40%	42%	43%	45%
2034	40%	42%	44%	46%
2035	41%	43%	45%	47%

## ABOUT THE CLIMATE LEADERSHIP COUNCIL

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The Climate Leadership Council is an international research and advocacy organization founded in collaboration with a who's who of business, opinion and environmental leaders to promote a carbon dividends framework as the most cost-effective, equitable and politically-viable climate solution.

Find out more at [www.clcouncil.org](http://www.clcouncil.org).

## THE FOUR PILLARS OF THE BAKER-SHULTZ CARBON DIVIDENDS PLAN

---

1. **A GRADUALLY RISING AND REVENUE-NEUTRAL CARBON TAX**
2. **CARBON DIVIDEND PAYMENTS TO ALL AMERICANS, FUNDED BY 100% OF THE REVENUE**
3. **THE SIMPLIFICATION OF CARBON REGULATIONS THAT ARE NO LONGER NECESSARY**
4. **BORDER CARBON ADJUSTMENTS TO LEVEL THE PLAYING FIELD AND PROMOTE AMERICAN COMPETITIVENESS**

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**CLIMATE  
LEADERSHIP  
COUNCIL**

# THE WALL STREET JOURNAL.

THURSDAY, JANUARY 17, 2019

Original Co-Signatories Include (full list on reverse):

- 4** Former Chairs of the Federal Reserve (All)
- 27** Nobel Laureate Economists
- 15** Former Chairs of the Council of Economic Advisers
- 2** Former Secretaries of the U.S. Department of Treasury

## Economists' Statement on Carbon Dividends

Global climate change is a serious problem calling for immediate national action. Guided by sound economic principles, we are united in the following policy recommendations.

**I.** A carbon tax offers the most cost-effective lever to reduce carbon emissions at the scale and speed that is necessary. By correcting a well-known market failure, a carbon tax will send a powerful price signal that harnesses the invisible hand of the marketplace to steer economic actors towards a low-carbon future.

**II.** A carbon tax should increase every year until emissions reductions goals are met and be revenue neutral to avoid debates over the size of government. A consistently rising carbon price will encourage technological innovation and large-scale infrastructure development. It will also accelerate the diffusion of carbon-efficient goods and services.

**III.** A sufficiently robust and gradually rising carbon tax will replace the need

for various carbon regulations that are less efficient. Substituting a price signal for cumbersome regulations will promote economic growth and provide the regulatory certainty companies need for long-term investment in clean-energy alternatives.

**IV.** To prevent carbon leakage and to protect U.S. competitiveness, a border carbon adjustment system should be established. This system would enhance the competitiveness of American firms that are more energy-efficient than their global competitors. It would also create an incentive for other nations to adopt similar carbon pricing.

**V.** To maximize the fairness and political viability of a rising carbon tax, all the revenue should be returned directly to U.S. citizens through equal lump-sum rebates. The majority of American families, including the most vulnerable, will benefit financially by receiving more in "carbon dividends" than they pay in increased energy prices.

# Original Co-Signatories

George Akerlof  
Nobel Laureate Economist

Robert Aumann  
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Martin Baily  
Former Chair of CEA

Ben Bernanke  
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Angus Deaton  
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Peter Diamond  
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Robert Engle  
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Janet Yellen  
Former Chair of Federal Reserve  
Former Chair of CEA

CLIMATE  
LEADERSHIP  
COUNCIL

The Honorable Jeff Rose.

Jeff Rose serves as Chief Justice of the Texas Third Court of Appeals in Austin, Texas, heading up the six-judge court as it handles a complex docket of civil, criminal, and administrative-law cases. Consistently ranking among the most productive Texas appellate judges, Justice Rose has earned a reputation as hard working, even tempered, and constitutionally grounded, leading Governor Greg Abbott to note, "Texans are extremely well-served with Justice Jeff Rose on the Third Court of Appeals."

Twice appointed by former Texas Governor Rick Perry, Rose has since been twice elected in Texas's Third Judicial District, which serves over 2.5 million people - first as an Associate Justice and now as Chief Justice. Rose also served as Chair of the Texas Council of Chief Justices, having been elected by his fellow Chief Justices to lead their efforts in organizing and advocating for the Texas appellate court system. He is an officer of the Texas Bar Appellate Law Section, a director of the State Bar Administrative Law Section, a Fellow of the Texas Bar Foundation, and a Master Barrister of the Lloyd Lochridge Inn of Court. Rose is a frequent speaker on the court system, judicial procedure and best practices, the Constitution, legal ethics, and litigation strategy, and he serves on the Board of Directors and Curriculum Committee for the Texas Center for the Judiciary.

Before joining the Third Court of Appeals in 2010, Rose served as a state district judge in Travis County and previously as Chief of Civil Litigation and then as Deputy First Assistant Attorney General under then-Texas Attorney General Greg Abbott. A graduate of Baylor University's Hankamer School of Business and the Vanderbilt Law School, Rose came to government service following a private litigation practice during which he earned board certification in Civil Trial Law, a distinction earned by less than 3% of Texas lawyers, and was recognized four times as a "Texas Super Lawyer." In both private and government practice, Rose litigated a broad range of cases in both state and federal courts, including the handling of some of Texas's most important legal cases.

Judge Rose has been active over the years in the Austin Bar Association as a board member and through its community service and continuing legal education committees. Rose is also active in his church and the Austin community, and in particular with children in need, through leadership roles on the boards of Big Brothers/Big Sisters, the Rise School of Austin, and the Central Texas Food Bank, as well as involvement with the Ronald McDonald House of Central Texas, of which his wife is a former Board President.

Justice Rose balances his professional and civic activities with his first priority, his family. Along with his wife Kim, a financial advisor, he actively parents three teenagers, Ben, Abby, and Will.

Daniel Wiseman  
Assistant Attorney General  
Environmental Protection Division

A graduate of the University of Texas School of Law, Daniel Wiseman has worked for the Office of the Attorney General of Texas for more than a dozen years defending state agencies.

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- Environmental Litigation
- Climate Change and Corporate Sustainability
- Employment Litigation
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- Government and Public Policy

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- J.D., University of Texas at Austin School of Law, 2007 with Honors; Order of the Conf. Texas Law Review
- B.A., University of Southern Mississippi, 2005, Summa Cum Laude
- Law Clerk, Hon. Keith Stanch, United States District Judge, Southern District of Mississippi, 2007-2008

**Bar Admissions**

- Texas, 2007
- Mississippi, 2008

**Court Admissions**

- U.S. Court of Appeals for the Fifth Circuit
- U.S. District Court for the Eastern District of Texas
- U.S. District Court for the Southern District of Texas
- U.S. District Court for the Western District of Texas
- U.S. District Court for the Southern District of Mississippi

Adam Sencenbaugh has tried more than 20 cases to jury verdict. He represents clients in environmental enforcement and permitting proceedings in state and federal courts as well as contested case hearings before the State Office of Administrative Hearings ("SOAH") and the Railroad Commission of Texas ("RRC"). Adam also maintains an active docket handling litigation under the Texas Solid Waste Disposal Act ("TSWDA") as well as the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").

Adam represented two major oil companies in a case of first impression regarding the burden of proof applied to the appeal of an administrative order issued under the TSWDA, obtaining a ruling from the Court of Appeals that the state must prove companies are liable via preponderance of the evidence at trial. In 2017, Adam defended an international metal recycler in a \$100 million environmental enforcement action brought by Bexar County and the State of Texas. In 2018, Adam represented an applicant at SOAH in the first case following passage of SB 708, which fundamentally overhauled the contested case hearing process for environmental permits.

Adam also served as co-counsel for a coalition of 88 school districts in a lawsuit challenging the constitutionality of the state's current school finance system. This lawsuit, which was tried over the course of 16 weeks, culminated in a 382-page decision from State District Judge John Dierz in August 2014, holding Texas's school finance system unconstitutional on all of the grounds asserted by Haynes and Boone's clients.

While working at Haynes and Boone, Adam served as a volunteer prosecutor for the city of Houston, where he prosecuted thousands of misdemeanor cases for the state of Texas. Prior to joining the firm, Adam completed a federal district court clerkship and served as an intern in the United States Attorney's Office for the Western District of

*Jeff Saitas*

*Saitas and Seales 2002-Present*

Member of the firm which specializes in environmental consulting and government affairs. Assists firm clients with regulatory, permitting and enforcement matters before federal and state regulatory agencies and the Texas Legislature, primarily in air pollution control, but also in water and waste matters.

*Texas Commission on Environmental Quality*

EXECUTIVE DIRECTOR 1998- 2002

Managed operations of an agency with over 3,000 employees and a budget of \$400 million; represented agency before Congress and the Texas Legislature on programmatic (air and water quality, waste management, water and wastewater utilities and water rights) and budget issues; acted as spokesman for the agency on major media issues; provided information and recommendations to commissioners and state leadership on budget and programmatic matters.

#### EDUCATION

MASTER OF SCIENCE, ELECTRICAL ENGINEERING

*University of Texas*

BACHELOR OF SCIENCE, MECHANICAL ENGINEERING

*Georgia Institute of  
Technology*



### Avi S. Garbow – Patagonia Environmental Advocate

Avi is a nationally-recognized environmental leader, lawyer, and advocate, with decades of experience tackling the most critical threats to our air, water, and lands. Honored by the National Law Journal as an Energy and Environmental Trailblazer, Avi currently serves as Patagonia's Environmental Advocate, helping to sharpen and strengthen the company's voice and vision on environmental and conservation issues as Patagonia pursues its mission: being in business to save the home planet. Nominated by President Obama and confirmed with the unanimous consent of the Senate, Avi served as General Counsel at EPA from 2013 to 2017 – the longest to hold that position - and prior to that served as the Agency's Deputy General Counsel. Avi's service as EPA General Counsel occurred during the most advanced efforts of the federal government to address climate change, and Avi played important roles in developing, implementing, and defending key domestic and international climate change strategies. Avi also helped lead the environmental practice of a major international law firm, and was a distinguished federal prosecutor in the U.S. Department of Justice. Avi received the Robert F. Kennedy Award for Public Service from the University of Virginia School of Law, obtained a Masters Degree in Marine Affairs, and serves on the Board of Trustees for Rare, an international conservation organization.

Lily Chinn is the managing partner of Katten's San Francisco Bay Area office. She offers a valuable skill set to businesses facing high-stakes examinations of their environmental and workplace safety practices. In agency enforcement actions, litigation and investigations, Lily's clients benefit from her years of experience as a US Department of Justice (DOJ) trial attorney in environmental and criminal matters. Using her familiarity with government decision-making processes, she has helped clients avoid criminal and civil charges and reach favorable settlements with government authorities and private parties.

Lily has represented clients investigated by the DOJ, the US Environmental Protection Agency, US Department of Interior, the Federal Energy Regulatory Commission (FERC), the Occupational Safety and Health Administration (OSHA), the US Chemical Safety and Hazard Investigation Board (CSB), Bureau of Safety and Environmental Enforcement (BSEE) and various state attorneys general and regulatory agencies. As a trial lawyer in the DOJ's Environmental Defense Section and in private practice, she has litigated cases in courtrooms across the country.

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## DEVELOPMENTS IN ENVIRONMENTAL CRIMINAL ENFORCEMENT

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August 1, 2019

### I. THE STATE OF TEXAS V. ARKEMA INC.

**Factual Background:** The District Attorney of Harris County, Texas has brought criminal charges against Arkema, Inc., an international producer of industrial chemicals, and several individual employees including the CEO, VP of Logistics and Crosby Plant Manager, under two separate criminal indictments related to impacts from chemical fires at its Crosby facility following the historic flooding caused by Hurricane Harvey. The refrigeration systems used to store organic peroxides at Arkema's Crosby Plant were compromised by the flooding in August 2017. As a result, the organic peroxides combusted, leading to numerous chemical fires.



- **Indictment I:** On August 3, 2018, a Grand Jury indicted Arkema, Inc., Arkema CEO, Richard Rowe, and Crosby Plant Manager, Leslie Comardelle, for reckless emission of air contamination arising from the chemical fire pursuant to Section 7.182 of the Texas Water Code.



- **Indictment II:** On April 10, 2019 a Grand Jury indicted Arkema and Arkema's vice president of logistics, Michael Keough, for two counts of assaulting a public servant. The indictment alleged that Arkema and Keough unlawfully and recklessly misrepresented the danger of a chemical explosion, resulting in bodily injury to David Klozik and Bryan Sweetman, two first responders providing assistance during Hurricane Harvey.

#### Key Developments:

- The cases have been reassigned from Judge Maria Jackson to Judge Belinda Hill in Harris County District Court and set for trial on October 7, 2019.
- The Chemical Safety Board completed its investigation and issued a [final report](#) on May 24, 2018.

## II. THE STATE OF TEXAS VS. INTERCONTINENTAL TERMINALS COMPANY, LLC

**Factual Background:** On March 29, 2019, the Harris County District Attorney's office indicted Intercontinental Terminals Company (ITC), a company providing storage facilities to the petrochemical industry, for the release of chemicals into nearby waterways at its Deer Park storage facility. On March 17, 2019, a chemical fire broke out at the Deer Park plant causing the alleged discharge of toxic chemicals into the nearby Tucker Bayou.



- **Indictment:** On April 29, 2019, the Harris County District Attorney's office charged ITC with five misdemeanor violations of discharging waste (namely industrial waste, xylene, benzene, ethylbenzene, toluene, oil, grease, and/or petroleum hydrocarbons) into Tucker Bayou and causing, or threatening to cause, water pollution in violation of TCEQ rules or permit.

### Key Developments:



- A trial date has not yet been set for the five indictments.
- Judge Raul Rodriguez has been assigned to the case in Harris County District Court.
- Both the Texas Attorney General and Harris County have filed civil law suits against ITC.
- The Chemical Safety Board investigation is ongoing.

## III. FEDERAL ENVIRONMENTAL CRIMINAL ENFORCEMENT PRIORTIES

On March 12, 2018, Acting Assistant Attorney General for the U.S. Department of Justice's Environmental and Natural Resources Division issued a [memorandum](#) outlining the new administration's enforcement principles and priorities. Among priorities discussed was a focus on criminal enforcement related to worker safety.

## IV. FEDERAL V. TEXAS ENVIRONEMNTAL CRIMES

A comparison of key Texas environmental crimes and related penalties to key equivalent federal environmental crimes and penalties is attached.

Key Texas Water Code Environmental Crimes		State Individual Penalty	State Corporate Penalty	Federal Equivalent Environmental Crimes	Federal Individual Penalty	Federal Corporate Penalty	Comments
7.145	Intentional or Knowing Discharge of Pollutants to Water	\$1,000-\$100,000; 5 years confinement	\$1,000-\$250,000	33 U.S.C. 1319(c)(2) Knowing CWA Discharge	\$5,000-\$50,000 per day; 3 years confinement	\$500,000	
7.147(a)	Unauthorized Discharge to Water	\$1,000-\$50,000; 1 year confinement	\$1,000-\$100,000	33 U.S.C. 1319(c)(1) Negligent CWA Discharge	\$2,500-\$25,000 per day; 1 year confinement	\$200,000	<ul style="list-style-type: none"><li>● Texas law does not require specific intent</li><li>● Federal law requires negligence</li></ul>
7.148	Failure to Properly Use Pollution Control Measures	\$1,000-\$100,000; 1 year confinement	\$1,000-\$250,000	33 U.S.C. 1319(c)(4) Tampering with a Monitoring Method	\$10,000 2 years confinement	\$500,000	
7.149(a)	False Statement (Documents)	\$1,000-\$100,000; 1 year confinement	\$1,000-\$250,000	33 U.S.C. 1319(c)(4) CWA False Statements	\$10,000 2 years confinement	\$500,000	
7.152	Intentional or Knowing Unauthorized Discharge and Knowing Endangerment (Water)	\$1,000-\$250,000; 10 years confinement	\$2,000-\$500,000	33 U.S.C. 1319(c)(3) CWA Knowing Endangerment	\$250,000; 15 years confinement	\$1,000,000	<ul style="list-style-type: none"><li>● Federal law also requires that knowledge of endangerment must exist at the time of the discharge;</li><li>● Federal law also includes an affirmative defense of consent</li></ul>
7.154	Reckless Endangerment (Water)	\$1,000-\$100,000; 1 year confinement	\$2,000-\$500,000				<ul style="list-style-type: none"><li>● No federal equivalent</li></ul>
7.155(a)(1)	Failure to Report Discharge or Spill	\$1,000-\$100,000; 1 year confinement	\$2,000-\$500,000	42 U.S.C. 11045(b)(4) Failure to Report to NRC	\$25,000; 2 years confinement	\$500,000	<ul style="list-style-type: none"><li>● Texas law requires reckless intent</li><li>● Federal law requires knowing and willful intent</li></ul>
7.157(a)	Violation Relating to Injection Wells	\$1,000-\$50,000	\$1,000-\$50,000	42 U.S.C. 300(h)(2)(b) Safe Drinking Water Act	\$25,000 per day; 3 years confinement	\$500,000	<ul style="list-style-type: none"><li>● Texas law requires knowing or intentional intent</li><li>● Federal law requires willful intent</li></ul>
7.162(a)(1)	Hazardous Waste Transportation	\$1,000-\$50,000; 10 years confinement	\$1,000-\$250,000	42 U.S.C. 6928(d)(1)(A) Knowingly Transporting Hazardous Waste	\$50,000 per day; 5 years confinement	\$500,000	
7.162(a)(2)	Hazardous Waste Storage	\$1,000-\$50,000; 10 years confinement	\$1,000-\$250,000	42 U.S.C. 6928(d)(2) Knowingly Transporting Hazardous Waste in Violation of Permit	\$50,000 per day; 5 years confinement	\$500,000	
7.162(a)(3)	False Statement (Hazardous Waste)	\$1,000-\$50,000; 2 years confinement	\$1,000-\$250,000	42 U.S.C. 6928(d)(3)(A) Knowingly Makes False Material Statement in Hazardous Waste Record	\$50,000 per day; 2 years confinement	\$500,000	
7.162(a)(4)	Tampering with Hazardous Waste Documentation	\$1,000-\$50,000; 2 years confinement	\$1,000-\$250,000	42 U.S.C. 6928(d)(4) Knowingly Destroying Documents related to Hazardous Waste	\$50,000 per day; 2 years confinement	\$500,000	
7.162(a)(5)	Tampering with Hazardous Waste Transportation Documentation	\$1,000-\$50,000; 2 years confinement	\$1,000-\$250,000	42 U.S.C. 6928(d)(5) Hazardous Waste Transportation without a Manifest	\$50,000 per day; 2 years confinement	\$500,000	<ul style="list-style-type: none"><li>● Texas law broader than federal equivalent</li></ul>
7.162(a)(7)	Release of Hazardous Waste	\$1,000-\$100,000; 1 year confinement	\$1,000-\$250,000				<ul style="list-style-type: none"><li>● No federal equivalent</li></ul>
7.162(a)(8)	Failure to Notify of Hazardous Waste Release	\$1,000-\$100,000; 1 year confinement	\$1,000-\$250,000	42 U.S.C. 11045(b)(4) Failure to Report to NRC	\$25,000; 2 years confinement	\$500,000	<ul style="list-style-type: none"><li>● Texas law requires knowing or intentional intent</li><li>● Federal law requires willful intent</li></ul>
7.163(a)(1)	Knowing Endangerment (Hazardous Wate)	\$2,000-\$500,000; 15 years confinement	\$5,000-\$1,000,000	42 U.S.C. 6928(e) Knowing Endangerment	\$250,000; 15 years confinement	\$1,000,000	<ul style="list-style-type: none"><li>● Federal law requires a concurrence requirement that knowledge of endangerment must exist at the time of the discharge</li><li>● Federal law also includes an affirmative defense of consent</li></ul>
7.163(a)(4)	Reckless Endangerment (Hazardous Wate)	\$1,000-\$100,000; 1 year confinement	\$2,000-\$500,000				<ul style="list-style-type: none"><li>● No federal equivalent</li></ul>
7.177(a)	Clean Air Act Permit Violation	\$1,000-\$50,000; 6 months confinement	\$1,000-\$50,000	42 U.S.C. 7413(c)(1) Clean Air Act Permit Violation	\$250,000; 5 years confinement	\$500,000	
7.178	Failure to Pay Clean Air Act Fee	Up to twice the amount of the fee; 90 days confinement	Up to twice the amount of the fee	42 U.S.C. 7413(c)(3) Failure to Pay Fee	\$5,000; 1 year confinement	\$10,000	
7.179(a)	False Statements under the Clean Air Act	\$1,000-\$100,000; 1 year confinement	\$1,000-\$250,000	42 U.S.C. 7413(c)(2)(A) False Statements under the Clean Air Act	\$250,000; 2 years confinement	\$500,000	
7.180(a)	Failure to Notify under the Clean Air Act	\$1,000-\$100,000; 1 year confinement	\$1,000-\$250,000	42 U.S.C. 7413(c)(2)(B) Failure to Notify under the Clean Air Act	\$250,000; 2 years confinement	\$500,000	
7.181(a)	Improper Use of Monitoring Device	\$1,000-\$100,000; 1 year confinement	\$1,000-\$250,000	42 U.S.C. 7413(c)(2)(C) Tampering with a Monitoring Method under the Clean Air Act	\$250,000; 2 years confinement	\$500,000	
7.182(a)	Reckless Endangerment (Air Contaminant)	\$1,000-\$250,000; 5 years confinement	\$2,000-\$500,000				<ul style="list-style-type: none"><li>● No federal equivalent</li></ul>
7.183(a)	Knowing Endangerment (Air Contaminant)	\$1,000-\$500,000; 5 years confinement	\$2,000-\$500,000	42 U.S.C. 7413(c)(5) Knowing Endangerment	\$250,000; 15 years confinement	\$1,000,000	<ul style="list-style-type: none"><li>● Federal law also requires that knowledge of endangerment must exist at the time of the discharge</li><li>● Federal law also includes an affirmative defense of consent</li></ul>

**Nathan E. Vassar**

Principal

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Austin, TX

**Nathan Vassar** is a Principal at Lloyd Gosselink Rochelle & Townsend, P.C. in Austin, TX. His practice focuses on assisting clients with enforcement defense matters, regulatory compliance, water quality matters, and water resources development. Mr. Vassar helps communities facing Clean Water Act compliance issues and represents clients in enforcement and civil litigation matters before federal and state courts and administrative agencies. Prior to the practice of law, Mr. Vassar worked in state politics as a Legislative Director for a State Senator and also interned with then-Tenth Circuit Judge Neil Gorsuch in Denver, Colorado. Mr. Vassar received his BA at the University of Virginia and his JD from the University of Texas School of Law.

**STATE ENFORCEMENT AUTHORITY AND DEVELOPMENTS IN SEP/FEDERALISM IN THE  
WATER ENFORCEMENT CONTEXT**

**BY NATHAN E. VASSAR\***

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This paper would not have been possible without the assistance of Mr. Joseph Reynolds, J.D. 2020 Candidate, Texas Tech University School of Law (Texas Tech Law Review, Vol. 52 Lead Articles Editor, Texas Bank Lawyer Vol. 43 Executive Editor).



## I. INTRODUCTION

The importance and prominence of state-initiated environmental enforcement has arguably never been as significant as the present time, in light of the current federal administration's focus on cooperative federalism. Although stated policy terms (such as cooperative federalism) do not necessarily mean a shift in state practices, experience since 2017 has underscored the importance of familiarity with state enforcement approaches for entities facing environmental enforcement. This paper, and the corresponding discussion at the 2019 Texas Environmental Superconference, will focus upon the context of state enforcement in the Lone Star State (with a focus on water enforcement), how the regulated community can navigate the enforcement process, and opportunities to claim credit for proactive approaches that yield environmental benefit.

In 1998, the State of Texas assumed the primary enforcement responsibilities of water quality, permitting, along with other responsibilities, with the delegation of Clean Water Act (CWA) authority from the federal government. Since then, the Texas Commission on Environmental Quality (TCEQ or Commission) has been in charge of wastewater permitting, monitoring, and enforcement actions. Such authority, however, is not exclusive, as the federal Environmental Protection Agency (EPA) can enforce against regulated entities under certain circumstances. The federal Environmental Protection Agency maintains the ability to issue Administrative Orders as well as seek more formal enforcement options, including Consent Decree enforcement.

Since 2016, however, the EPA has shifted its approach regarding oversight goals in the enforcement context. As discussed later in Section Three, the effect of EPA's reduced enforcement trends has coincided with its frequent deferral to state-driven approaches. First, however, we outline Texas' current enforcement framework including the TCEQ's statutory authority and the application of its enforcement standards by agency staff.

## II. FRAMEWORK FOR STATE WASTEWATER ENFORCEMENT

The TCEQ maintains general jurisdiction over water and "the state's water quality program including issuance of permits, enforcement of water quality rules, standards, orders, and permits, and water quality planning."<sup>1</sup> Many of these water quality standards within the Commission's jurisdiction are outlined in the Texas Pollution Discharge Elimination System (TPDES) that advance the goals and objective of the CWA per the 1998 agreement with the EPA which transferred primary enforcement authority of wastewater pollution control programs to the TCEQ. The bulk of the Commission's enforcement scheme of how and when to bring an action is outlined in Chapter 7 of the Texas Water Code (Chapter 7). Moreover, Chapter 7 mandates that the TCEQ adopt and publish an enforcement and penalty policy to encourage compliance and provide further guidance to Commission staff members. The following subsections discuss each aspect of the state enforcement framework of wastewater disposal to provide a general understanding of their roles.

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<sup>1</sup> TEX. WATER CODE ANN. § 5.013.

A. *1998 Memorandum of Agreement*

The CWA established the basic regulatory structure for pollutant discharges into the waters of the United States. The CWA grants the EPA the authority to enforce these water quality standards through permitting, monitoring, and enforcement actions. Water quality standards are established and reviewed (on a triennial basis) under the regulatory umbrella of the National Pollutant Discharge Elimination System (NPDES), the Congressionally-established wastewater pollution control program.<sup>2</sup> Although the EPA administers a couple wastewater pollution control programs under the CWA, it largely delegates these duties to states to administer the program within that state's jurisdiction consistent with the goals and objectives of the federal standards in NPDES program and CWA.<sup>3</sup>

In 1998, the EPA did just that when it entered into a Memorandum of Agreement (MOA) with the Texas Natural Resource Conservation Commission, the predecessor to the TCEQ.<sup>4</sup> The MOA consists of eleven chapters that specify the allocation of responsibilities between the Commission and the EPA regarding the administration of NPDES/TPDES.<sup>5</sup> The MOA effectively transferred primary authority to regulate wastewater permitting,<sup>6</sup> compliance monitoring,<sup>7</sup> and enforcement activities<sup>8</sup> to the TCEQ.<sup>9</sup> Under this agreement, the TPDES program must fulfill the objectives and goals of the CWA and the NPDES system, however, the state approach may be appropriately tailored if the TCEQ believes the change will help advance the underlying statutory goals.<sup>10</sup>

The TCEQ not only has the authority, but also the responsibility to maintain an effective enforcement program by taking timely action and appropriate actions for wastewater permits and unpermitted discharges.<sup>11</sup> The Commission must consider the EPA's national and regional policies when adopting state policies and maintain file information that is readily available to the EPA.<sup>12</sup> Consistent with the MOA, TPDES permits are issued and administered by the TCEQ, but the EPA retains oversight authority over the TCEQ's actions.<sup>13</sup> The EPA has the opportunity to review and comment on draft permits and retains enforcement authority over any entity that is outside of the TCEQ's jurisdiction.<sup>14</sup> Additionally, the EPA is responsible for ensuring that the TPDES program is consistent with all federal regulations.<sup>15</sup>

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<sup>2</sup> 33 U.S.C. § 1342.

<sup>3</sup> *Id.* § 1342(b).

<sup>4</sup> Memorandum of Agreement Between the Texas Natural Resource Conservation Commission and the U.S. Environmental Protection Agency Concerning the National Pollutant Discharge Elimination System, (Sept. 14, 1998), at 1, <https://www.epa.gov/sites/production/files/2013-09/documents/tx-moa-npdes.pdf> [hereinafter Memorandum of Agreement].

<sup>5</sup> *See generally, id.*

<sup>6</sup> 40 C.F.R. § 123.25.

<sup>7</sup> *Id.* § 123.26.

<sup>8</sup> *Id.* § 123.27.

<sup>9</sup> *Id.*

<sup>10</sup> Memorandum of Agreement, *supra* note 4, at 11.

<sup>11</sup> *Id.* at 5.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 33.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 61.

## *B. Texas Water Code Enforcement Authority*

### *1. Texas Water Code Chapter 5*

Chapter 5 of the Texas Water Code (Chapter 5) outlines the TCEQ's powers and duties regarding environmental quality in addition to the Commission's organizational structure including the permitting process. The Commission has general jurisdiction over the state's water quality programs ranging from permit issuance and, importantly, the enforcement of water quality rules, standards, orders, and permits.<sup>16</sup> Chapter 5 also provides the statutory grant of authority to the Executive Director of the TCEQ (ED) to enforce permits, standards, or administrative orders.<sup>17</sup>

### *2. Texas Water Code Chapter 7*

Chapter 7 of the Texas Water Code (Chapter 7) governs the TCEQ's enforcement powers.<sup>18</sup> This chapter applies to all forms of violations within the Commission's jurisdiction including municipal solid waste, air and water quality, and hazardous waste.<sup>19</sup> Specifically, these powers allow the TCEQ to take corrective action, grant injunctive relief, and assess different forms of penalties as they relate to wastewater disposal.<sup>20</sup> Chapter 7 also outlines the reporting requirements that the TCEQ must follow regarding enforcement actions.<sup>21</sup> Under the Texas Water Code, the TCEQ must adopt and publish a general enforcement policy that includes the penalty framework utilized in assessing fines and evaluating SEPs.<sup>22</sup> Additionally, Chapter 7 provides the procedural framework for the TCEQ in evaluating the degree of an enforcement action and the Commission's next move. The underlying goal of this enforcement framework is to deter violations and incentivize future compliance.

### *3. Texas Water Code Chapter 26*

Chapter 26 of the Texas Water Code defines "water in the state" and outlines the TCEQ's jurisdiction regarding wastewater disposal.<sup>23</sup> This jurisdiction includes all bodies of surface water that are partially or wholly inside or bordering the state, as well as waters adjacent to water in the state.<sup>24</sup> This grants TCEQ jurisdiction over any person or entity discharging wastewater into water

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<sup>16</sup> TEX. WATER CODE ANN. § 5.013 (outlining the commission's general jurisdiction over various environmental regulatory media).

<sup>17</sup> TEX. WATER CODE ANN. § 5.230.

<sup>18</sup> TEX. WATER CODE ANN. § 7.002.

<sup>19</sup> *Id.* § 5.013 (outlining the TCEQ's general jurisdiction to include water and the "state's water quality program including issuance of permits, enforcement of water quality rules, standards, orders and permits, and water quality planning").

<sup>20</sup> *Id.* § 7.002.

<sup>21</sup> *Id.* § 7.003 (requiring publication of enforcement actions in the Texas Register at least once a month).

<sup>22</sup> *Id.* § 7.006 (mandating the adoption of an enforcement policy to deter violations).

<sup>23</sup> *Id.* § 26.001.

<sup>24</sup> *Id.*

in the state and the authority to permit and regulate it and is in line with TPDES authority in the MOA and the grant of general jurisdiction in Chapter 5.<sup>25</sup>

### *C. Enforcement Process & Vehicles*

#### *1. Permitting*

As stated above, the MOA grants the TCEQ the authority to regulate wastewater permitting.<sup>26</sup> Wastewater permits require the monthly submittal of Discharge Monitoring Reports (DMRs), self-reporting, along with collected data samples.<sup>27</sup> Permitted entities are also subject to scheduled site investigations, where a Commission staff member may review and identify potential violation events.

#### *2. Facility Inspections & Discharge Monitoring Reports*

Most enforcement actions begin during the Commission's routine inspection of permitted facilities or upon review of self-reported records.<sup>28</sup> DMRs provide the TCEQ with information regarding compliance with permitting parameters. When the TCEQ conducts a site inspection, agency staff may review records and identify sampling errors and discrepancies.

#### *3. Initiating Enforcement Actions*

When a violation is identified, the TCEQ ED may issue a Notice of Violation (NOV) that includes the ED's recommended action regarding penalty or corrective action.<sup>29</sup> The ED provides notice of the report to the person charged within ten days.<sup>30</sup> This gives individuals or businesses the opportunity to remedy the violation within the time specified in the NOV.<sup>31</sup> An NOV effectively provides the violating party (respondent) notice of noncompliance and works as an opportunity for self-correction NOVs are issued on a site basis, and may contain notice of more than one violation from that site.<sup>32</sup>

The violating party has an opportunity to address the violation or bring to light any information that may not have been evaluated by the TCEQ in inspection or DMR review to resolve the conflict.<sup>33</sup> If, however, the party is nonresponsive and/or fails to resolve the violation

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<sup>25</sup> *Id.* §§ 5.013, 26.001. This grant of authority does not cover instances within the jurisdiction of the Texas Railroad Commission. Memorandum of Agreement, *supra* note 4 at 1.

<sup>26</sup> Memorandum of Agreement, *supra* note 4 at 2.

<sup>27</sup> 40 C.F.R. § 122.41.

<sup>28</sup> TEX. WATER CODE ANN. § 7.0025(a); *The Enforcement Process: From Violations to Actions*, TEX. COMM'N ON ENVTL. QUALITY (May 29, 2019), <https://www.tceq.texas.gov/compliance/enforcement/process.html> [hereinafter *The Enforcement Process*].

<sup>29</sup> *Id.*; TEX. WATER CODE ANN. § 7.054.

<sup>30</sup> TEX. WATER CODE ANN. § 7.055.

<sup>31</sup> *The Enforcement Process*, *supra* note 28.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*; see *The Enforcement Process*, *supra* note 28.

within the specified period, the action will be referred to enforcement via a Notice of Enforcement (NOE).<sup>34</sup>

An NOE serves as notice that the Commission has initiated a formal enforcement action for the violations observed.<sup>35</sup> An NOE may be issued for a variety of reasons. As addressed above, if the violating party fails to respond to an NOV, or fails to return to compliance, then the ED may issue an NOE.<sup>36</sup> The ED may evaluate compliance history and the degree of violations when determining its next action.<sup>37</sup> If the violation is more severe, then the ED may skip the NOV process and issue an NOE.<sup>38</sup> Furthermore, if the violating party has a history of non-compliance due to repeated violations or failure to bring a facility back into compliance, then the ED may issue a NOE.<sup>39</sup> After issuing either form of notice, the ED must verify the information from the DMRs or the inspection relied upon by the Commission to confirm a violation has occurred.<sup>40</sup>

#### 4. *Draft, Administrative, & Agreed Orders*

After the ED issues notice, the enforcement coordinator will reach out to the violating party to discuss the violations and next steps in the enforcement process.<sup>41</sup> If the case is likely to settle, an agreed order will be drafted outlining the steps the party must take to enter compliance and stipulate any administrative penalty owed.<sup>42</sup> The Commission favors settlement and often provides an incentive to do so through reduced penalties for earlier settlement. If, however, the parties are not able to come to an agreement, and the respondent continues to contest the action, the matter then shifts to the framework of an administrative hearing conducted at the State Office of Administrative Hearings (SOAH), although parties often still resolve by settlement prior to a formal SOAH hearing (sometimes after a SOAH procedural schedule is established).<sup>43</sup>

The framework of a settlement is most often an agreed order. An agreed order is a type of administrative order that includes the conditions of the order and the associated penalty.<sup>44</sup> There are two types of agreed orders a 1660 Order and a Findings Order. The 1660 Order does not require an admission of guilt and is not admissible in any other civil proceedings.<sup>45</sup> In contrast, a Findings Order includes findings of fact and conclusions of law and does not contain any denial language.

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<sup>34</sup> See *Enforcement Definitions*, TEX. COMM'N ON ENVTL. QUALITY (May 29, 2019), <https://www.tceq.texas.gov/compliance/enforcement/definitions.html#noe> ("If you have received an NOV and correct all violations listing the NOV, within the time given, you will not be referred for enforcement for those violations").

<sup>35</sup> *Id.*

<sup>36</sup> *The Enforcement Process*, *supra* note 28.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *The Enforcement Process*, *supra* note 28. The coordinator may also offer the respondent the opportunity to provide additional information regarding the violation that may have not been available to the Commission, or set up a meeting.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Enforcement Definitions*, *supra* note 34.

<sup>45</sup> TEX. WATER CODE ANN. § 7.070.

## 5. *TCEQ Penalty Policy*

TCEQ's process to impose penalties is detailed and outlined in the TCEQ Penalty policy. The TCEQ's Office of Compliance and Enforcement publishes a penalty policy that describes the computation and assessment of administrative penalties that may arise as a result of enforcement actions.<sup>46</sup> This policy has been revised three times and provides TCEQ staff a set of guidelines to follow when calculating penalties for various violations.<sup>47</sup> Although the penalty policy addresses a wide array of potential violations, the statutory authority to impose penalties for water quality violations flows from Chapter 7 of the Texas Water Code.<sup>48</sup>

### III. RECENT DEVELOPMENTS

#### A. *Cooperative Federalism*

The EPA under the Trump Administration has implemented a policy shift to what it has called the cooperative federalism framework. This approach recommends shared accountability between the EPA and the State, although as a practical matter, has resulted in a state-first regulatory reality. In the EPA's Strategic Plan issued in February of 2018, it clarified that it intends to promote cooperative federalism by analyzing trends of successful and unsuccessful delegation efforts. As detailed below, some states have been more aggressive than others in seeking primacy over various permitting and enforcement matters.

##### 1. *Missouri Letter and EPA Response*

In 2017, the Director of the Division of Environmental Quality (DEQ) of the Missouri Department of Natural Resources sent a letter to the Deputy Administrator of Region 7 of the EPA regarding the EPA's oversight of the State's administration of the NPDES.<sup>49</sup> The letter stressed the independence of Missouri's program citing to the Missouri-EPA Memorandum of Agreement (MoMOA) and advocated for a more hands-off approach to oversight by the federal government. The Director acknowledged the importance of some federal oversight of state administration, but believed the EPA was operating outside of the scope of the state-federal agreement in the MoMOA. This plea to reign in the EPA's jurisdiction would, according to the letter, increase the efficiency of state programs while reducing the EPA's expenditure of resources.

The EPA's Deputy Administrator responded to the Missouri letter, taking the position that such a request was reasonable and acceptable.<sup>50</sup> The Deputy Administrator agreed with the basic

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<sup>46</sup> *TCEQ Penalty Policy*, TEX. COMM'N ON ENVTL. QUALITY (Apr. 2014), [https://www.tceq.texas.gov/assets/public/comm\\_exec/pubs/rg/rg253/penaltypolicy2014.pdf](https://www.tceq.texas.gov/assets/public/comm_exec/pubs/rg/rg253/penaltypolicy2014.pdf) [hereinafter *Penalty Policy*].

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Letter from Ed Galbraith, Dir., Div. of Env'tl. Quality, Mo. Dep't of Nat. Res., to Edward Chu, Deputy Adm'r, Region 7, U.S. Env'tl. Prot. Agency (Sept. 18, 2017), [https://regform.org/wp-content/uploads/2017/11/Letter-to-Chu-2017\\_0917.signed\\_scan.pdf](https://regform.org/wp-content/uploads/2017/11/Letter-to-Chu-2017_0917.signed_scan.pdf) [hereinafter *Missouri Letter*].

<sup>50</sup> Letter from Edward Chu, Deputy Adm'r, Region 7, U.S. Env'tl. Prot. Agency, to Ed Galbraith, Dir., Div. of Env'tl. Quality, Mo. Dep't of Nat. Res. (Oct. 12, 2017), <http://www.nacwa.org/docs/default-source/conferences-events/Hot->

principle articulated in the Missouri letter and agreed to defer to Missouri to conduct inspections, permit, and generally carry out enforcement actions, demonstrating greater compliance with the MoMOA – without unnecessary second-guessing by the federal government. Specifically, the response agreed to reduce oversight of permitting to the statutory minimum of reviewing for legal sufficiency of permits under section 402(d) of the CWA. The Missouri correspondence signals one of the most direct and tangible outcomes from the cooperative federalism framework.

## 2. *The EPA's New Direction*

Since the Missouri letter in 2017, both the Department of Justice (DOJ) and the EPA have released memoranda regarding the EPA's goals moving forward with state oversight of federal programs. The EPA identified cooperative federalism and a priority in the 2018-2022 EPA Strategic Plan and emphasized enhancing shared accountability between states and the EPA.<sup>51</sup> The EPA intends to tailor state oversight further, in continuance with ongoing practice.<sup>52</sup>

In a 2018 memorandum on principles and best practices for oversight of federal environmental programs implemented by states, EPA Administrator Wheeler credits the agency's shift, in part, to the specialized state experience with program implementation.<sup>53</sup> The memorandum outlines general deference to states implementing federally delegated programs, effective communication, clear standards of review and predictable process, and a transparent process for prioritizing issues.<sup>54</sup>

## 3. *Trends/Data of Enforcement Actions Since January 2017*

In recent years, enforcement has decreased at both the Texas and national levels. In 2018, the TCEQ reported the lowest total number of NOV's issued since 2014, although the Commission acknowledges that such trends may also reflect the increase of voluntary self-audits in recent years.<sup>55</sup> TCEQ NOV's have also steadily declined since 2016 in all regulated media.<sup>56</sup> On the federal front, the EPA has reported a significant decrease in investigation and enforcement actions since 2016.<sup>57</sup>

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Topics-in-Clean-Water-Law-Webinar/2017-11-15mdnr\_response.pdf?sfvrsn=2 [hereinafter Response to Missouri Letter]

<sup>51</sup> WORKING TOGETHER FY 2018-2022 U.S. EPA STRATEGIC PLAN (Feb. 2018), <https://www.epa.gov/sites/production/files/2018-02/documents/fy-2018-2022-epa-strategic-plan.pdf> [hereinafter EPA STRATEGIC PLAN]

<sup>52</sup> See Memorandum from Andrew R. Wheeler, Acting Administrator, U.S. Environmental Protection Agency, to Assistant Administrators, Regional Administrators, Deputy Assistant Administrators, & Deputy Regional Administrators (Oct. 30, 2018), <https://www.acwa-us.org/wp-content/uploads/2018/11/State-Oversight-Memo.pdf> [hereinafter State Oversight Memo].

<sup>53</sup> *Id.*; See EPA STRATEGIC PLAN, *supra* note 51, at 25 (“Specifically, states have assumed more than 96 percent of the delegable authorities under federal law.”).

<sup>54</sup> State Oversight Memo, *supra* note 52.

<sup>55</sup> 2018 ENFORCEMENT REPORT, TEX. COMM'N ON ENVTL. QUALITY (Nov. 2018), at 1-7, [https://www.tceq.texas.gov/assets/public/compliance/enforcement/enf\\_reports/AER/FY18/enfrptfy18.pdf](https://www.tceq.texas.gov/assets/public/compliance/enforcement/enf_reports/AER/FY18/enfrptfy18.pdf).

<sup>56</sup> *Id.* at T-21–T-31.

<sup>57</sup> *Fiscal Year 2018 EPA Enforcement and Compliance Annual Results*, ENVTL. PROT. AGENCY (Feb. 8, 2019), <https://www.epa.gov/sites/production/files/2019-02/documents/fy18-enforcement-annual-results-data-graphs.pdf>.



## B. *Evolution of Supplemental Environment Projects*

One critical tool that can offset costs to the regulated community when facing enforcement is the use of Supplemental Environmental Projects (SEPs).<sup>58</sup> SEPs provide a violating party the opportunity to voluntarily participate or implement a project that enhances, protects, and improves the environment, with a corresponding financial benefit offsetting an administrative penalty (either directly at 1-to-1 or at 50%, depending upon the governmental or private nature of the respondent – see below for a more detailed discussion of offsets).<sup>59</sup>

There are a wide range of potential projects that may qualify for a SEP, but in Texas, each proposed project is evaluated on a case by case basis to ensure it is appropriate for a particular situation.<sup>60</sup> Above all, for a SEP to be approved, it must provide a tangible environmental or public health benefit and have a nexus to the violation at issue.<sup>61</sup> The TCEQ's SEP policy provides some flexibility in the nexus requirement if there a particular public need for a different project in a community, but has a hard geographic line around the Texas border.<sup>62</sup>

The TCEQ has outlined three distinct types of SEPs: Pre-Approved, Custom, and Compliance. Pre-Approved SEPs are essentially turn-key projects that are administered by third-parties that the respondent pays the offset amount to contribute to environmental quality instead of the Texas General Revenue Fund.<sup>63</sup> Custom SEPs are projects designed, proposed, and implemented by the respondent and require more resources from both the Commission and the respondent.<sup>64</sup> Compliance SEPs allow the respondent to funnel all of the penalty amount into correcting the violation and returning to compliance.<sup>65</sup> Importantly, in the context of Compliance SEPs, TCEQ has begun to allow respondents to look backwards to post-violation projects, and attain credit for those projects. Such approach is consistent with a policy objective of incentivizing compliance early (following a violation), rather than an implicit encouragement for respondents to wait for an enforcement order to invest in corrective measures. As a result, in many cases, when TCEQ seeks a penalty for a violation, the regulated entity may be able to receive an offset for much (if not all) of the penalty through a Compliance SEP that points to a project designed to support compliance.

The allowable offset amount of a SEP is taken into account by the TCEQ and is dependent on the type of environmental benefit the specific SEP provides. The TCEQ evaluates whether a SEP provides a Direct Benefit, Indirect Benefit, or Mixed Benefits.<sup>66</sup> A Direct-Benefit SEP's impact is significant, immediate, and provides enduring enhancements to the quality of the

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<sup>58</sup> See generally, *Supplemental Environmental Projects: Putting Fines to Work Closer to Home*, TEX. COMM'N. ON ENVTL. QUALITY (Oct. 2015), [https://www.tceq.texas.gov/assets/public/comm\\_exec/pubs/gi/gi-352.pdf](https://www.tceq.texas.gov/assets/public/comm_exec/pubs/gi/gi-352.pdf) [hereinafter *SEPs*].

<sup>59</sup> *Id.* at 1; TEX. WATER CODE ANN. § 7.067(b)(2).

<sup>60</sup> *Id.*; see TEX. WATER CODE ANN. § 7.067.

<sup>61</sup> *SEPs*, *supra* note 58 at 2.

<sup>62</sup> *Id.* at 4.

<sup>63</sup> *Id.* at 2.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *SEPs*, *supra* note 58 at 2.

environment or mitigates further degradation.<sup>67</sup> An example of a Direct-Benefit SEP is one that enhances wastewater treatment for parameters that have caused violations. Under a Compliance SEP, this may offset a local government's penalty by 100%.<sup>68</sup> A for-profit business may offset the assessed penalty by up to 50%.<sup>69</sup> An Indirect-Benefit SEP does not have an immediate impact on improving the environment.<sup>70</sup> This includes educational or public-awareness projects.<sup>71</sup> Regardless of the type of respondent implementing the project, it may offset a penalty up to 33%.<sup>72</sup> As the name suggests, Mixed-Benefit SEPs have both a direct and indirect impact on environmental quality. These may offset penalties, regardless of the type of respondent, by up to 50%.<sup>73</sup>

SEPs are not designed to merely bring a violating party back into compliance with water quality standards, but instead go above and beyond the minimum requirements. In addition to the above requirements, there are limitations on where the funds may be spent. Certain administrative costs and other non-compliance-based costs cannot be included.

#### IV. CONCLUSION

The role of state enforcement plays a critical part in the administration of the CWA through its delegated programs to state agencies. The structure above is outlined as an overview tool and reference for those who may face TCEQ water-related enforcement. As for any entity facing compliance requirements, knowing the process – as well as important tools/strategies – can be critical to reach an outcome of compliance and fiscal prudence. SEPs play an important role in offsetting penalty amounts that would otherwise be paid to the state (or the federal government, depending upon the enforcement context), and can yield value in the implementation of projects/equipment acquisition that otherwise may not be pursued.

The level of federal enforcement may undergo further evolution in the years to come, however, for delegated programs/states, the role of state enforcement is a constant that will continue to impact permittees and the broader regulatory community.

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 3.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*



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### **Josh helps clients resolve high-stakes compliance, enforcement, and litigation matters.**

He brings the perspective gained from a distinguished U.S. government service career to provide clients with strategic counsel on air, water, and waste issues with a focus on mobile source emissions. He also litigates those matters and advises on proactive environmental compliance strategies.

Prior to joining Beveridge & Diamond, Josh served as Senior Trial Attorney in the Environmental Enforcement Section of the Environment and Natural Resources Division (ENRD) of the U.S. Department of Justice (DOJ). During his DOJ career, he received the Samuel J. Heyman Service to America Medal and was named Federal Employee of the Year in 2017 in recognition of his work as Lead Counsel in the *United States v. Volkswagen AG, et al.* ("Clean Diesel") civil Clean Air Act (CAA) enforcement litigation. He also has received the Assistant Attorney General's Award for Excellence, the EPA Administrator's Award for Excellence, and numerous other DOJ commendations and awards. Clients benefit from the experience he gained advising senior officials across agencies and at corporations.

Josh's public service includes a distinguished and ongoing military career. Josh currently serves in the Army Reserve as Associate General Counsel in the Office of General Counsel of the Defense Logistics Agency, where he also serves as Co-Chair of the Installation and Environmental Law Practice Group.

During his time on active duty, Josh served first as a criminal prosecutor and legal advisor in one of the army's largest criminal jurisdictions then subsequently as a litigation attorney in the Environmental Law Division of the U.S. Army Judge Advocate General's Corps. He is also a former Senior Administrative Law Attorney in the Administrative Law Division of the Department of the Army and a former Associate Professor of Administrative and Civil Law at the Army Judge Advocate General's School in Charlottesville, Virginia. His military awards include the Army Meritorious Service Medal awarded on multiple occasions as well as the Army Commendation Medal.



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For almost 30 years, Cindy has been assisting clients nationwide with resolving environmental problems through her experience as an attorney and chemical engineer. Before her legal career began over 25 years ago, she worked as an environmental consulting engineer, completing air permits, removing underground storage tanks, and conducting asbestos inspections, among other projects. Prior to founding C Bishop Law in 2011, she was a partner at Gardere Wynne Sewell, LLP in Dallas.

Ms. Bishop's legal and technical background enables her to effectively and efficiently understand and resolve her clients' environmental problems. She has a broad range of litigation experience, including litigating federal CERCLA contribution and cost recovery actions before the US Supreme Court as well as state statutory and common law claims involving property damage and personal injury allegedly caused by contamination. In two separate federal cost recovery actions, she received favorable summary judgment decisions within one thirty-day period. Ms. Bishop has also defended numerous clients in environmental enforcement actions initiated by municipalities, the Texas Commission on Environmental Quality, and the United States Environmental Protection Agency, reducing or eliminating penalties.

She has helped clients close impacted sites using innovative, risk-based approaches, saving one client over \$4 million in estimated cleanup costs. She has assisted clients with obtaining closure on several properties using municipal setting designations (MSD). She has also reviewed numerous environmental reports and records for properties to determine potential environmental liabilities for lenders and real estate developers and has defended potentially responsible parties in litigation with state and federal agencies to minimize the clients' liability at contaminated properties. She has reduced or eliminated state and federal penalties for clients through the Texas Audit Privilege Act and EPA's Self-Disclosure Policy. Ms. Bishop also has resolved a variety of issues involving leaking underground storage tanks at former service stations located in many states, including Arizona, Arkansas, Illinois, Indiana, Iowa, Massachusetts, Michigan, Pennsylvania, Tennessee, and Texas.

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Laura is committed to achieving clients' goals through leadership, teamwork, advocacy and precise documentation, particularly in the environmental and process safety areas for chemical manufacturing, oil and gas production, pipeline, airline and real estate clients. She is a trusted advisor, who is adept at communicating effectively at all levels of the client organization and with outside stakeholders. Her practice is increasingly focused on helping clients navigate the complex new world of ESG and climate risk disclosure.

Prior to joining the firm, Laura held the position of senior counsel at Occidental Chemical Corporation for 11 years, where she was the primary counsel responsible for environmental, health, process safety, product stewardship, quality assurance and security functions (HESS), as well as transactional risk management. Additionally, along with prior law firm experience, Laura served for four years as an assistant regional counsel/enforcement attorney for the Environmental Protection Agency (EPA) Region 6 in Dallas, specializing in hazardous waste and multi-media enforcement.

Ms. Whiting has held leadership positions in several professional and civic organizations, including the City of Dallas' Environmental Health Commission. She has served for over 20 years on the state boards and advisory committees of the Dixon Water Foundation and The Nature Conservancy.

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# ESG Disclosure: Transparency, Transformation, and Risk

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In corporate America today, the odd phrase *Environmental, Social and Governance* (“ESG”) can mean a lot of different things, or not much at all. This paper attempts to provide a definition and context for the term, explain how and why it is used, demonstrate how investors are driving the proliferation of ESG reporting, illuminate how investor reliance on ESG information creates new risks for reporting companies, and suggest steps attorneys can take to help mitigate the risks.

## I. The Evolution of ESG Disclosures

**A. What is ESG?** In basic terms, ESG is a collection of information about a company’s operations in three broad areas of activity: Environmental, Social and Governance. It is data-based as well as narrative, and typically static or backward-looking. Increasingly, it is goal-oriented and aspirational.

Environmental information describes the company’s impact on natural resources. It consists of detailed data on water use, toxic releases, the generation, disposal and recycling of waste, air emissions, energy efficiency and enforcement actions. It frequently includes historic trend data to demonstrate progress toward reducing environmental impacts.

Social information refers to the impact that companies have on employees, supply chains, local communities and society at large. Example attributes include efforts to protect human rights, non-discrimination, diversity, advancement, pay equality, parental support, fair labor practices, consumer protection, animal welfare, local training, and community capacity building. Social attributes may be the most difficult to quantify, but pose increasingly significant risks for brand reputation and share value.

Corporate governance is a system of controls and procedures by which a company manages its internal affairs and relationships with its stakeholders, including customers, shareholders, investors, suppliers, governments, communities and employees. Examples of governance attributes include management structure, executive compensation, audits, internal controls, board diversity, shareholder rights and transparency. The board of directors is primarily responsible for setting governance standards, mediating conflicts among stakeholders and monitoring the company on behalf of shareholders.

**B. Who is interested in ESG information?** Public and private companies face a variety of formal and informal stakeholders with increasing interest in ESG information, which is beginning to play a significant role in consumer and investor decision-making. Any snippet of negative information can be amplified by traditional and social media, resulting in a significant short or long-term impact on brand reputation, sales, and share price. Companies struggle to find the sweet spot of ESG reporting, somewhere between reporting too little and reporting too much.

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<sup>1</sup> Ms. Whiting would like to thank Foley & Lardner LLP associates Amanda L. Aragon, Hillary N. Vedvig and Richard E. Guyer for their enthusiastic assistance in the preparation of this paper.

<b>Stakeholders</b>	<b>Examples of Potential Areas of Concern</b>
Customers	Product safety, treatment of employees, environmental impact, raw material sourcing, and social/environmental impact; anything that impacts the reputation of the company
Traditional Shareholders	Material information that could impact share price
Modern and Activist Shareholders	Material information; evidence of behavior that violates the ethical or social norms of the shareholder
Investors	Anything that could impact profits or share price
Suppliers	Environmental impact, manufacturing and labor practices; internal controls
Governments	Compliance in all areas, environmental impact, labor relations, internal controls
Communities	Environmental impact, local employment and training, wages, emergency response, diversity
Employees	Anything that could jeopardize company/job viability, labor relations, wages, diversity, parity, work-life balance, good governance; environmental performance

**C. What (or Who) Is Behind the Proliferation of ESG Reporting?** Worker safety and environmental reporting is nothing new, and companies are always eager to publicize local community charity and support efforts. More recently, large corporations have been proud to highlight progress in diversifying their workforces. What is new, however, is the mushrooming demand from supply chain actors, investors and activists to adhere to new external ESG operating standards and to report comprehensive ESG data and operating information on a variety of platforms. Operating procedures and data once closely held by corporate managers is now everybody's business.

Health, Environment and Safety Reports. For decades, heavy industry has been voluntarily reporting environmental and worker safety information through self-produced annual Environment, Health and Safety ("EHS") reports, emphasizing the environmental and safety compliance metrics unique to the reporting company's operations and industry. Perhaps originally produced in order to counteract the publicity of environmental disasters and ENGO criticism, the reports strive to demonstrate that the company is a good steward of the environment. The reports have evolved to more broadly describe the firm's overall Environment, Health and Safety *Program* and aspirations. In some ways EHS reports provided public justification for the company's social license to operate. Originally distributed as a glossy brochure with the annual report to shareholders, EHS information today is also posted in a variety of formats on the company's website. Critics of the traditional EHS report object to the selective nature of the information, the lack of transparency in how the data are derived and the inconsistency among various company reports that prohibits a meaningful comparison of performance and risk factors.

Corporate Social Responsibility Reports. On a parallel path, private firms began to embrace an international business management strategy known as Corporate Social Responsibility



(“CSR”). At its most basic level, a CSR strategy generally involves operating at a level that exceeds regulatory requirements in order to advance some social good. Motivations for a CSR approach are varied, ranging from the ethical desires of the company founder to the strategic belief that an enterprise can reduce risk and increase long-term profits by integrating CSR behaviors into profits-seeking financial strategies. CSR implementation approaches include local or business-aligned corporate philanthropy, mission-driven enterprises (e.g., low-income housing), cause-related marketing (e.g., TOMS Shoes) and supply-chain certifications (e.g., Fair Trade). Unless well-integrated into operations, CSR efforts may be disparaged for simply “greenwashing” corporate greed. But whatever the motivation for CSR, firms feel compelled to publicize their efforts, which has led to stand-alone CSR Reports, or the integration of CSR and EHS information into combined reports (paper or electronic) for stakeholders. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2957820](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2957820)

Sustainability Reports. More recently, stakeholder demand for “sustainable” enterprise has dominated the public conversation and need for a wider universe of ESG-type disclosures, including economic issues, through Sustainability Reports. The UN World Commission on Environment and Development defines the concept of sustainability in terms of development: “Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.” The U.S. EPA explains that “[t]o pursue sustainability is to create and maintain the conditions under which humans and nature can exist in productive harmony to support present and future generations.”

UN Global Compact. In order to promote sustainable development and responsible business practices, the United Nations (“UN”) first brought together governments, businesses, and labor in 1999 through a collaborative forum process known as the UN Global Compact. The Compact launched The Ten Principles for responsible business practices in 2004, which address human rights, labor, the environment and anti-corruption practices. <https://www.unglobalcompact.org/what-is-gc/mission/principles> Over 8,000 businesses worldwide have committed to implement the Ten Principles, including L’Oréal, Bayer AG, Coca-Cola, and Deloitte, and 4000 governments, including a few cities in the U.S. such as Milwaukee and San Francisco. <https://www.unglobalcompact.org/what-is-gc/participants>

The UN Sustainable Development Goals. Following the expiration of the Global Compact’s Millennium Development Goals in 2015, the UN adopted The UN Sustainable Development Goals (“SDGs”), which are a collection of 17 global goals set by the United Nations General Assembly in 2015. The SDGs are part of Resolution 70/1 of the United Nations General Assembly: “Transforming our world: the 2030 Agenda for Sustainable Development” (shortened to “2030 Agenda”). The goals are broad and interdependent, yet each has a separate list of targets to achieve. Achieving all 169 targets would signal accomplishing all 17 goals. The SDGs cover social and economic development issues including poverty, hunger, health, education, global warming, gender equality, water, sanitation, energy, urbanization, environment and social justice. Remarkably, many corporations around the world are strategically adopting selected SDGs and aligning their corporate sustainability programs with the goals and related targets. The simple, colorful graphic SDG icons are easily recognizable on corporate websites and literature. <https://www.un.org/sustainabledevelopment/sustainable-development-goals/>



Any individual or organization can follow, join, and create SDG actions around the globe by downloading the app “SDGs in Action” in the App Store or on Google Play.

CERES and Sustainability Reporting. Meanwhile, a parallel initiative aimed in-part at the business investment community was developed under the auspices of CERES, the Coalition for Environmentally Responsible Economies and the Tellus Institute, with the support of the UN Environment Programme. CERES launched the first Sustainability Reporting Framework and Reporting Guidelines in 2000, with the goal of ensuring corporate accountability to the 10 Ceres Principles geared toward environmental sustainability.

Global Reporting Initiative. Ceres then formed an independent non-profit organization, the Global Reporting Initiative (“GRI”), which has become the most widely used ESG and sustainability framework for reporting by multinational companies, small enterprises, governments, NGOs, and industry groups in over 90 countries. Now in its fifth iteration, the GRI Standards program provides a modular framework, guidance, and training on how to prepare a self-published report for measuring and communicating economic, environmental, social, and governance performance. <https://www.globalreporting.org/Pages/default.aspx> Once complete, a reporting entity may register the report with GRI (in glossy format and indexed to GRI Standards) and make it available to investors and the general public. <https://database.globalreporting.org/>

Directive of the European Parliament. A significant benefit of preparing a GRI-compliant report is that it satisfies the 2014 Directive of the European Parliament that large European-based companies prepare non-financial statements on environmental, social, employee-related, anti-corruption and bribery matters, respect for human rights, and diversity. (Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014). In response to this Directive, European-based companies began in earnest to require extensive ESG disclosures from their US-based supply chain partners, and in some cases, certification of adherence to the European company’s CSR/sustainability standards.

CDP. Another reporting initiative was launched in 2002. The London-based CDP (formerly the Carbon Disclosure Project) is specifically geared toward helping the investment community assess sustainability issues among target and portfolio companies. Investors and customers can request climate/carbon, water security and/or forest-related information from companies via CDP. Respondents (and self-selected companies) provide voluntary disclosures to CDP and may elect whether or not to make the information available to the requesting investors, the customers, and the public. CDP analyzes and scores the responses. Scoring is designed to motivate companies to take action to reduce negative impacts on the environment. Investors may

use the information to assess a company's financial vulnerability to climate change risk. Think of it as a form of outsourced due diligence. Over 7,000 companies responded last year, and over 525 investors with \$96 trillion in assets requested information through CDP last year. <https://www.cdp.net/en>

Principles of Responsible Investing. At the invitation of the United Nations in 2005, institutional investors developed a framework and reporting platform to support sustainable investment practices. PRI is a non-profit organization that promotes the integration of ESG factors into investment decisions. PRI asks large institutional investors to adhere voluntarily to its Principles for Responsible Investment and to report annually the extent to which they implement the Principles. The Principles call for investors to “incorporate ESG issues into investment analysis and decision-making processes,” to seek “appropriate disclosure on ESG issues” by the entities in which they invest and to “promote implementation of the Principles within the investment community.” Signatories may access each other's data and will receive feedback from PRI's annual assessment of their data, including an assessment score. Signatories include BlackRock, State Street Global Advisors, and The Vanguard Group. Much of a signatory party's investment data, including ESG information, is publically available in a Transparency Report. <https://www.unpri.org/>

#### **D. How Are Investors Driving ESG Performance and Reporting?**

Socially Responsible Investing. The Forum for Sustainable and Responsible Investment defines sustainable, responsible, and impact investing (“SRI”) as an “investment discipline that considers ESG criteria to generate long-term competitive financial returns and positive societal impact.” The Forum's mission is to see a rapid shift of investment practices toward sustainability. <https://www.ussif.org/>

Early responsible investing often involved “negative/exclusionary screening” – withdrawing investments from socially undesirable companies, such as tobacco producers. Modern responsible investors more readily approach investment targets using “positive/best-in-class screening” based on ESG performance relative to industry peers. Increasingly, investors are applying an “ESG integration” approach to their portfolios, which is the systematic and explicit inclusion by investment managers of ESG factors into financial analysis. Additional responsible investment strategies include “impact investing,” i.e., targeted investments aimed at solving social or environmental problems, such as new soil monitoring technology to promote water efficiency. The Forum identified about \$12.0 trillion in total assets under management in 2017 using sustainable, responsible, and impact investing strategies, relying in part on reported ESG information.

Sustainable Indices. To help target sustainable investment, the Dow Jones Sustainability Indices were launched in 1999 and have become significant investment benchmarks for sustainable investing. To be incorporated into a Dow Jones index, a company is assessed based on long-term ESG plans and must continue to make progress against its ESG goals in order to remain in the fund.

Third Party Scoring/Rating Services. Several financial-industry focused ESG platforms have emerged to provide investors with additional ESG data and/or analysis derived from

independent sources, in addition to the target company's self-reported data. For example, Institutional Shareholder Services ("ISS") provides ESG screening, ratings, and analytics to help investors develop and integrate responsible policies and practices into their investment strategies. In 2018, ISS launched the *Environmental & Social QualityScore* and the *Governance QualityScore*, providing a data-driven approach to measuring the quality of corporate ESG disclosures and identifying key disclosure omissions. The scoring effort covers about 4,700 companies across 24 industries considered to have the most exposure to ESG risks. <https://www.issgovernance.com/esg/rankings/environmental-social-qualityscore/>

Delaware Voluntary Certification. On June 27, 2018, the State of Delaware, with jurisdiction over thousands of corporations, enacted the Delaware Certification of Adoption of Transparency and Sustainability Standards Act, which became effective on October 1, 2018. The first of its kind in the U.S., it provides Delaware-governed entities a voluntary forum for demonstrating a commitment to corporate and social responsibility and sustainability. Companies that participate in the program can obtain a certification of adoption of transparency and sustainability standards from the Delaware Secretary of State. To obtain a certificate, the company must adopt and post on its website a set of standards and assessment measures and periodic self-assessment reports. If a company is a reporting entity, it may publicly disclose its participation in Delaware's sustainability reporting program.

#### **E. A Steady Drumbeat from Investors for More Disclosures and Uniformity**

SEC Guidance on Climate Risk Disclosure. Although the U.S. Securities and Exchange Commission ("SEC") has yet to address head-on potential ESG disclosure requirements, it has acknowledged the potential need for companies to disclose climate-related risks. In response to a petition from a coalition of institutional investors and ENGOs, the SEC issued an interpretive release in 2010 entitled *Commission Guidance Regarding Disclosure Related to Climate Change* to help clarify how existing SEC disclosure requirements apply for climate-related matters. [Release Nos. 33-9106; 34-61469] Securities Act Rule 408 and Exchange Act Rule 12b-20 require a registrant to disclose, in addition to the information expressly required by regulation, "such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading." The most pertinent non-financial disclosure rules of Regulation S-K include: (i) Item 101, Description of Business; (ii) Item 103, Legal Proceedings; (iii) Item 503(c), Risk Factors; and (iv) Item 303, Management's Discussion and Analysis. 17 C.F.R. Parts 210 and 229. The SEC highlighted the ways in which climate change may trigger disclosure obligations: (1) the direct impact of climate-related legislation, regulations, and international accords; (2) the indirect impact of regulations and resulting business trends, both positive and negative; and (3) the physical impacts of climate change.

GAO Report on Climate Risk Disclosures. In April 2016, the SEC requested public input on modernizing certain business and financial disclosure requirements, including potential changes in reporting climate-related risks in SEC filings. Congress subsequently requested that the U.S. Government Accountability Office ("GAO") review the SEC's disclosure requirements. The GAO issued a report on its review in February 2018 and noted that: (a) the SEC faces constraints in reviewing climate-related disclosures because it primarily relies on information that companies provide; (b) climate-related disclosures vary in formats and specificity, making it

difficult for SEC reviewers and investors to compare and analyze related disclosures across company filings; and (c) although some investor groups and asset manager firms have expressed the need for more climate-related disclosures, there is no consensus on the priority of such disclosures. <https://www.gao.gov/products/GAO-18-188>

Petition for SEC Rulemaking for ESG Disclosures. On October 1, 2018, a coalition of law professors and investors representing over \$5 trillion in assets under management submitted a petition to the SEC for rulemaking on uniform ESG disclosure. At present, it appears the SEC is concerned that not all ESG information would be considered material by a reasonable investor, and thus is not currently suitable for a prescriptive rulemaking. <https://www.sec.gov/rules/petitions/2018/petn4-730.pdf>

SASB Standards. The Sustainability Accounting Standards Board (“SASB”) was founded in 2011 to develop and disseminate sustainability accounting standards. Similar to what the Financial Accounting Standards Board has done for financial reporting, SASB aims to integrate its standards into the Form 10-K filed by public companies with the SEC. SASB recognizes investors’ need to focus on ESG information that is *material* to operating performance and to an investment decision. The final SASB standards, released in November 2018, cover ten broad industry sectors and are broken down into over 80 individual industrial categories, allowing for an emphasis on material information and the ability to compare the performance of different companies with a particular industry. The standards were developed based on extensive feedback from companies and investors as part of a publicly-documented process. Current SASB alliance members include well known institutional investors, asset managers, and financial advisors. Over 70 companies have started using the SASB standards in public reports, including eight companies incorporating the ESG information into annual SEC filings. <https://www.sasb.org/>

CDSB. Formed in 2007 as a project of CDP, the London-based Climate Disclosure Standards Board (“CDSB”) is an international consortium of business and environmental NGOs. The CDSB Framework for reporting environmental, climate, and natural capital information is designed to help organizations present the information in existing mainstream reports for the benefit of investors. The Framework was updated in April 2018 to align with the TCFD recommendations.

TCDF. The Task Force on Climate-Related Financial Disclosures (“TCFD”) was set up in 2015 by the Financial Stability Board (“FSB,” formed by the G20 major economies following the global financial crisis) to develop voluntary, consistent climate-related financial risk disclosure protocols for use by companies, banks, and investors in providing information to stakeholders. The motivating idea is that the availability of more reliable information on the exposure of financial institutions to climate-related risks and opportunities will strengthen the stability of the financial system and facilitate the transition to a more stable and sustainable global economy. Chaired by Michael Bloomberg, in 2017 the Task Force issued comprehensive recommendations and guidance on how climate-related financial disclosures should be prepared. The recommendations are structured around four core elements of how organizations operate – governance, strategy, risk management, and metrics & targets. The Task Force also issued comprehensive implementation guidance for the finance sector and for four non-financial groups: the energy group, the transportation group, the materials and buildings group, and the agriculture, food, and forest products group. TCDF guidance is intended to be used in conjunction with the



TCDF recommendations, the SASB standards, and the CDSB framework. The Task Force issued a financial disclosure status report in June 2019, finding that the number of disclosing companies increased by 15%. Citing the Intergovernmental Panel on Climate Change report issued in October 2018, Global Warming of 1.5° C, the Task Force called for accelerated progress in disclosures in order to channel investment to sustainable and resilient solutions and business models.

Nasdaq ESG Reporting Guidelines – Nasdaq, the trading home for over 4,000 public companies, released its ESG Reporting Guide 2.0 in May 2019. The Guide includes the latest widely-used third-party reporting methodologies and aims to help public and private companies manage and customize the voluntary ESG disclosure process, with an emphasis on materiality. Nasdaq suggests that the Guide may stimulate additional ESG implementation measures, such as:

- Internal documentation and management of ESG performance data
- Inclusion of material ESG indicators in enterprise risk management (ERM) systems
- Peer and competitor benchmarking and analysis
- Undertaking a materiality assessment and publishing the results of that assessment
- Greater engagement with current and prospective employees on sustainability issues
- Productive meetings with investors and analysts
- Integration of ESG metrics into management performance (and remuneration) indicators
- Formal inclusion of ESG data in board practice and oversight
- Inclusion in indexes and other lists related to ESG outperformance
- Disclosure of ESG data in stand-alone sustainability reports
- Disclosure of ESG data to established sustainability reporting frameworks
- Disclosure of ESG data in financial filing and investor documents
- Creation of products and services that address sustainability concerns (such as the SDGs)

<https://business.nasdaq.com/esg-guide>

## **II. Transparency, Reliance and Legal Risk**

**A. ESGs as Due Diligence.** Investors and other stakeholders are demanding ESG information and transparency in how the data was developed and how a company *implements* the various environmental, social and governance elements that make up its chosen CSR/sustainability program. There are plenty of studies to support the proposition that a company with robust ESG metrics will thrive and even out-perform its peers over the long term.

<https://www.fool.com/investing/2019/05/22/does-esg-investing-produce-better-stock-returns.aspx>

In some respects, the reporting and analysis of ESG metrics provides investors and potential investors with important non-financial *due diligence* information. To the extent that information is vetted by a third party scoring service, the investor has essentially out-sourced part of its diligence effort. Beyond mere ESG implementation, companies are electing, or are being pushed by investors, to set measurable ESG *targets* for continuous improvement with deadlines. Whether motivated by the UN's SDGs or a desire to see progress in greenhouse gas reductions, investors and activists are likely to monitor a company's progress toward meeting its goals, to engage with the companies, and to hold them accountable. Significantly, investors increasingly

rely on ESG disclosures to flag a company's weaknesses and *vulnerabilities*. Investors want to understand exactly how social issues, as well as the environment and a changing climate will impact company operations and long term sustainability.

Corporate ESG information is distributed in a many locations, some more formal than others, including glossy annual company reports, company websites, corporate codes of conduct, policies and procedures, marketing brochures, product packaging, investment offerings, SEC filings, third party self-disclosure platforms, submissions to third party scoring services, and in conference calls and meetings with analysts and investors. Interested stakeholders of all stripes increasingly view ESG statements as fact, not puffery, and rely on the information to make decisions. Successful consumer and investor lawsuits based on false, misleading, or contradictory ESG claims are sparse, but the legal foundation is in place. One can only assume that as investors make significant financial investments in reliance on ESG-related statements, more claims will be brought, standing will be upheld, and corporate liability will be established.

**B. Liability under the Securities Exchange Act of 1934 ("Exchange Act").** Section 10(b) of the Exchange Act, as well as SEC Rule 10b-5, contain anti-fraud provisions which create liability for fraudulent statements made to investors. This applies to statements made anywhere, even outside of formal SEC filings. Furthermore, public company CEOs and CFOs, who are required to certify quarterly and annual reports filed with the SEC, potentially face "control person" liability under Section 20(a) of the Exchange Act if ESG disclosures, even those hyperlinked within the filings, are not accurate.

Specificity of Statements Made in ESG Disclosures. The most common federal securities class actions arising from public ESG disclosures have been brought under Sections 10(b) and 20(a) of the Exchange Act. Under Section 10(b) of the Exchange Act, a statement must be false or misleading and material to a reasonable investor. In other words, the success of the case depends on whether the ESG disclosures were specific and measurable enough to realistically be misleading. If an ESG disclosure is so clearly aspirational that a reasonable investor could not rely on it, courts generally do not consider the ESG disclosure to be false or misleading. For example, in *Bondali v. Yum! Brands, Inc.*, the Sixth Circuit dismissed a Section 10(b) action against Yum! Brands ("Yum") that was based on Yum's SEC filings and earning calls emphasizing the company's commitment to "strict" food quality and "food safety." Ultimately, the court held that these claims, whether made in the company's Code of Conduct or SEC filings, were "too squishy, too untethered to anything measureable, to communicate anything that a reasonable person would deem important to a securities investment decision." 620 F. App'x (6th Cir. 2015); *In re Yum! Brands, Inc. Sec. Litig.*, 73 F. Supp. 3d 846,862–63 (W.D. Ky. 2014), *aff'd sub. nom. Bondali v. Yum! Brands, Inc.*, 620 F. App'x 483 (6th Cir. 2015).

If ESG disclosures are concrete and measurable, however, then courts may find these claims actionable. In 2012, following the Deepwater Horizon incident, Plaintiffs brought a Section 10(b) action against BP based on several statements BP made explicitly highlighting safety reform efforts made following previous accidents in 2005 and 2006. These statements were made in sustainability reports, in annual reviews and reports, and during analyst calls. The Southern Texas District Court found these statements to be actionable because they were made as "statement[s] of existing fact" that "cover[ed] all aspects of [BP's] operations." *In re. BP plc, Sec Litig.*, No. 4:12-cv-1256, 2013 WL 6383968 (S.D. Tex., Dec. 5, 2013). A similar case was brought following a



coal mine fire in 2006. The Southern District of West Virginia found ESG disclosures actionable under a Section 10(b) claim because defendant Massey Energy stated in its SEC filings, in its press releases, and in its corporate social responsibility reports that “safety was the ‘first priority every day’ at Massey,” and that it was an “industry leader in safety.” *In re Massey Energy Sec. Litig.*, 883 F. Supp. 2d 597 (S.D. W. Va. 2012).

To reduce risk, companies should have procedures in place to confirm the accuracy of ESG-related statements (metrics, goals, programs, risks, policies, procedures, etc.), regardless of where the statements are made. Where sufficient leeway exists, companies should set process-based or soft goals, rather than clearly measureable targets.

An individual may still be liable under SEC Rule 10b-5 for disseminating a false statement, even if he or she did not “make” the statement. In *Lorenzo v. Securities and Exchange Commission*, an investment banker at a brokerage firm sent two emails that he knew contained false statements in an effort to solicit investments in an offering. The emails had been drafted by and sent at the request of the banker’s boss. 139 S. Ct. 1094 (2019). The Court considered the potential liability for a false statement that is not “made” by a person under the Court’s 2011 decision in *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011). In *Janus*, the Court held that only a “maker” of a statement – one who has “ultimate authority” over the statement’s content and whether to communicate it – can be liable for violations of Rule 10b-5(b), because 10b-5(b) specifically addresses “untrue statement[s]”. The Court held that a person who did not “make” a false statement under Rule 10b-5(b) may nonetheless be liable under Rule 10b-5(a) or (c) if he or she disseminates a false statement with intent to defraud. The Court ruled that dissemination of someone else’s false statements falls within the language of (a) and (c) of Rule 10b-5, which prohibit “devices,” “schemes,” and “artifices to defraud” as well as “act[s], practice[s], or course[s] of business” that “operate...as a fraud or deceit.” The Court affirmed *Janus* but held that a disseminator with the requisite scienter can be primarily liable under 10b-5(a) and (c) AND secondarily liable for aiding and abetting a violation of 10b-5(b).

The *Lorenzo* ruling strengthens the ability of the SEC and plaintiffs in private securities fraud suits to pursue those who engage in fraudulent schemes or practices in situations where the only conduct involved concerns a material misstatement and they are not the “makers” of the misstatement. This ruling has broad implications for anyone responsible for communicating ESG information to investors, even if not individually responsible for the content of those communications. However, it should be noted that the extent of liability is limited by the scienter requirement – the intent to defraud.

The Delaware Supreme Court recently issued a potentially significant decision for the use of ESG information, applying the *Caremark* doctrine concerning a corporate board’s duty of loyalty to the company. In sum, a Board of Directors may be held liable if directors fail to make a good faith effort to put into place a reasonable information and reporting system about the corporation’s central compliance risks. This decision came following an incident in 2015 when Blue Bell Creameries USA, Inc., made and distributed ice cream tainted with *listeria* bacteria. As a result, eight people were sickened, three of whom died. The Court held that the directors failed to satisfy their duty of loyalty because even though a management-level compliance program existed, that was not sufficient to avoid company exposure where that company is responsible for

a single food product, here ice cream, and in which the company's "mission critical" compliance issue is food safety. *Marchand v. Barnhill*, No. 533, 2018 (Del. June 19, 2019).

**C. Liability under State Consumer Protection and Anti-Fraud Statutes and Regulations.** ESG statements made almost anywhere, such as on websites, on labels, or in corporate social responsibility reports, may be challenged by consumers under federal and state consumer protection and anti-fraud statutes as false or misleading. If the company's ESG statements are sufficiently concrete as to be false or misleading, it may face liability. While the cases discussed below do not define liability, the companies no doubt incurred extensive legal fees and negative publicity, which suggests that companies should proactively look for opportunities to align their supply chains with positive ESG targets, in lieu of being forced to defend the company against allegations of questionable practices.

The Ninth Circuit decided several omissions-based class action lawsuits based on companies' alleged failure to disclose information. The Ninth Circuit consolidated seven of these omissions-based class actions, including: *Dana v. The Hershey Co.*, No. 16-15789, 2016 WL 1213915 (N.D. Cal. Mar. 29, 2016) (holding that Hershey was not required to disclose that its products contained coca beans harvested by children and forced laborers because "the weight of authority limits a duty to disclose . . . to issues of product safety unless disclosure is necessary to counter an affirmative representation"); and *Wirth v. Mars, Inc., Mars Petcare US, and Iams Co.*, No. 15-cv-1470, 2016 WL 471234 (C.D. Cal. Feb. 5, 2016) (holding that Mars was not required to disclose that seafood used in pet food may have been caught by Thai fishing boats using forced labor). On July 10, 2018, the Ninth Circuit upheld the district court's decisions in all seven cases, all based on similar omission-based claims as in *Dana* and *Wirth*, for the following reasons:

- Plaintiffs failed to allege that the existence of forced labor in the supply chain affected the products' central function and therefore, defendants were under no duty to disclose;
- Defendant's omission was not contrary to a representation actually made by defendant and was not an omission of a fact defendant was obliged to disclose and therefore the omission was not actionable under California's Consumers Legal Remedies Act ("CLRA");
- Plaintiffs did not state an Unfair Competition Law ("UCL") claim because Defendants did not have a duty to disclose the forced labor; and
- Plaintiffs' False Advertising Law ("FAL") claims failed because failing to disclose a fact that Defendants did not have a duty to disclose was not likely to deceive anyone.

*Wirth v. Mars, Inc.*, 730 F. App'x 468, (Mem)—469 (9th Cir. 2018) (unpublished decision); *Dana v. Hershey Co.*, 730 F. App'x 460, 461 (9th Cir. 2018) (unpublished decision).

Recently, the Ninth Circuit relied on these opinions to uphold the district court's decision in *Sud v. Costco Wholesale Corp.*, No. 4:15-cv-03783, 2017 WL 345994, at \*5 (N.D. Cal. Jan. 24, 2017) to dismiss Plaintiff's claim that Costco violated California consumer protection laws by failing to disclose forced labor in the supply chain of prawns sold in Costco stores. 731 F. App'x 719, 720 (9th Cir. 2018) (unpublished decision). The court held that slave labor in a product's supply chain did not relate to the central functionality of a food product. *Id.* at 864. The court further held that the plaintiffs' claims under the CLRA, the unlawful and fraudulent prongs of the UCL and the FAL all required showing that Costco had a duty to disclose forced labor in the product supply chain, which the Plaintiff did not.

Using an ESG-type claim to recast the image of a plastic pre-packaged food product by using the word “fresh” on the label also carries risks. In *Shane v. Fla. Bottling, Inc.*, 2017 WL 8240786, at \*1 (C.D. Cal., 2017), Plaintiff brought a class action challenging a subsidiary of Florida Bottling’s use of the terms “cold pressed” and “fresh pressed” on its juices. Plaintiff claimed that the juices were actually “heat pressed” and “pasteurized” and were therefore false and misleading in violation of the following:

- breach of express warranty under section 2313 of the California Commercial Code;
- breach of implied warranty of merchantability under section 2314 of the California Commercial Code;
- “unlawful” business practices in violation of California's Unfair Competition Law (“UCL”), Sections 17200 et seq. of California's Business and Professions Code;
- “unfair” business practices in violation of the UCL;
- “fraudulent” business practices in violation of the UCL;
- false advertising in violation of California's False Advertising Law (“FAL”), California Business and Professions Code section 17500 et seq.;
- violation of the Consumer Legal Remedies Act (“CLRA”), sections 1750 et seq. of California's Civil Code; and
- restitution based on a theory of quasi-contract or unjust enrichment.

The court in *Shane* ultimately dismissed Plaintiffs' UCL, CLRA, and FAL claims for lack of particularity with leave to amend, and dismissed Plaintiff's implied warranty claim without leave to amend. The court allowed the other claims to proceed.

Often claims such as these fail for vagueness and lack of injury. For example, in *Veal v. Citrus World, Inc.*, 2013 WL 120761, at \*10 (N.D. Ala. 2013), the court rejected Plaintiff’s claims that that Florida’s Natural Orange Juice was not “fresh” “100%” or “pure” and was therefore misleading because, “[t]he fact that the plaintiff may have believed defendant hired individuals to hand squeeze fresh oranges one by one into juice cartons, then boxed up and delivered the same all over the country does not translate into a concrete injury to plaintiff upon his learning that beliefs about commercially grown and produced orange juice were incorrect.”

**D. Case Study – *Smith v. Keurig Green Mountain, Inc.*, No. 4:18-cv-06690 (N.D. Cal. 2019).** Plaintiff Kathleen Smith brought a class action against Defendant Keurig Green Mountain, Inc. (“Keurig”), alleging that Defendant’s “recyclable” single-serve plastic coffee pods were mislabeled because they are not in fact recyclable, due to their size, composition, and a lack of a market to reuse the pods. Specifically, Plaintiff claimed:

- The pods are made from Polypropylene (#5) plastic—a material currently accepted for recycling in approximately 61% of U.S. communities—domestic municipal recycling facilities (“MRFs”) are not equipped to capture materials as small as the Pods and separate them from the general waste stream; and
- Keurig’s instructions further impede the Pods’ recyclability by advising users that they need not remove the Pods’ paper filter, which ensures contamination. And due to the Pods’ design, their foil lids are difficult to remove, posing another risk of contamination

Plaintiff asserted liability under the following: (1) breach of express warranty, (2) violation of the California Consumers Legal Remedies Act (“CLRA”), (3) violation of California’s Unfair Competition Law (“UCL”) based on fraudulent acts and practices, (4) violation of the UCL based on commission of unlawful acts, (5) violation of the UCL based on unfair acts and practices, and (6) unjust enrichment.

The Court’s Order set forth case as follows:

- Defendant argued that Plaintiff lacked standing. The court rejected this argument.
  - *Injury-in-fact*: Plaintiff has sufficiently alleged an injury-in-fact because Plaintiff had other available alternatives at the time of her purchase.
  - *Causation*: Plaintiff suffered economic injury due to Defendant’s mislabeling because she paid more than she would have paid had she known the Pods were not recyclable.
  - *Redressability*: Plaintiff’s alleged injury is not that she was unable to recycle the Pods, but instead that she was misled to believe they were recyclable due to Defendant’s mislabeling. Accordingly, Plaintiff’s injury would be redressed not by enabling her to recycle, but by making her whole and preventing Defendant’s alleged mislabeling.
  - *Standing for Injunctive Relief*: Keurig contends that Plaintiff lacks standing for injunctive relief because there is no risk of future deception to Plaintiff, because Keurig would have to enlarge the pods to make them recyclable, and so the consumer would be able to assess the changes. The court rejected this argument, noting that Keurig could plausibly make recyclable Pods without changing their size.
- Defendant argued failure to state a claim because Keurig’s labeling is truthful and consistent with what is known as the “Green Guides.” The court rejected this argument as premature at this stage.
  - Title 16, Section 260.12 of the Code of Federal Regulations (“the Green Guides”) establishes commercial practices regarding recyclability claims. It states that “[a] product or package should not be marketed as recyclable unless it can be collected, separated, or otherwise recovered from the waste stream through an established recycling program for reuse or use in manufacturing or assembling another item.” 16 C.F.R. § 260.12(a).
  - But the Green Guides also state that if a product is rendered non-recyclable because of its size or components—even if the product’s composite materials are recyclable—then labeling the product as recyclable would constitute deceptive marketing.
  - Thus, even following Keurig’s logic that the Green Guides might operate as a liability shield, the allegations in the complaint are not precluded based on the Green Guides’ plain text.
- CLRA and UCL Claims
  - Defendant argued it is implausible that a reasonable consumer under the circumstances—i.e. a consumer who wants to preserve the environment—would not understand the recyclability of the Pods in light of the disclaiming language that

they are “[n]ot recyclable in all communities” and the directive for consumers to “check locally” to determine recyclability at their local MRFs.

- The court rejected this argument based on the reasonable consumer test for two reasons:
  - (1) Keurig again ignores that the complaint avers that the disputed Pods are not recyclable at all. As a result, Defendant’s purportedly analogous cases where disclaimers were sufficient to render an advertisement not false or misleading are irrelevant. Similarly, cases where courts have found that a modicum of common sense would reveal the truth behind advertising are also inapplicable: common sense would not so clearly lead a person to believe that a package labeled “recyclable” is not recyclable anywhere.
  - (2) Although Keurig argues that its labeling is sufficient under the Green Guides, as discussed above, the complaint alleges facts that indicate the opposite, facts which this Court must accept as true at this stage
- Express Warranty
  - Plaintiff identifies the label “recyclable” as an express warranty and alleges that Keurig breached this warranty because the Pods are not recyclable. Defendant contends that the qualifying statements on the Pods’ packaging that say “check locally to recycle empty cup” preclude a breach of express warranty claim.
  - For a breach of express warranty claim under California law, a plaintiff must allege: (1) the exact terms of the warranty, (2) reasonable reliance thereon, and (3) that the breach of that warranty proximately caused plaintiff’s injury.
    - Plaintiff has sufficiently alleged a breach of express warranty claim. To start, although Keurig argues that the statement “recyclable” is equivocal because there is a qualifying statement that the Pods are “not recycled by all communities,” Plaintiff disputes that this language is anywhere on the relevant packaging.
    - Also, although Defendant characterizes the “check locally to recycle empty cup” language as advising consumers to check with their local MRFs to find out if they can recycle the Pods, Plaintiff maintains that the more reasonable interpretation of this language is as a directive telling consumers to check with local MRFs to learn *how* to recycle the Pods.
- Unjust Enrichment
  - Plaintiff argued she would not have bought the Pods at the price she did had she known the Pods were not recyclable and that Defendant was wrongly enriched by those purchases.
  - There is generally “no cause of action in California for unjust enrichment.” The court construed this as a quasi-contract seeking restitution for the money wrongly earned by Defendant.
- First Amendment
  - Defendant argued that Plaintiff’s invocation of the Green Guides is tantamount to compelling speech by requiring Defendant to change its labeling of the Pods, and that such compelled speech violates the First Amendment.

- The court rejected this argument, noting that “Keurig again advances arguments that are unwarranted when taking all facts alleged in the complaint as true. The complaint alleges that the Pods are not recyclable at all. Taking that allegation as true, it does not follow that Plaintiff seeks to compel Defendant to finetune its qualifying statement; rather, Plaintiff seeks to stop Defendant from mislabeling the Pods as ‘recyclable,’ because it alleges that statement is false.”
- Class Allegation
  - Defendant last moved to strike Plaintiff’s class allegations, claiming that the class definition is overbroad. The court rejected this argument.
  - Plaintiff alleged that the Pods are not recyclable anywhere; unless this dispute of fact is resolved in Defendant’s favor, a proposed class of people who purchased the Pods does not seem overbroad, as everyone who purchased the Pods, regardless of the capabilities of their local MRFs, would be affected.

**E. Real World Case Study: Falling Behind on ESG- JanSport.** In 2014, Cornell University and 14 other U.S. colleges terminated their contracts with JanSport after its parent company, VF Corporation, refused to sign a five-year, legally binding Accord on Worker Safety. This Accord followed the Rana Plaza factory collapse in Bangladesh that killed 1,129 workers and injured more than 2,000. Originally, Cornell University upheld its contract with JanSport, since JanSport itself did not operate in Bangladesh. However, following widespread student and faculty protests and pressure, Cornell University cut ties with JanSport. In fact, the general manager of the Cornell Store, which sells on-campus Cornell merchandise and apparel, noted that due to the many schools that cut ties with the JanSport, “[t]here’re actually a number of brands that are starting to make sweatshirts and backpacks that are similar to JanSport’s style.”

### **III. ESG Best Practices for Lawyers**

- Verify the accuracy of ESG statements, regardless of what form the statements appear.
- Perform and oversee audits of ESG disclosures is necessary.
- Ensure that ESG statements are either based in fact, or are “soft” statements without measurable metrics.
- Focus on appropriate oversight of governance frameworks that promote transparency, accountability, and adaptability.
- Be aware of liability and accountability of boards and companies for their actions or inactions.
- Build the right frameworks, policies, procedures, controls, and evidence needed to identify compliance concerns.
- Manage enforcement threats on the reputation, financial health, and operation performance of a company.
- Be aware of enforcement risks that stem from voluntarily principles like human rights and the environment as well as from traditional areas, like anti-bribery and corruption, competition, and taxation.
- Communicate with regulators as needed to minimize conflict, inconsistency, or disarray.
- Prioritize the time and resources needed to support ESG goals.

- Regularize internal engagement of ESG goals.
- Engage with third-parties and external advisors may play in achieving ESG goals.
- Proactively engage with C-Suite/Board on ESG goals.
- Communicate strategic importance of ESG goals with legal team.



## Matthew Z. Leopold's Bio



Matthew Z. Leopold was appointed by President Trump on September 1, 2017 and confirmed by the U.S. Senate as EPA's General Counsel on December 14, 2017. He comes to the Agency from private practice in Tallahassee, Florida at the law firm of Carlton Fields. He previously served as the General Counsel of the Florida Department of Environment Protection (DEP) and as an attorney at the U.S. Department of Justice (DOJ), Environment and Natural Resources Division. During his years of federal and state government service, and in private practice, he handled a broad range of environment and natural resource law issues and worked on complex environmental cases. He has advised two Florida Governors, the White House, and multiple state and federal agencies on environmental matters.

While with the Florida DEP, he acted as the primary attorney to the Department Secretary and advised the Office of Governor Rick Scott on regulatory requirements and state policy for air, water, waste, and public lands. He assisted in filing and litigating *Florida v. Georgia*, an original action in the U.S. Supreme Court to address consumptive uses of water in the 20,000 square mile Apalachicola-Chattahoochee-Flint river basin. He also argued in the 11th Circuit Court of Appeals in the long-running Everglades case brought by the United States against the State of Florida. Mr. Leopold led enforcement actions related to oil and gas development in Southwest Florida, to address the first hydraulically-fractured oil and gas well in that region and worked on the siting of a nuclear reactor in South Florida. In 2015, he was appointed to the Federal Judicial Nominating Commission for the Northern District of Florida by U.S. Senators Marco Rubio and Bill Nelson.

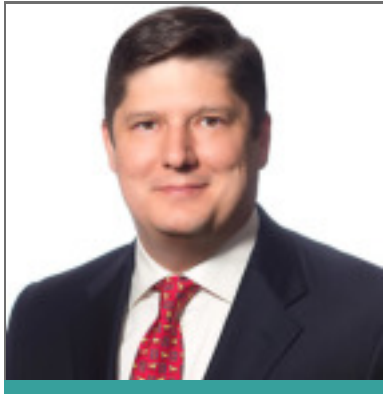
At DOJ, he worked on enforcement and defensive litigation, client counseling, and regulatory and policy initiatives, such as the National Oceans Policy and the U.S. Coral Reef Task Force. He was a member of the BP oil spill civil enforcement trial team formed to address the 2010 Deepwater Horizon oil spill in the Gulf of Mexico and handled cases related to the Border Fence Land Acquisition Project. He twice received the Assistant Attorney General's Award for Excellence for his work in those two matters.

Mr. Leopold worked in the Washington office of Governor Jeb Bush as a federal policy advisor on environmental matters, representing DEP and Florida's five Water Management Districts on issues they faced in Congress and with federal agencies. He represented Florida's interests to Congress during passage of the Gulf of Mexico Energy Security Act, which led to a legislative ban on new oil and gas leasing in the Eastern Gulf of Mexico.

Mr. Leopold hails from the Tampa area and is a graduate of the University of Florida and the Florida State University College of Law. He and his wife Kim have four children and enjoy spending their time doing family activities.

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Mr. Janoe is "great at getting deals done and finding a win-win solution to the issues at hand"

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Scott Janoe is the firmwide chair of Baker Botts' Environmental Department. He advises energy, mining, and manufacturing clients on environmental, health, safety, and transportation matters. Mr. Janoe's clients turn to him for the full suite of environmental issues ranging from permitting and compliance counseling to litigation, enforcement defense, and crisis management. Over the years, he has developed particular experience in regulatory compliance issues arising from oil and gas exploration and production. Mr. Janoe has assisted energy clients on environmental matters from California to New Jersey, North Dakota to offshore Gulf of Mexico and many points in between.

## **Upstream Air Enforcement: Recent Trends**

By: Scott Janoe and Kim White, Baker Botts, LLP<sup>1</sup>

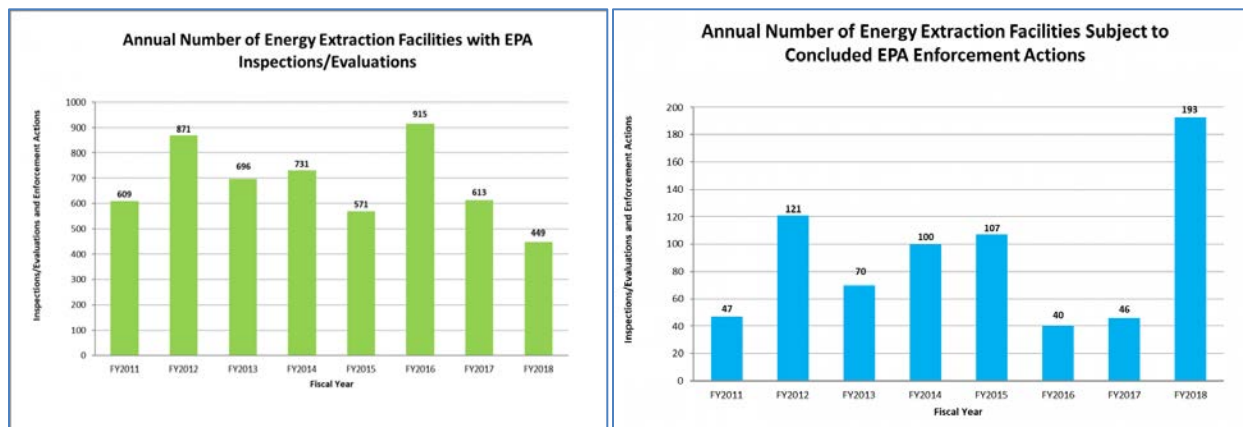
### **I. Introduction**

The shale boom in the first decade of the 2000s spawned heightened regulatory scrutiny and targeted enforcement initiatives from federal and state agencies. Greater public and regulatory scrutiny of the upstream extraction industry led to a rise in air inspections and enforcement actions in shale plays across the nation. This ultimately culminated in a series of consent decrees between the U.S. Environmental Protection Agency (“EPA”), state agencies, and upstream oil and gas companies. This paper examines the trends across those consent decrees. Finally, this paper examines attempts to apply and to enforce against oil and gas operators under the federal Clean Air Act Risk Management Program.

### **Pre- vs. Post-Shale Boom History of Upstream Enforcement**

Prior to the shale boom, the upstream oil and gas industry had experienced limited air enforcement for several decades. This was especially true at the federal level, as oil and gas operations were primarily regulated by state agencies. The enforcement that did occur generally stemmed from significant environmental incidents such as spills.<sup>2</sup> However, increased drilling activity across the country, concerted non-governmental organization (“NGO”) critiques of the alleged environmental harms of hydraulic fracturing, and challenges to major infrastructure projects all served to highlight upstream operations.

In 2011, EPA adopted a National Enforcement Initiative entitled “Ensuring Energy Extraction Activities Comply with Environmental Laws.” Under this initiative, EPA increased the number of inspections and evaluations for energy extraction companies, including upstream operators, as shown in the charts below.<sup>3</sup>



EPA renewed the initiative twice, in 2014 and 2016. Overall, this initiative has been in effect for approximately eight years, spanning EPA fiscal years 2012-2019. Some developments and examples of regulatory enforcement activities that occurred during the eight-year period as part of the enforcement initiative included the following:

- From 2014-2016, EPA Region 6 and the Texas Commission on Environmental Quality (“TCEQ”) conducted flyovers of upstream operations in the Eagle Ford Shale. These flyovers were followed by Clean Air Act Section 114 information requests to operators.
- In September 2015, EPA issued a “Compliance Alert” in connection with the enforcement initiative entitled “EPA Observes Air Emissions from Controlled Storage Vessels at Onshore Oil and Natural Gas Production Facilities.”<sup>4</sup> The Alert documented certain concerns EPA had identified regarding “vapor control systems” designed to control air emissions from storage vessels at onshore oil and natural gas production facilities. The Alert described potential options to address compliance issues associated with the vapor control systems, many of which were developed as part of the Noble consent decree that covered operations in Colorado, discussed in more detail below.
- In September 2016, EPA’s Office of Enforcement and Compliance Assurance conducted a series of field inspections of operations in the Eagle Ford Shale as part of the declared enforcement initiative. The inspections focused on emissions from vapor recovery units and maintenance issues.

In Spring 2019, EPA announced that for fiscal years 2020-2023, it will transition the “Ensuring Energy Extraction Activities Comply with Environmental Laws” initiative to instead focus on “significant public health and environmental problems without regard to sector.”<sup>5</sup> EPA plans to instead “focus on significant sources of volatile organic compounds (VOCs) that have a substantial impact on air quality (without regard to sector), and that may adversely affect vulnerable populations or an area’s CAA attainment status.”<sup>6</sup> In addition, EPA plans to evaluate the idea of merging the newly transitioned initiative into the pre-existing initiative on “Cutting Hazardous Air Pollutants.”<sup>7</sup> EPA has not yet provided further details regarding the transition away from the prior initiative to this new focus.

## **II. Federal Consent Decrees**

A significant result of EPA’s eight-year upstream enforcement initiative was a series of federal consent decrees between EPA and upstream oil and gas companies. These were comprehensive judicial consent decrees with substantial penalties and injunctive relief for upstream operations. This Section summarizes and examines trends across the most significant of these consent decrees.

### **A. 2015 Noble Consent Decree**

In April 2015, EPA and the state of Colorado filed a complaint alleging that Noble Energy Inc., (“Noble”), violated the federal Clean Air Act and Colorado regulations at over three thousand oil and gas sites across the Denver-Julesburg (“DJ”) basin.<sup>8</sup> Specifically, the complaint alleged that Noble failed to minimize VOC emissions from condensate storage tanks.<sup>9</sup> The allegations in the complaint stemmed from EPA optical gas imaging inspections of condensate tanks in 2012 and follow-up Clean Air Act Section 114 requests in 2013. EPA’s inspections

revealed VOC emissions from condensate tanks caused by high pressure dumps from separators, with a root cause of the pipeline capacity-driven need to “pressure up.”

The consent decree included civil penalties of \$4.95 million (\$3.475 million to U.S. and \$1.475 million to Colorado), \$60 million in injunctive relief, \$4.5 million in Environmental Mitigation Projects (“EMP”), and \$4 million in Supplemental Environmental Projects (“SEPs”).<sup>10</sup> The agreed injunctive relief requires extensive corrective action. The settlement requires the installation of vapor control systems and several “next generation” enforcement tools, *e.g.*, tank pressure monitoring, infrared camera monitoring, and continuous data reporting under Section 144 of the Clean Air Act.<sup>11</sup> The settlement also required new emissions controls on thousands of tanks and drilling equipment across the DJ basin.<sup>12</sup>

## **B. Subsequent Consent Decrees**

Since 2015, there have been additional judicial consent decrees between EPA and upstream oil and gas companies. The next section compares trends across four of these consent decrees.

EPA’s 2016 consent decree with Slawson Exploration involved alleged Clean Air Act violations for upstream operations on the Fort Berthold Indian Reservation in North Dakota.<sup>13</sup> EPA alleged that Slawson failed to adequately design, operate, and maintain vapor control systems on its storage tanks at oil and natural gas well pads on the reservation, resulting in emissions of VOCs, HAPs, and methane. Slawson paid \$2.1 million in civil penalties, \$2.05 million in SEPs/EMPs, and \$4.1 million in injunctive relief.

In 2017, PDC Energy entered into a consent decree with EPA involving approximately 650 condensate storage tank batteries and associated vapor control systems at upstream sites in the Wattenberg Field in Colorado.<sup>14</sup> The consent decree resolves alleged violations of Colorado Regulation 7, Section XII requirements for VOC emissions and vapor control systems at condensate storage tanks, which are incorporated into Colorado’s State Implementation Plan and federally enforceable under the Clean Air Act. PDC Energy paid \$2.5 million in civil penalties, \$1.7 million in SEPs/EMPs, and \$18 million in injunctive relief.

Most recently, in March 2018, XTO Energy, Inc. entered into a judicial consent decree with EPA covering alleged Clean Air Act violations for upstream operations that, as with Slawson, are located on the Fort Berthold Indian Reservation in North Dakota.<sup>15</sup> The consent decree identifies five well pads and 20 related wells, alleging that vapor control systems in place at the well pads did not direct all vapors from the wells to pollution control devices, resulting in emissions “directly to the atmosphere.” The allegations in the complaint stemmed from EPA inspections in June 2014 and March 2015. In marked contrast from the other consent decrees, XTO’s settlement with EPA resulted in \$320,000 in civil penalties and \$425,000 in injunctive relief.

## **C. Consent Decree Trends**

The table below compares the injunctive relief requirements for the four EPA consent decrees. In the Slawson Exploration 2016 consent decree and the PDC Energy 2017 consent decree, EPA utilized requirements similar to those it utilized in the Noble consent decree.

In contrast, in the 2018 XTO consent decree, EPA departed from several requirements that it utilized in the Noble consent decree.

The chart shows that EPA’s enforcement has evolved from imposing design criteria on upstream operators to a “find and fix” system for adopting injunctive relief to reduce emissions.

**Settlement Term Evolution<sup>16</sup>**

Description or Requirement	Noble Energy	Slawson Exploration	PDC Energy	XTO Energy
Date	4/22/2015	12/1/2016	10/31/2017	3/26/2018
Location	Colorado	North Dakota	Colorado	North Dakota
Number of Sites	3,400	171	650	20
Civil Penalty	\$4.95 MM	\$2.1 MM	\$2.5 MM	\$320,000
Estimated Retrofit Costs	\$60 MM	\$4.1 MM	\$18 MM	\$450,000
EMP	\$4.5 MM	\$2.05 MM	\$1.7 MM	N/A
SEP	\$4 MM	N/A	N/A	N/A
Develop Modeling Guideline	Yes	Yes	Yes	No
Determine Maximum Peak Flow	Yes	Yes	Yes	Yes
Determine VCS Capacity	Yes	Yes	Yes	Yes
Perform Field Survey	Yes	Yes	Yes	Yes
Conduct Engineering Evaluation	Yes	Yes	Yes	Yes
If Applicable, Modify VCS	Yes	Yes	Yes	Yes
Self-Certify	Yes	Yes	Yes	Yes
3 <sup>rd</sup> Party Verification	Yes	Yes	Optional	No
Next Generation Tank Headspace Continuous Monitoring	Yes	Yes	Yes	No
Directed Inspection and Prevent Maintenance Program	Yes	Yes	Yes	Yes

Description or Requirement	Noble Energy	Slawson Exploration	PDC Energy	XTO Energy
Routine IR Camera Inspections	Yes	Yes	Yes	Yes
Root Cause Investigation for “Reliable Information”	Yes	Yes	Yes	Yes
Divestiture Approval or Liability Certifications	Yes	Yes	Yes	Yes
Mechanism for Well Shut-Ins	Yes	Yes	Yes	Yes

From the Noble consent decree in 2015 to the XTO consent decree in 2018, the parties have tailored the injunctive relief to account for changes in emissions issues and regulatory approach. For example, the requirements for directed inspection and preventative maintenance vary from enforcement to enforcement. In addition, in more recent years, EPA has not required third-party verification of some of these requirements or continuous monitoring of tank headspace emissions. Overall, EPA has moved from a design criteria approach based on formulaic application of peak emission pressure formulae to a “find and fix” approach that tailors engineering solutions to issues identified in the field. This latter approach has proven effective in reducing overall emissions and is the cornerstone of similar state enforcement initiatives.

### **III. State Agency Involvement**

Federal enforcement activity for upstream operations has primarily involved initiation of enforcement by EPA with some degree of involvement from the corresponding state agencies. For example, Colorado was a party to the Noble consent decree and received civil penalties under the judicial agreement. The New Mexico Environment Department has coordinated inspections and enforcement matters with EPA Region 6. Similarly, TCEQ has worked with EPA Region 6 and operators following overflights.

Perhaps the most active state enforcement initiative has been in North Dakota, where the then North Dakota Department of Health (“NDDoH”)<sup>17</sup> led its own upstream enforcement initiative on state-regulated lands.<sup>18</sup> Following the rollout of the Noble consent decree and EPA’s 2015 Compliance Alert, North Dakota negotiated its own state-level consent decree pursuant to its delegated Clean Air Act regulatory program. In 2015, several upstream operators in North Dakota formed the Bakken Upstream Air Task Force with the purpose of working directly with the NDDoH to evaluate technical, mechanical, and engineering aspects of field management of vapor recovery and potential for fugitive emissions. The task force represented more than 93 percent of the oil and gas production in North Dakota.

NDDoH and the Bakken Upstream Air Task Force finalized an industry-wide consent decree template in 2016. The consent decree was based on an NDDoH initiative to identify problematic emissions and address them in a systematic way. Dozens of operators entered these



decrees in 2017 and 2018 in North Dakota state court, and the injunctive relief under the “find and fix” policy remains in effect to this day.

#### **IV. Potential Enforcement under the Risk Management Program**

In September 2016, EPA Region 8 began exploring potential Clean Air Act Section 112(r) enforcement under the Risk Management Program’s General Duty Clause. These matters concentrated on oilfield fatalities and were built off of a similar enforcement initiative from EPA Region 3. This initiative has not yet resulted in any final enforcement decrees or other agreements.

##### **A. Applicability Thresholds**

The potential for enforcement under Clean Air Act Section 112(r) poses significant jurisdictional questions arising from the imposition of the Act’s General Duty Clause on operations that are otherwise not subject to the substantive Risk Management Plan program requirements. Many upstream oil and gas operations are not subject to the RMP program, which applies to “a stationary source that has more than a threshold quantity of a regulated substance in a process.”<sup>19</sup> This is because “regulated substances in naturally occurring hydrocarbon mixtures need not be considered when determining whether more than a threshold quantity is present at a stationary source.”<sup>20</sup> “Naturally occurring hydrocarbon mixtures” are defined to “include any combination of the following: condensate, crude oil, field gas, and produced water.”<sup>21</sup> Thus, many upstream facilities do not exceed applicability thresholds once naturally occurring hydrocarbon mixtures are excluded.

##### **B. “Ambient Air”**

The 1990 Clean Air Act Amendments adopted the General Duty Clause to protect public health and the environment from “accidental releases” to the “ambient air.”<sup>22</sup> “Accidental release” is defined as “an unanticipated emission of a regulated substance or other extremely hazardous substance into the ambient air from a stationary source.”<sup>23</sup> “Ambient air” is defined as “that portion of the atmosphere, external to buildings, to which the general public has access.”<sup>24</sup> The U.S. Supreme Court has noted that “ambient air” is “the statute’s term for the outdoor air used by the general public.”<sup>25</sup> EPA guidance has stated that employees and contractors are not considered part of the “general public” as that term is used in the regulatory definition of “ambient air.”<sup>26</sup> Because many upstream facilities are remotely located and cover large leased areas, releases often do not impact areas that are accessible to the general public.

The 1990 Clean Air Act Amendments tasked the U.S. Occupational Safety and Health Administration (“OSHA”) with implementing a program “to prevent accidental releases of chemicals which could pose a threat to employees.”<sup>27</sup> In addition, the legislative history of the 1990 Clean Air Act Amendments demonstrates that the scope of EPA’s authority under the Clean Air Act is limited to the prevention, minimization, and hazard assessment of accidental releases to the ambient air and does not include employee safety, authority over which Congress expressly granted to OSHA.

EPA and OSHA have developed memoranda of understanding (“MOU”) that reinforce the delineation between OSHA and EPA authority with respect to accidental releases. EPA and OSHA’s MOU on Chemical Accidents states that “OSHA is the federal agency with

primary responsibility for worker safety and health,” while “[t]he United States Environmental Protection Agency (EPA) is the federal agency with primary responsibility for the protection of public health and the environment.”<sup>28</sup> Moreover, the broader MOU between OSHA and EPA requires EPA to refer worker safety issues, including worker conditions issues to OSHA.<sup>29</sup>

While the Risk Management Plant General Duty Clause enforcement initiative has not yet resulted in significant enforcement matters, upstream facilities that are not otherwise subject to the Risk Management Plan program should continue to monitor any enforcement developments in this area.

## **V. Conclusion**

In the past decade and a half, the upstream oil and gas industry has witnessed a significant change in the level of regulatory activity, and in turn, inspection and enforcement activity directed at the industry. Over the past five years, federal and state enforcement actions appeared to land on a “find and fix” approach to emissions issues. Looking ahead, regulators may pivot their focus on the upstream industry to a broader emissions reduction and/or worker safety focus. Time will tell if this will result in a significant change in enforcement trends for upstream oil and gas operations.

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<sup>1</sup> Scott Janoe is a Houston-based Partner and Chair of Baker Botts, LLP’s Environmental Law Section. Kim White is a Houston-based Senior Associate in the Environmental Law Section.

<sup>2</sup> See U.S. EPA, Profile of the Oil and Gas Extraction Industry, Section VII.C., Review of Major Legal Actions, at 126-27 (Oct. 2000) (describing significant enforcement actions for the oil and gas extraction industry in EPA fiscal years 1996-1998, including a crude oil spill into a wetland area in California, a groundwater contamination matter, an emissions reporting matter for natural gas engines on the Southern Ute Indian Reservation in Colorado, and a CERCLA hazardous waste disposal matter), available at <https://nepis.epa.gov/Exe/ZyPDF.cgi/50000EM6.PDF?Dockey=50000EM6.PDF>.

<sup>3</sup> U.S. EPA, National Compliance Initiative: Ensuring Energy Extraction Activities Comply with Environmental Laws, available at <https://www.epa.gov/enforcement/national-compliance-initiative-ensuring-energy-extraction-activities-comply>.

<sup>4</sup> U.S. EPA, EPA Observes Air Emissions from Controlled Storage Vessels at Onshore Oil and Natural Gas Production Facilities (Sept. 2015), available at <https://www.epa.gov/sites/production/files/2015-09/documents/oilgascompliancealert.pdf>.

<sup>5</sup> 84 Fed. Reg. 2848, 2850 (Feb. 8, 2019).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Consent Decree, *U.S. v. Noble Energy, Inc.*, at 1, app. A (No. 1:15-CV-00841, D. Colo., Apr. 22, 2015); See also Notice of Lodging of Proposed Consent Decree Under the Clean Air Act, 80 Fed. Reg. 23,289 (Apr. 27, 2015)

<sup>9</sup> Consent Decree, *Noble Energy*, at 1-2

<sup>10</sup> Notice of Lodging, 80 Fed. Reg. at 23,289

<sup>11</sup> See Consent Decree, *Noble Energy*, at sec. IV (Injunctive Relief)

<sup>12</sup> See *id.* at app. A (list of systems subject to the decree)

<sup>13</sup> Consent Decree, *U.S. v. Slawson Expl. Co.* (No. 1:16-CV-00413-CSM D.N.D. Dec. 1, 2016).

<sup>14</sup> Consent Decree, *U.S. v. PDC Energy, Inc.* (No. 1:17-CV-01552 D. Colo. Oct. 31, 2017).

<sup>15</sup> Consent Decree, *U.S. v. XTO Energy, Inc.* (No. 1:18-cv-00060-DLH-CSM, D.N.D., Mar. 23, 2018).

<sup>16</sup> Consent Decree, *U.S. v. Noble Energy, Inc.*, at 1, app. A (No. 1:15-CV-00841, D. Colo., Apr. 22, 2015); Consent Decree, *U.S. v. Slawson Expl. Co.* (No. 1:16-CV-00413-CSM D.N.D. Dec. 1, 2016); Consent Decree, *U.S. v. PDC Energy, Inc.* (No. 1:17-CV-01552 D. Colo. Oct. 31, 2017); Consent Decree, *U.S. v. XTO Energy Inc.* (No. 1:18-CV-00060, D.N.D., Mar. 23, 2018).

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<sup>17</sup> On April 29, 2019, pursuant to a legislative change, NDDoH’s environmental arm transitioned to an independent agency named the North Dakota Department of Environmental Quality.

<sup>18</sup> A large portion of oil and gas operations in North Dakota occur in Indian Country or on other lands subject to direct EPA regulation.

<sup>19</sup> 40 CFR § 68.10(a).

<sup>20</sup> *Id.* § 68.115(b)(2)(iii).

<sup>21</sup> *Id.* § 68.3.

<sup>22</sup> 42 U.S.C. § 7412(r).

<sup>23</sup> *Id.* § 7412(r)(2)(A).

<sup>24</sup> 40 C.F.R. § 50.1(e).

<sup>25</sup> *Train v. NRDC*, 421 U.S. 60 (1975); see also *U.S. v. W.R. Grace*, 455 F.Supp.2d 1172, 1175 (D. Mont. 2006) (finding that Congress did not alter the “longstanding regulatory definition” of “ambient air” when it adopted the 1990 Clean Air Act Amendments).

<sup>26</sup> Memorandum from Stephen D. Page, Director, U.S. EPA Office of Air Quality Planning and Standards, Re: Interpretation of “Ambient Air” in Situations Involving Leased Land Under the Regulations for Prevention of Significant Deterioration (PSD) (June 22, 2007) (“we consider this term [general public] generally to include anyone who is not employed by or under control of the lessor, but, more specifically, persons who do not require lessor’s permission to be on the property . . . For example, contractors or delivery persons that are expressly granted access to a plant site by the lessor are not the general public, but instead are considered ‘business invitees’”).

<sup>27</sup> Pub. L. 101-549, Sec. 304(a).

<sup>28</sup> MOU between EPA and OSHA on Chemical Accident Investigation (Dec. 1, 1996).

<sup>29</sup> MOU between OSHA and EPA Office of Enforcement (Feb. 13, 1991).

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**Taming NEPA Tigers in the Trump Administration: How Two Agencies Handle  
Consideration of Greenhouse Gas Emissions Under the National Environmental Policy Act  
And Why It Matters**, by Ann Navaro and Daniel Pope, Bracewell LLP

Presented at the 2019 Texas Environmental Superconference: “The Greatest Superconference on Earth”

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## **I. Introduction: Welcome to the Big Top**

On March 28, 2017, President Trump issued Executive Order 13783, *Promoting Energy Independence and Economic Growth*, setting off a flurry of activities at federal agencies relating to climate change policies put in place by the previous Administration.<sup>1</sup> The Executive Order directed the White House Council on Environmental Quality (CEQ) to revoke its August 2016 guidance to federal agencies on how to consider climate impacts in environmental analyses of proposed federal agency actions under the National Environmental Policy Act (NEPA).<sup>2</sup> All other federal agencies were directed to reconsider their own related agency actions.<sup>3</sup>

In an effort to fill the void created by the rescission of the 2016 guidance, on June 21, 2019, CEQ released for public review draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions. Naturally, the Draft has provoked a spectrum of reactions. Some observers characterize the guidance as an unlawful attempt to roll back agency consideration of greenhouse gas (GHG) emissions under NEPA at a time when courts are demanding more robust consideration; yet another example of the Administration's hostility to climate science. Others view the guidance as a simple statement of what NEPA requires, shorn of the previous era's policy preferences, and a reminder to agencies of NEPA's basic principles.

But what does NEPA actually require and what do the Administration's pronouncements on the subject really mean when it comes to federal action and litigation? We consider these questions below in the context of two agencies with missions critical to the production of oil and gas and the development of related infrastructure: the Department of the Interior and the Federal Energy Regulatory Commission. Both have struggled to address greenhouse gas emissions in a way that satisfies courts, but the agencies' underlying actions are critically different in ways that are meaningful to NEPA. When it is required, sufficient evaluation of GHGs is a critical act, often prominently positioned in the center ring, given the litigation circus that can result from federal approval of permits and leases for private sector development of oil and gas.

## **II. The National Environmental Policy Act – Tiger?**

NEPA, sometimes called the “magna carta” of environmental laws, may seem a tiger when private action is ensnared in its requirements or when litigation exposes flaws in compliance with the statute. NEPA's purpose is broad:

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<sup>1</sup> Exec. Order No. 13,783, *Promoting Energy Independence and Economic Growth* (March 28, 2017).

<sup>2</sup> *Id.* at 3(c) (directing CEQ to rescind *Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews*, 81 Fed. Reg. 51,866 (August 5, 2016)). CEQ rescinded its guidance on April 5, 2017. 82 Fed. Reg. 16,576 (Apr. 5 2017).

<sup>3</sup> The Executive Order defines “agency actions” to include “regulations, orders, guidance documents, policies, and any other similar agency actions.” E.O. 13,783, 2(a).

To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation . . . .<sup>4</sup>

While NEPA aspires to lofty goals, it does not mandate any particular agency decisions or impose substantive environmental obligations on federal agencies. Rather, NEPA's mandate "is to insure a fully informed and well-considered decision . . . ."<sup>5</sup> The agency will "have available, and will carefully consider, detailed information concerning significant environmental impacts . . ." and will inform the public of those impacts.<sup>6</sup>

NEPA requires the preparation of an Environmental Impact Statement (EIS) for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment. . . ."<sup>7</sup> "Major Federal action" includes actions that are "potentially subject to federal control and responsibility" and covers nearly every action taken by the federal government from rulemakings to grants to the issuance of permits.<sup>8</sup> Otherwise private action may become "federalized" for purposes of NEPA, depending on the circumstances.

Federal actions that may not amount to "major federal action significantly affecting the quality of the human environment" often require less detailed NEPA review pursuant to regulations implementing NEPA promulgated by CEQ.<sup>9</sup> Agencies may prepare an Environmental Assessment (EA) to determine whether an EIS is needed or to otherwise comply with the statute.<sup>10</sup> If no EIS is needed, the EA process terminates with a "Finding of No Significant Impact" or FONSI.<sup>11</sup> Some actions may fall under a "categorical exclusion" established by an agency for a category of actions not requiring either an EA or EIS.

When preparing an EA or EIS, an agency must consider impacts and effects of the proposed agency action and alternatives to that action. "Effects" and "impacts" are synonymous terms defined as including ecological, aesthetic, historic, cultural, economic, social or health impacts.<sup>12</sup> There are three types of effects or impacts. (1) Direct effects are impacts "which are caused by the action and occur at the same time and place."<sup>13</sup> (2) Indirect effects are impacts "which are caused by the action and are later in time or farther removed in distance but are still

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<sup>4</sup> 42 U.S.C. § 4321.

<sup>5</sup> Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978).

<sup>6</sup> Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

<sup>7</sup> 42 U.S.C. § 4332 (2)(C).

<sup>8</sup> 40 C.F.R. 1508.18.

<sup>9</sup> 40 C.F.R. Parts 1500–1508.

<sup>10</sup> 40 C.F.R. § 1508.9.

<sup>11</sup> 40 C.F.R. § 1508.13.

<sup>12</sup> 40 C.F.R. § 1508.8.

<sup>13</sup> 40 C.F.R. § 1508.8(a).



reasonably foreseeable.”<sup>14</sup> (3) Cumulative effects are impacts resulting from “the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless what agency or person (Federal or nonfederal) undertakes such other actions.”<sup>15</sup> Agencies need not consider effects that are remote or speculative.<sup>16</sup>

In litigation, courts review allegations that an agency’s work fails to satisfy NEPA’s requirements under the judicial review provisions of the Administrative Procedure Act (APA).<sup>17</sup> In relevant part, under the APA a court may “hold unlawful and set aside” agency action that the court determines is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”<sup>18</sup> With respect to GHGs, a NEPA challenge might raise two substantive questions. First, did NEPA require the agency to consider the effect of its actions on climate as a direct, indirect, and/or cumulative effect? Second, if the agency was so required, was its analysis sufficient under NEPA? Given the brevity of NEPA itself and the discretion afforded by the CEQ regulations, judicial assessment of NEPA adequacy may often seem a subjective endeavor. Indeed, early in its history, Justice Marshall noted that “this vaguely worded statute seems designed to serve as no more than a catalyst for development of a ‘common law’ of NEPA.”<sup>19</sup> However, as explained below, agencies and the private sector can learn valuable lessons from recent litigation concerning this issue that can be used in ongoing efforts to tame the NEPA tiger.

### **III. The Department of the Interior**

The Bureau of Land Management within the Department of the Interior is responsible for coal, oil, and gas leasing on public lands under the Minerals Leasing Act.<sup>20</sup> BLM’s procedures for leasing lands for coal development or oil and gas development involve a number of steps and may involve consultations with other agencies, depending on the location of the lease. For our purposes here, it is sufficient to note that BLM’s decisions, whether individually or in consultation with other agencies, often trigger NEPA’s requirements that federal agencies take a “hard look” at the environmental impacts of a particular decision involving the development of natural resources on federal lands.

The Department of Interior does not contest that it is obligated to conduct such “hard look” reviews under NEPA in appropriate circumstances. The Secretary of the Interior recently affirmed that the agency evaluates climate change under NEPA in appropriate circumstances.<sup>21</sup> Critics complain that the agency should go further – and use its discretion to emphasize

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<sup>14</sup> 40 C.F.R. § 1508.8(b).

<sup>15</sup> 40 C.F.R. § 1508.7.

<sup>16</sup> 40 C.F.R. § 1508.8.

<sup>17</sup> 5 U.S.C. § 701, *et seq.*

<sup>18</sup> 5 U.S.C. 706(2).

<sup>19</sup> *Kleppe v. Sierra Club*, 427 U.S. 390, 421 (1976) (Marshall, J., dissenting).

<sup>20</sup> *See* 30 U.S.C. § 181 *et seq.* BLM is sometimes required to coordinate with other agencies before approving leases; for example, BLM leases natural resources on lands managed by the United States Forest Service (“USFS”). Before BLM can lease resources on USFS lands, it must first obtain that agency’s approval. 30 U.S.C. §§ 201(a)(3)(iii), 207(a).

<sup>21</sup> Adam Anton, *Here’s what Bernhard could do on climate—if he wanted to*, Climatewire (May 23, 2019), <https://www.eenews.net/climatewire/stories/1060381769/search?keyword=greenhouse>.

renewable energy resources while fulfilling its mandate to preserve natural resources for future generations – but no law compels the Department to make decisions based on climate impacts.

### **A. Claw Marks: BLM’s Track Record in NEPA Litigation**

More than a dozen decisions, stretching across several Administrations, have addressed allegations that BLM failed to comply with NEPA with respect to the analysis of downstream GHG emissions resulting from the ultimate use of coal and oil and gas extracted from federal leases. BLM has lost more cases than it has won, but both wins and losses have provided valuable insights into how the agency can make effective decisions that survive judicial review.

Much of the focus has been on coal leasing. For example, in the agency win category, plaintiffs challenged a coal lease sale in the Wyoming’s Powder River Basin.<sup>22</sup> At the District Court level, the court dismissed plaintiff’s GHG-related claims for lack of standing, reasoning that the plaintiffs failed to demonstrate a link between their interests and the GHG emissions associated with the coal leases. While plaintiffs asserted that a decision not to authorize the coal leases would decrease the supply of coal, driving up the price of coal and thus reducing the consumption of coal for electrical generation, the court found that chain of causation too attenuated.<sup>23</sup> On appeal, the D.C. Circuit disagreed with the District Court on the standing question, but affirmed the decision nevertheless, holding that BLM adequately addressed climate change in its EIS, including by estimating GHG emissions.<sup>24</sup>

The BLM quantified average CO<sub>2</sub> or CO<sub>2</sub>e emissions for the Antelope Mine, for Wyoming, and for the United States. From these figures it quantified the Antelope Mine’s contribution to state-wide CO<sub>2</sub>e and nation-wide CO<sub>2</sub> emissions and the Wyoming Powder River Basin’s contribution to nation-wide CO<sub>2</sub> emissions. It also projected Antelope Mine’s contribution to state-wide emissions going forward.<sup>25</sup>

The Court also noted that BLM was not required to “identify specific effects on the climate in order to prepare an adequate EIS.”<sup>26</sup>

In the loss category, in *WildEarth Guardians v. BLM*, the Tenth Circuit remanded a Wyoming District Court decision upholding BLM’s NEPA analysis for the offering of four coal leases to the two largest coal mines in the United States.<sup>27</sup> The only issue on appeal was whether BLM was reasonable in concluding that the various alternatives analyzed in the EIS would not present any major difference in GHG emissions, because if the leases were not issued coal would

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<sup>22</sup> See *WildEarth Guardians v. Jewell*, 738 F.3d 298 (D.C. Cir. 2013).

<sup>23</sup> *Id.*, at 86.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 309.

<sup>26</sup> *Id.*

<sup>27</sup> 870 F.3d 1222 (10th Cir. 2017).

be replaced by other coal available in the market.<sup>28</sup> The Tenth Circuit soundly rejected this so-called “perfect substitution” approach which is unlikely to make a repeat appearance in BLM NEPA analyses.<sup>29</sup>

While it may seem that NEPA obligations relative to coal leasing are directly transferable to oil and gas leasing, one case underscored a potential difference. In *Western Organization of Resource Councils v. BLM*, the Montana District Court held that BLM violated NEPA when approving the 2015 Buffalo and Miles City Resource Management Plans in the Powder River Basin.<sup>30</sup> In pertinent part, the court found that the BLM failed to: (a) consider reasonable alternatives that would decrease the amount of extractable coal for leasing; (b) sufficiently analyze the effects of GHG emissions associated with downstream use of coal and oil and gas; and (c) adequately explain its decision to use only a 100-year time horizon for analyzing the effects of climate change, rather than also analyzing impacts over a shorter period, such as 20 years.<sup>31</sup> The EISs for the RMPs did look at GHGs associated with coal leasing but not for oil and gas leasing as BLM took the position that lease development and production for fluid minerals was much more speculative than for coal.<sup>32</sup> The court has not invalidated the planning decisions, and instead has required that BLM (and other agencies involved in the RMPs) conduct remedial NEPA analyses by November 29, 2019.<sup>33</sup>

BLM has a poor record when it comes to NEPA cases in the oil and gas arena, failing to satisfy judicial expectations with respect to GHG emissions. Two courts have concluded that the downstream combustion of oil and gas are attributable to agency decisions to allow extraction and production as indirect effects of such decisions – notably, these adverse decisions have not been appealed by the government. Rather, BLM has made an effort to revise its work.<sup>34</sup> In the first, in leasing portions of the Santa Fe National Forest for oil and gas development in 2014, BLM had asserted that consumption of oil and gas resources was not “an indirect effect of oil and gas production because production is not a proximate cause of GHG emissions resulting from consumption.”<sup>35</sup> However, the EA did provide a rough calculation of the metric tons of annual CO<sub>2</sub> that might result assuming full lease development. Relying on a number of previous cases from both BLM and FERC contexts as well as CEQ regulations and guidance, the Court concluded in 2018 that GHG emissions related to combustion might be removed in distance and time but were still “reasonably foreseeable.”<sup>36</sup> As a result, BLM’s decision not to consider

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<sup>28</sup> *Id.* at 1233–34.

<sup>29</sup> *Id.* at 1235.

<sup>30</sup> 2018 WL 1475470 (D. Mont. March 26, 2018).

<sup>31</sup> *Id.* at \*17–18.

<sup>32</sup> *Id.* at \*9.

<sup>33</sup> Judgment at 1 in *Western Org. of Res. Councils v. U.S. Bureau of Land Mgmt.*, No. CV-16-21-GF-BMM (D. Mont. July 31, 2019).

<sup>34</sup> *San Juan Citizen’s Alliance v. U.S. Bureau of Land Management*, 326 F.Supp.3d 1227, 1244 (D.N.M. 2018).

<sup>35</sup> *Id.* at 1242 (internal quotations omitted).

<sup>36</sup> *Id.* at 1243–44.

downstream GHG emissions was arbitrary and capricious.<sup>37</sup> BLM is currently in the process of revising its NEPA analysis consistent with the court order.<sup>38</sup>

BLM's obligation to consider downstream GHG consumption was recently addressed in *WildEarth Guardians v. Zinke*<sup>39</sup>, in which the D.C. District Court reviewed BLM's decision to issue 473 oil and gas leases throughout Wyoming, Utah, and Colorado.<sup>40</sup> BLM had issued a series of EAs and FONSI for these leasing decisions, and the plaintiffs challenged these decisions on the grounds that the agency had not adequately considered GHG emissions in a number of contexts.<sup>41</sup> The Court held that while estimating GHG emissions related to drilling activity would be difficult on a case-by-case basis at the leasing stage (i.e., before drilling plans for the sites had been finalized by the lessees), it would be possible for BLM to engage in "reasonable forecasting and speculation" about the development of the lease sites in the aggregate.<sup>42</sup> The Court also concluded that BLM was required to discuss downstream GHG emissions in greater detail—even if quantification was impossible.<sup>43</sup> In concluding that BLM was obliged to consider these downstream effects, the Court relied on precedent from a series of FERC cases discussed below.<sup>44</sup> The Court declined to vacate the leases issued by BLM, but enjoined the agency from approving applications for permits to drill until BLM revised its NEPA analysis.<sup>45</sup> BLM sought a voluntary remand to reconsider its NEPA analysis, which the court granted.<sup>46</sup>

In the wake of their Wyoming victory, Wild Earth Guardians has again sued the Department of the Interior challenging the authorization and issuance of 210 oil and gas leases covering 68,232.94 acres of land in New Mexico administered by the BLM in the agency's Pecos District.<sup>47</sup> WildEarth Guardians contends that BLM failed to adequately consider the direct, indirect, and cumulative effects of oil and gas development on the leased lands.<sup>48</sup> Notably, the complaint specifically argues that CEQ's withdrawal of its 2016 climate guidance "does not

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<sup>37</sup> *Id.* at 1244.

<sup>38</sup> Joint Status Update in *San Juan Citizens Alliance v. U.S. Bureau of Land Management*, No. 1:16-CV-00376-JOB-JHR (D.N.M. Apr. 19, 2019).

<sup>39</sup> 368 F.Supp.3d 41 (D.D.C. 2019)

<sup>40</sup> *Id.* at 55.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 67 (internal quotations omitted).

<sup>43</sup> *Id.* at 71.

<sup>44</sup> *Id.* at 71–74.

<sup>45</sup> *Id.* at 85.

<sup>46</sup> Federal Defendants' Motion for Voluntary Remand and Memorandum in Support, *WildEarth Guardians v. Bernhardt*, No. 1:16-CV-01724-RC at 1 (D.D.C. May 24, 2019) (describing the motion as unopposed by WildEarth Guardians). *See also* *Native Village of Point Hope v. Salazar*, 730 F.Supp.2d 1009 (D. Alaska 2010). Plaintiffs challenged the Bureau of Ocean Energy Management's ("BOEM") decision to offer approximately 29.4 million acres of public lands on the outer continental shelf of the Chukchi Sea for oil and gas leasing. Plaintiffs asserted that BOEM failed to adequately analyze the impact of the lease sale in the context of a warming climate. The court granted plaintiffs' motion for summary judgment, in part, remanding the matter to the agency to analyze the environmental impact of natural gas development.

<sup>47</sup> Petition for Review of Agency Action at 1–2, *WildEarth Guardians v. Bernhardt* No. 1:19-CV-00505 (D.N.M. June 3, 2019).

<sup>48</sup> *Id.* at 3.

change BLM’s obligation under NEPA to take a hard look and fully assess the significance of the climate impacts of its oil and gas leasing decisions.”<sup>49</sup> WildEarth Guardians also insists that BLM “completely fail[ed]” to account for the costs of carbon—although the WildEarth Guardians used the SC-CO<sub>2</sub> tool for estimating the cost of downstream carbon emissions (at \$42 per ton), their complaint focuses more on the absence of a cost calculation rather than the failure to use the SC-CO<sub>2</sub> tool.<sup>50</sup>

## **B. Paper Tiger? The Social Cost of Carbon Protocol**

The Social Cost of Carbon protocol (“SC-CO<sub>2</sub>”), developed for use in a rulemaking context in the previous Administration, aims to measure the costs, in dollars, of impacts resulting from GHG emissions. Non-governmental organizations have been eager to persuade courts to require BLM and other agencies to use SC-CO<sub>2</sub> in their EAs and EISs to highlight the monetary costs of leasing activity in the climate context. In most cases, courts have been unwilling to affirmatively require agencies to use SC-CO<sub>2</sub> unless the agency has effectively opened the door in some fashion.

This was the case after BLM and the U.S. Forest Service (USFS) authorized coal exploration activities in a portion of Colorado’s North Fork Valley called the Sunset Roadless Area.<sup>51</sup> Plaintiffs challenged BLM decisions approving the coal exploration plan and two lease modifications for an area associated with the West Elk coal mine near Somerset, Colorado, as well as actions taken by USFS related to an exemption from the Colorado roadless rule. BLM and USFS conceded that they were required to consider GHG emissions as indirect effects of their EIS, and even addressed the likelihood that methane could be released from mine operations and the coal was destined for combustion in a power plant.<sup>52</sup> However, the Court held that the agency violated NEPA by using the social cost of carbon protocol in the draft EIS to quantify impacts and removing it in the final without explanation while retaining quantification of benefits.<sup>53</sup>

The same issue—the consideration of the benefits of a lease without adequate consideration of the costs of GHG emissions—posed a challenge to the U.S. Office of Surface Mining’s (“OSMRE”) approval of Signal Peak Energy’s application for a federal mining plan modification.<sup>54</sup> Like BLM and USFS, OSMRE had conceded in an EA that “mining, processing, shipping, and combusting coal” would be a logical consequence of approving a mining plan and would be an indirect effect for NEPA purposes.<sup>55</sup> OSMRE’s EA included references to specific benefits of the mining plan modification, but the EA failed to quantify

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<sup>49</sup> *Id.* at 24 (citing *San Juan Citizens Alliance v. U.S. Bureau of Land Management*, 326 F.Supp.3d 1227 (D.N.M. 2018)).

<sup>50</sup> *Id.* at 53.

<sup>51</sup> *High Country Conservation Advocates v. U.S. Forest Service*, 52 F.Supp.3d 1174, 1181 (D.Colo. 2014).

<sup>52</sup> *Id.* at 1190.

<sup>53</sup> *Id.* The lease modifications in question were part of the agencies’ decisions that resulted in opening the Sunset Roadless Area to on-the-ground mining exploration. *Id.* at 1184–85.

<sup>54</sup> *Montana Environ. Info. Center v. U.S.*, 274 F.Supp.3d 1074, 1081 (D.Mont. 2017).

<sup>55</sup> *Id.* at 1095.

the costs of the modification.<sup>56</sup> The Court held that OSMRE's failure to take a "hard look" at GHG emissions costs associated with the modification required the Court to vacate the mining plan and remand the issue to OSMRE for further consideration of costs.<sup>57</sup> The Court never explicitly stated that the agency was required to use the SC-CO<sub>2</sub> protocol to quantify costs, but it did rely heavily on *High Country* in which the court identified the SC-CO<sub>2</sub> protocol as an available tool for quantifying the costs of GHG emissions.<sup>58</sup> And while OSMRE tried to distinguish economic impact assessments from cost-benefit analyses in its response to comments, the court determined it was a "distinction without a difference."<sup>59</sup>

WildEarth Guardians also challenged OSMRE's approval of a mining plan for the El Segundo Mine in New Mexico, arguing, among other things, that the agency should have adopted the SC-CO<sub>2</sub> method for evaluating GHG emissions.<sup>60</sup> The court disagreed with the plaintiffs, holding that the approach employed by the agency for evaluating GHG emissions comported with the recommendations found in the CEQ's Final Guidance on GHG emissions.<sup>61</sup> The court further reasoned that the "CEQ guidance specifically states that agencies need not use the social cost of carbon method to evaluate GHG emissions."<sup>62</sup>

### C. Key Takeaways

Courts, in many cases district courts, have concluded fairly consistently that BLM and other agencies involved in approving extractive activity have an obligation to consider both the GHG emissions associated with extractive operations themselves and those that result from the combustion of the natural resources produced. In most cases, the agencies have not continued to dispute that downstream GHG emissions are an indirect effect coal and oil and gas leasing—combusting those natural resources is the point of extraction, after all. It remains to be seen how much of a role the SC-CO<sub>2</sub> tool will play in BLM decisions, however. The *High Country Conservation Advocates* court concluded that if your EIS lives by the cost-benefit analysis, well, it just might die by it too if the agencies fail to consider GHG emissions costs. That conclusion has been somewhat clarified by the recent decision in *WildEarth v. Zinke*—it appears that the agencies need not be overly worried about mentioning economic benefits associated with a project, although a fairly intensive discussion of economic benefits should be counterbalanced by appropriate discussion.

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<sup>56</sup> *Id.* at 1098.

<sup>57</sup> *Id.* at 1105.

<sup>58</sup> *Id.* at 1097–98.

<sup>59</sup> *Id.* at 1096 n.9.

<sup>60</sup> *WildEarth Guardians v. Jewell*, 2017 U.S. Dist. LEXIS 131624, at \*38 (D.N.M. Feb. 16, 2017). WildEarth Guardians had also challenged OSMRE's failure to take a "hard look" at GHG emissions and their direct, indirect, and cumulative effects; the Court concluded that OSMRE's participation as a coordinating agency in an EA that did address such effects for the development of the El Segundo Mine sufficed as a "hard look." *Id.* at \*34–36.

<sup>61</sup> *Id.* (citing 81 Fed. Reg. 51,866–67).

<sup>62</sup> *Id.*

## IV. The Federal Energy Regulatory Commission

While courts and agencies have acknowledged that coal, oil, and gas developers should account for downstream GHG emissions where the agency is actually permitting the production of the resource, FERC's role with respect to downstream, indirect GHG emissions has been less intuitive, especially where it acts merely to approve the transportation of a product.

FERC has struggled with the scope of its NEPA obligations particularly in the area of transmission infrastructure, and it's not hard to see why. When a federal approval is required for a liquefied natural gas ("LNG") terminal or an interstate pipeline, what GHG emissions are appropriately considered as effects of the project itself? More specifically, what are the *indirect* or *cumulative* effects of these projects? These projects connect significant productive regions with markets for oil and gas, and the transfer of resources from one location to another has economic and environmental impacts. So even if estimating *direct* GHG emissions seems fairly straightforward (e.g., construction and operation of one of these projects is likely to itself generate X tons of CO<sub>2</sub>), addressing whether NEPA requires assessment of indirect and cumulative effects on climate, from the end use of the transported product, for example, has been a significant struggle for FERC.

### A. FERC Approvals of LNG Export Facilities

Under Section 3 of the Natural Gas Act ("NGA"), FERC approves the siting, construction, expansion, or modification of LNG terminals.<sup>63</sup> When Section 3 was enacted, most expected that natural gas would be imported. After hydraulic fracturing dramatically changed the energy landscape, LNG importers sought to reconfigure their facilities for export. This is more complicated than turning a valve or pressing a button—serious modifications have to be completed before these facilities are ready to export LNG. Because FERC approves these projects, NEPA is triggered and FERC must consider the environmental impacts associated with the project.

In 2014, FERC considered Cameron LNG's proposal to modify its LNG import terminal in Louisiana for export. Sierra Club challenged the proposal, arguing that FERC should consider environmental harms that would stem from induced productive activity upstream of the LNG terminal.<sup>64</sup> Sierra Club argued that by shipping natural gas resources out of the country, domestic prices would rise and developers would construct and operate new wells; it argued that GHGs associated with these activities were indirect effects attributable to Cameron LNG's operations.<sup>65</sup> FERC dismissed these concerns by noting that Sierra Club had not identified any particular fields or projects that would likely be served by Cameron LNG's terminal.<sup>66</sup>

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<sup>63</sup> 15 U.S.C. § 717b(a).

<sup>64</sup> Cameron LNG, LLC, 147 F.E.R.C. ¶ 61,230 (2014).

<sup>65</sup> *Id.* at 8–9. *See also id.* at 9 n.26.

<sup>66</sup> *Id.* at 25.

Sierra Club later challenged another FERC modification approval for the Freeport LNG terminal in Texas—this time before the Court of Appeals for the District of Columbia.<sup>67</sup> Sierra Club specifically argued that NEPA required FERC to consider indirect effects of exporting natural gas, inducing additional natural gas production and increasing reliance on domestic coal-fired generation.<sup>68</sup> Because FERC had failed to address these issues in its EIS for the Freeport modification project, Sierra Club argued that the approval needed to be vacated and remanded.<sup>69</sup> The D.C. Circuit held that such considerations were not appropriate for FERC’s NEPA process for Section 3 approvals—FERC approves the siting, construction, modification, and operation of LNG terminals but does not actually authorize a terminal’s export activity.<sup>70</sup> Authority to approve export activity resides in the Department of Energy (“DOE”) instead. Because DOE makes decisions whether to approve LNG export activity, FERC could not be the “legally relevant cause” of induced upstream production and associated GHG emissions.<sup>71</sup> The Court effectively suggested that if Sierra Club wanted to address induced production and GHG emissions, it should challenge the DOE’s export authorization for the Freeport LNG facility.<sup>72</sup>

Which it did.<sup>73</sup> The DOE’s various environmental impacts analysis documents *had* considered GHG emissions stemming from induced production and the use of other fuels for electricity generation.<sup>74</sup> Although DOE had addressed GHG emissions indirectly caused by its decision to allow LNG exports from the Freeport terminal, Sierra Club challenged its discussion of the effects of such GHG emissions (and other environmental impacts) as too vague—the DOE had not estimated particular volumes of exports and how environmental effects might stem from those particular volumes.<sup>75</sup> As for GHG emissions associated with induced production, the Court noted that the DOE had provided a Life Cycle Report that documented emissions from each stage of the well-to-terminal cycle. For downstream emissions, the Court accepted DOE’s explanation that LNG exports would compete against a number of other types of energy sources (nuclear, wind, solar, fossil, and otherwise) in importing countries.<sup>76</sup> Such an analysis “would require consideration of the dynamics of all energy markets in LNG-importing countries” and such an effort would be speculative at best.<sup>77</sup> The Court concluded that the DOE’s handling of these GHG-related questions was acceptable for the purposes of export authorization under the NGA.<sup>78</sup>

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<sup>67</sup> *Sierra Club v. FERC*, 827 F.3d 36 (2016) (“Freeport” decision).

<sup>68</sup> *Id.* at 40.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 47–48.

<sup>71</sup> *Id.* at 48. The D.C. Circuit relied on the Supreme Court’s holding in *Department of Transportation v. Public Citizen*, 51 U.S. 752 (2004), a case which held that the Department of Transportation was not required to analyze the environmental impacts of increased truck traffic between Mexico and the United States, because the agency lacked statutory authority to bar entry of Mexican trucks on environmental grounds.

<sup>72</sup> *Id.* at 47.

<sup>73</sup> *Sierra Club v. United States Department of Energy*, 867 F.3d 189 (D.C. Cir. 2017).

<sup>74</sup> *Id.* at 194.

<sup>75</sup> *Id.* at 196–97.

<sup>76</sup> *Id.* at 202.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 203.



The two LNG cases support FERC’s position that its NEPA analysis need not extend to indirect downstream emissions from combustion of the exported LNG, for which it is not the legally relevant cause for NEPA purposes.

## **B. FERC Approvals of Interstate Pipelines**

When FERC analyzes an interstate—but not international—project, the D.C. Circuit’s perspective has differed. Under Section 7 of the NGA, FERC will authorize the construction and operation of an interstate natural gas pipeline if it determines that the pipeline is in the public convenience and necessity.<sup>79</sup> In 2017, a panel of the D.C. Circuit vacated and remanded FERC’s certificate of public convenience for the Sabal Trail pipeline, a pipeline designed to transfer natural gas from Alabama and Georgia into Central Florida – a pipeline that was already operational at the time of the decision.<sup>80</sup> Although numerous petitioners challenged FERC’s approval on other grounds, the Court vacated the order solely because the agency had not adequately considered downstream GHG emissions that would occur as power plants in Florida burned natural gas for electricity generation.<sup>81</sup>

Contrasting its decision in the *Sabal Trail* case to its decision in *Freeport* and its companion cases, the D.C. Circuit held that FERC had to consider indirect downstream GHG emissions in its EIS because its approval was a legally relevant cause of those emissions.<sup>82</sup> The D.C. Circuit faulted FERC for failing to reasonably forecast downstream GHG emissions or alternatively explain why it was unable provide such a forecast.<sup>83</sup> Specifically, the court explained that, rather than asking whether the agency has authority over the emitting activity, the agency must ask whether its action statute permits it to consider the information if it were provided. In FERC’s case under the NGA, the D.C. Circuit assumes without argument or explanation that FERC can deny a certificate solely for environmental reasons; therefore, FERC can consider downstream combustion information. Public statements from FERC officials have cast doubt on the question of whether FERC has authority under the NGA to deny solely on environmental grounds.

It is important to note that Sabal Trail was designed to deliver 100% of shipments to specific power plants for combustion. Thus there was no uncertainty about the destination and use of the gas, whereas in most circumstances the downstream uses and locations of the transported gas are subjects of conjecture. Even so, the D.C. Circuit acknowledged that analysis would involve certain assumptions about actual pipeline subscriptions and utilization and downstream combustion, the court recommended that FERC disclose its assumptions in its EIS so that a reviewer could take its conclusions “with the appropriate amount of salt.”<sup>84</sup> The D.C. Circuit also observed that FERC had declined to use the Social Cost of Carbon tool, despite

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<sup>79</sup> 15 U.S.C. Section 717f(e).

<sup>80</sup> *Sierra Club v. FERC*, 867 F.3d 1357, 1363 (D.C. Cir. 2017).

<sup>81</sup> *Id.* at 1363.

<sup>82</sup> *Id.* at 1372. In dissent, Judge Brown disagreed that FERC was the legally relevant cause of downstream GHG emissions, insisting that Florida’s own power plant siting agencies played a significant role in these decisions. *See id.* at 1381 (Brown, J., dissenting).

<sup>83</sup> *Id.* at 1374.

<sup>84</sup> *Id.*

Sierra Club’s request that FERC use the tool for estimating the long-term climate costs for the pipeline’s impact.<sup>85</sup> In a previous case, FERC had successfully defended its rationale not to use the tool; the D.C. Circuit asked FERC on remand to explain if its rationale for continued nonuse of the Social Cost of Carbon remained the same.<sup>86</sup>

On remand, FERC did address downstream GHG emissions and disclosed its assumptions.<sup>87</sup> FERC estimated that the annual gross downstream emissions of GHG in carbon-dioxide equivalent units (CO<sub>2</sub>e) would be 14.5 million metric tons, assuming that 100 MMcf of natural gas were combusted per day.<sup>88</sup> That figure would be offset by closure of coal plants in Florida, reducing the annual CO<sub>2</sub>e tonnage to 8.36 million metric tons.<sup>89</sup> FERC again declined to use the Social Cost of Carbon tool, noting that the tool is less useful for midstream projects (and more useful for production or consumption) and that CEQ does not require a monetized cost-benefit analysis of environmental impacts.<sup>90</sup> FERC’s order was fractured, as Commissioner LaFleur dissented especially regarding majority’s dismissal of the usefulness of the Social Cost of Carbon tool.<sup>91</sup> Commissioner Glick dissented along similar lines.<sup>92</sup>

### C. Key Takeaways

FERC’s responsibility to consider indirect effects of its approvals depends significantly on the scope of the agency’s approval for a particular project. We’ve seen that FERC’s responsibility to consider GHGs in a NEPA analysis is limited to the siting, construction, modification, and operation of LNG export terminals. But the D.C. Circuit has considered pipelines another matter, and as long as the Sabal Trail case remains good law on the scope of NEPA for Section 7 approvals, FERC will need to take it into account as it considers pipeline certificates. However, the CEQ guidance is expected to shape *how* FERC proceeds with its EAs and EISs in the future.

Disputes over GHG emissions and how to estimate their effects continue to fracture decisionmaking at FERC. Despite the holdings of *Freeport* and its companion cases, the proper treatment of GHGs under NEPA continues to be a major point of contention for the Commissioners themselves. In May 2019, FERC considered a challenge by Sierra Club of Houston to Freeport LNG’s proposal to add an additional LNG train to its export terminal.<sup>93</sup> FERC prepared an EA for the modification effort, but the Houston Chapter of the Sierra Club argued that an EIS was required for the modification, given that the global impact of GHGs would be a “significant impact” warranting the EIS.<sup>94</sup> As a result of the EA, FERC recommended

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<sup>85</sup> *Id.* at 1375.

<sup>86</sup> *Id.*

<sup>87</sup> Florida Southeast Connection, LLC, 162 F.E.R.C. ¶ 61,233 (2018).

<sup>88</sup> *Id.* at 10.

<sup>89</sup> *Id.*

<sup>90</sup> *See id.* at 16–19.

<sup>91</sup> Separate Statement of Comm’r LaFleur, concurring, attached to *id.*, at 1.

<sup>92</sup> Separate Statement of Comm’r Glick, concurring, attached to *id.*, at 1.

<sup>93</sup> Freeport LNG Development, L.P., 167 F.E.R.C. ¶ 61,155 (May 17, 2019).

<sup>94</sup> *Id.* at 16–17.

a FONSI.<sup>95</sup> Citing the *Freeport* cases and other FERC decisions, FERC concluded that FERC is unable to “determine whether a project’s contribution to climate change would be significant” and that FERC is not responsible for evaluating emissions that are indirect effects of export activity.<sup>96</sup>

Commissioner LaFleur concurred in the result of the decision to authorize the construction and operation of Freeport LNG’s Train 4 project, but expressed concern that FERC’s FONSI for the Train 4 project and FERC’s “failure to assess [the] significance of climate change impacts” increased the chances that a court would vacate FERC’s approval and remand the decision.<sup>97</sup> Commissioner LaFleur pleaded that FERC should address these issues, both for indirect impacts and cumulative impacts of GHGs, noting that a court may very well require such analyses.<sup>98</sup>

Commissioner Glick strongly dissented from the Train 4 decision, arguing that the decision violated NEPA and the public interest requirements of the NGA. Calling the decision “arbitrary and capricious,” he argued that FERC’s decisions not to address climate change for LNG terminals was both risky, along the lines of Commissioner LaFleur’s comments, and pointless.<sup>99</sup> Because NEPA does not require a particular decision in response to information about GHGs, Commissioner Glick insisted that transparency about GHG impacts should be preferred.<sup>100</sup> He cited as well to filings by developers, evidently concerned that FERC’s position on GHG emissions exposed their projects to the risks of NEPA litigation delays, in which the developers disclosed GHG impacts estimates beyond what FERC had requested.<sup>101</sup>

In the pipeline context, FERC recently approved an expansion of the Transco pipeline project in Pennsylvania and New Jersey with Commissioner LaFleur concurring in the order and Commissioner Glick dissenting in full.<sup>102</sup> It is also worth observing that Commissioners LaFleur and Glick have both grounded their complaints about GHG effects in both NEPA and the NGA itself, as Sections 3 and 7 both contain public interest clauses. But the question whether a court would read those public interest clauses to require an agency’s affirmative decision that, on balance with environmental impacts and GHG emissions, an LNG export terminal or pipeline is in the public interest is a question for another paper.

Commissioner LaFleur’s term has expired, and FERC already has an empty seat after the passing of Chairman McIntyre earlier this year. Because no more than three seats on FERC can be filled by a single party, President Trump would likely appoint one Republican first and one Democrat afterwards; Commissioner LaFleur (herself a Democrat) has often been the deciding vote that has allowed projects to move forwards. She has shifted from dissenting (when FERC

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<sup>95</sup> *Id.* at 20.

<sup>96</sup> *Id.* at 19.

<sup>97</sup> Separate Statement of Comm’r LaFleur, concurring, attached to *id.*, at 1.

<sup>98</sup> *Id.* at 3.

<sup>99</sup> Separate Statement of Comm’r Glick, dissenting, attached to *id.*, at 1.

<sup>100</sup> *Id.* at 6.

<sup>101</sup> *Id.* at 6.

<sup>102</sup> Transcontinental Gas Pipe Line Company, LLC, 167 F.E.R.C. ¶ 61,110 (2019).

was full) to concurring with criticisms after FERC became a four-person commission. It remains unclear how a Commission with new members will be arrayed on issues like NEPA and climate change, but it seems likely that divergent views will continue to shape its internal dialogue as well as its certificate orders under the Natural Gas Act.

## **V. Council on Environmental Quality – Tiger Tamer?**

Congress created CEQ in Title II of NEPA and charged it with various duties.<sup>103</sup> Amongst its other functions, CEQ develops and issues guidance and rules that implement the Act – its very function, then, is to tame the NEPA tiger by properly defining agency obligations under the statute and providing expert insight into complex questions. Two ongoing efforts will be key to the federal agencies in their own efforts to sufficiently address the climate-related implications of their actions. First, as discussed above, CEQ is seeking public comment on draft guidance on the consideration of GHGs.<sup>104</sup> Second, we anticipate, if it has not happened already by the date of this conference, that CEQ will soon begin the public review process for the first ever significant revisions to the regulations implementing NEPA. Both endeavors have the potential to meaningfully change the legal landscape discussed above.

The draft guidance fits comfortably within nine double-spaced pages, in contrast to the 2016 guidance which occupied nearly 34 double-spaced pages.<sup>105</sup> The draft guidance primarily focuses on the question of *how* and to what degree to analyze effects from GHG emissions, rather than on the question of *when* such effects must be analyzed. With respect to when, CEQ notes only that the effects must have a “sufficiently close causal relationship” to the proposed action in order to merit analysis.<sup>106</sup> With respect to how, emphasizing the rule of reason, CEQ uses the guidance to remind agencies to use existing information and avoid speculation. The draft notes that GHG emissions are a satisfactory proxy for assessing climate effects and that agencies should try to quantify emissions when they are “substantial enough to warrant quantification, and when it is practicable to quantify them using available data and GHG quantification tools.” With respect to cumulative impacts, the draft guidance advises that a separate cumulative effects analysis is not required because an appropriately framed qualitative discussion is sufficient given that “the potential effects of GHG emissions are inherently a global cumulative effect.” Notably, the guidance states that NEPA does not require a cost/benefit analysis or monetization of impacts with respect to GHGs – indirectly addressing those few court decisions, discussed above, that suggest that monetization may be required if the agency monetizes the benefits of agency action.

Revisions to the CEQ regulations implementing NEPA have the potential to implicate the assessment of climate impacts in a number of ways. In particular, NEPA wonks are watching to

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<sup>103</sup> See 42 U.S.C. §§ 4341–47, 4372–75.

<sup>104</sup> See Guidance on the Consideration of Greenhouse Gases, COMMISSION ON ENVIRONMENTAL QUALITY (July 15, 2019), [https://ceq.doe.gov/guidance/ceq\\_guidance\\_nepa-ghg.html](https://ceq.doe.gov/guidance/ceq_guidance_nepa-ghg.html).

<sup>105</sup> The 2016 guidance can be found at 81 Fed. Reg. 51,866 (August 5, 2016).

<sup>106</sup> Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions, 84 Fed. Reg. 30,098 (June 26, 2019).

see if CEQ proposes a new approach to “indirect effects,” which, as explained above, is often the driver behind the need to consider GHG emissions. Some have posited that the Supreme Court’s decision in *U.S. Department of Transportation v. Public Citizen* may provide the best way forward for a rule that more clearly cabins the obligation to consider the indirect effects of federal action.<sup>107</sup> In that decision, the Supreme Court explained: “a ‘but for’ causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations.”<sup>108</sup> Rather, NEPA requires a relationship between the effect and “alleged cause” that is similar to tort law’s proximate cause doctrine.<sup>109</sup> Whatever the final approach in the proposed rule, the implications for the consideration of climate impact are likely to be top of mind for stakeholders as they review CEQ’s efforts.

## **VI. Conclusion: the Circus Goes on, the Tiger is not Tamed**

Litigation over an agency’s NEPA obligation to consider effects on climate from decisions related to oil and gas will continue into the foreseeable future. While some aspects of the circus may seem tame and settled with respect to BLM, the extent and nature of the agency’s consideration of the issue remains a lively area for disagreement – especially if actions taken by CEQ change the playing field. With respect to FERC, its unique composition and differing responsibilities remain fodder for continued efforts to define its NEPA responsibilities – one way or another.

When agencies struggle with an issue of this sort, private development may be slowed or halted by agencies proceeding very cautiously in an effort to anticipate challenges and by resulting litigation that could include injunctions against agency actions that allow oil and gas production or transportation. Thus far, these agencies have not been able to entirely tame NEPA, particularly in the area of GHGs emissions. The private sector has a compelling interest in staying in the ring.

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<sup>107</sup> *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004).

<sup>108</sup> *Id.* at 767.

<sup>109</sup> *Id.*



**Dan Werner**  
**SVP, LNG Marketing – Europe & Americas**

Dan Werner joined NextDecade in January 2019 with more than 25 years of experience in the energy industry, and a strong background in commercial, financial, technical, and regulatory areas. Werner identifies and develops opportunities to sell LNG into European and Americas markets, managing and negotiating SPAs for NextDecade's Rio Grande LNG project in South Texas. Highly experienced in commercial structuring and contract negotiation, Werner has worked in the LNG industry since 1999 and has lived and worked in several countries around the world. Prior to joining NextDecade, Werner was a Senior Vice President with GNL Quebec, leading pre-FEED, FEED, and EPC functions for a planned 10.5 mtpa liquefaction and export facility. Before that, Werner served in senior management roles – mostly in commercial roles – with Delfin LNG, Golar LNG, BG Group, and Sempra. Following completion of undergraduate engineering studies, Werner earned an MBA in finance and marketing from Loyola University of Chicago.

LNG Export Facilities: Permitting Process Overview  
David Wochner, Steve Morton, Janessa Glenn<sup>1</sup>  
Friday, August 2, 2019

## **I. INTRODUCTION TO LNG**

The global natural gas industry has seen dramatic changes in supply and demand as a result of the U.S. shale revolution. While the United States was a significant importer of liquefied natural gas (“LNG”) for decades, today, in response to growing worldwide demand, the emergence of new production areas, and evolving extraction and transportation technologies, a robust competitive market has developed for LNG exports that places the United States at the center of the global natural gas market. In February 2016, Cheniere Energy was the first U.S. company to export LNG from the Lower 48 United States. Since then, the United States has exported LNG to meet demand in Asia, Europe, and South America and now ranks as the third largest exporter in the world behind Qatar and Australia.

### **a. What is LNG?**

LNG is produced when natural gas is cooled at ambient pressures to approximately minus 162 degrees Celsius, at which point the natural gas commodity is reduced to approximately 1/600th of its original size in volume, becoming “liquefied,” and thus facilitating shipment of much greater volumes of natural gas. LNG is cooled through a refrigerated cycle process that involves compression, condensation, expansion, and evaporation to transform the gas into a liquid form. Once the natural gas has been liquefied, it can be stored in thermally insulated tanks specifically designed to maintain the natural gas in liquid form at -160°C and then transported on

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<sup>1</sup> The authors would like to thank the following additional authors from K&L Gates: Mike O’Neill, Jennifer Bruneau, Toks Arowojolu and Abraham Johns.

LNG tanker ships. LNG, which is in large part composed of methane, is odorless, colorless, non-toxic and non-flammable, which makes it safe to transport.

LNG offers numerous benefits to consumers, the environment, and economies around the world. Once LNG is re-gasified, LNG is a major fuel source for power generation and for industrial and commercial end-users. Due to the versatile nature of LNG, it can be a source for a variety of other uses such as: “a raw material for products including paints, fertilizer, plastics, antifreeze, dyes and medicine, or as a fuel used for industrial purposes, such as producing steel, glass, paper, clothing, brick and electricity, and for residential and businesses purposes, such as heating, cooking and drying clothes.”<sup>2</sup> Supporting the development of LNG export projects can also help boost the U.S. economy. A 2017 study determined that “increased exports of clean and abundant U.S. natural gas (in the form of liquefied natural gas or LNG) could support between 220,000 and 452,000 additional American jobs and add up to \$73 billion to the U.S. economy by 2040.”<sup>3</sup> It also will greatly benefit the U.S. trade imbalance. Finally, when used for power generation, natural gas emits half as much carbon dioxide as compared to coal, which provides tremendous benefits to the environment. In fact, LNG development companies are eager to build new export facilities to meet the growing demand from Asian countries that seek to shift from utilizing coal to cleaner burning natural gas.

#### **b. Current LNG Export Activity on the Gulf Coast**

According to the International Energy Agency (“IEA”), the United States is on track to become the largest exporter of LNG in the world by 2024, displacing Qatar and Australia.<sup>4</sup> The

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<sup>2</sup> The Center for LNG, *available at* <https://lngfacts.org/>.

<sup>3</sup> ICF, “Impact of LNG Exports on the U.S. Economy: A Brief Update,” (Sept. 2017), *available at* <https://www.api.org/~media/Files/Policy/LNG-Exports/API-LNG-Update-Report-20171003.pdf>.

<sup>4</sup> International Energy Agency, “Gas 2019: Analysis and Forecasts to 2024,” *available at* <https://www.iea.org/gas2019/>.



Gulf Coast is at the center of LNG infrastructure development due to the vast natural gas supplies in Texas. FERC currently regulates twenty-four operational LNG facilities, three of which are LNG export facilities in the Gulf Coast. There are currently 11 proposed LNG facilities at FERC and 6 in the pre-filing stage.

## **II. PERMITTING AN LNG EXPORT FACILITY**

The federal Natural Gas Act (“NGA”) of 1938, as amended in the decades since enactment, establishes jurisdiction for regulating the import and export of natural gas, including natural gas as LNG. Section 3 of the NGA directs federal agencies to consider whether a proposed import or export is in the “public interest.”<sup>5</sup> The federal government has split the review of natural gas and LNG import and export proposals between two agencies: FERC reviews the siting, construction, and operation of facilities used for the import or export of natural gas and LNG and the Department of Energy’s (“DOE”) Office of Fossil Energy evaluates the import or export of the natural gas and LNG commodity.

### **a. The Federal Energy Regulatory Commission**

Established by the 1977 Department of Energy Organization Act, FERC is an independent agency that oversees interstate energy flows and markets, including facilities used for LNG import and export and interstate natural gas pipelines.<sup>6</sup> FERC has five Senate-confirmed commissioners, no more than three of which may be from the same political party, and acts by majority vote.<sup>7</sup> With the Energy Policy Act of 2005, Congress granted FERC

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<sup>5</sup> 15 U.S.C. § 717b (a).

<sup>6</sup> In addition to oversight over LNG and natural gas activities, FERC also has jurisdiction over interstate wholesale electric power markets, hydropower projects, and interstate oil pipelines.

<sup>7</sup> At present, FERC has four members and one vacant seat. One member, Commissioner Cheryl LaFleur, will leave the Commission at the end of August 2019 (<https://twitter.com/CLaFleurFERC/status/1141783991982395393>). At that time, there will be two Republican and one Democratic members of the Commission. The Commission needs three commissioners to be present and participate to constitute a quorum.

exclusive authority over the siting, construction, expansion or operation of LNG import and export terminals.<sup>8</sup> FERC also has jurisdiction over interstate natural gas pipelines pursuant to NGA Section 7, including interstate pipelines that transport gas to or from LNG terminals.<sup>9</sup>

FERC's process for reviewing LNG export project proposals has three primary stages: the applicant-initiated pre-filing process; the filing and review by FERC of the applicant's formal application culminating with the Commission's order approving or denying the project; and the post-authorization activities including any challenges to the order and the applicant's engagement with FERC staff to proceed with construction. FERC's permitting process is outlined below.

*i. Pre-Filing*

FERC's regulations mandate that an applicant for an authorization to site, construct, and operate an LNG terminal must use the Commission's pre-filing procedures.<sup>10</sup> FERC's pre-filing process allows LNG terminal applicants to interface with FERC without the strictures of FERC's prohibition against *ex parte* communication that exists in a contested proceeding.<sup>11</sup> That way, FERC staff and applicants can address FERC's initial issues quickly and openly.

During the pre-filing period, the LNG applicant describes the project proposal, files draft environmental resource reports, and initiates consultation with cooperating federal and state

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<sup>8</sup> 15 U.S.C. § 717b (e) (1).

<sup>9</sup> See 15 U.S.C. § 717f(c). If the feed gas or takeaway pipeline is not an interstate pipeline, then FERC may regulate the interconnecting facilities as part of the LNG terminal under Section 3 of the NGA. See, e.g., *Freeport LNG Development, LP*, 107 FERC ¶ 61,278 (2004) (approving a send-out pipeline associated with an LNG import proposal pursuant to Section 3 of the NGA).

<sup>10</sup> 18 C.F.R. § 157.21(a).

<sup>11</sup> See 18 C.F.R. § 385.2201(b) (prohibiting off-the-record communications regarding the merits of a contested proceeding between).

agencies. This consultation period includes filing a letter of intent and preliminary waterway suitability assessment with the U.S. Coast Guard.<sup>12</sup>

The thirteen draft resource reports<sup>13</sup> are preliminary versions of resource reports that FERC will use to generate the environmental impact statement or environmental assessment needed to comply with the National Environmental Policy Act (“NEPA”).<sup>14</sup> FERC is the lead federal agency for evaluating potential environmental impacts of an LNG project, so FERC will undertake a detailed review of these potential impacts while coordinating with other federal, tribal, and state agencies. FERC staff provides comments regarding the draft resource reports, highlighting topics that require additional information or clarification. Applicants often file updated versions of their draft resource reports that respond to FERC staff’s comments. Applicants also must file a draft version of resource report 13, which provides detailed information regarding the proposed facility’s engineering and construction, at least 90 days prior to filing the formal project application.<sup>15</sup>

LNG applicants must be in the pre-filing process for at least 180 days after FERC staff approves an applicant’s request to commence pre-filing.<sup>16</sup> After 180 days, the applicant may end the pre-filing process by submitting its formal application package to the Commission. However, many applicants elect to engage in the pre-filing process for longer than 180 days.

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<sup>12</sup> 18 C.F.R. § 157.21 (a) (1).

<sup>13</sup> The required resource reports cover the following topics: (1) general project description; (2) water use and quality; (3) fish, wildlife, and vegetation; (4) cultural resources; (5) socioeconomics; (6) geological resources; (7) soils; (8) land use, recreation, and aesthetics; (9) air and noise quality; (10) project alternatives; (11) reliability and safety; (12) PCB contamination; and (13) engineering and design material.

<sup>14</sup> 42 U.S.C. § 4332(C).

<sup>15</sup> 18 C.F.R. § 157.21 (f) (12).

<sup>16</sup> 18 C.F.R. § 157.21(a) (2) (i).

## *ii. Formal Application*

When project applicants have received all the feedback from FERC staff regarding the proposed projects, the applicants submit their formal applications for the LNG project and any associated jurisdictional pipeline to FERC. The formal application process allows FERC to review final versions of resource reports, request further information from the applicant, consult and coordinate with other reviewing federal, tribal, and state agencies, and solicit input from stakeholders or members of the public.

Upon submission of a formal application for an LNG project to FERC, Commission staff will issue a public notice in order to solicit public input regarding the project. FERC staff also will conduct or supervise evaluations of the project application materials.<sup>17</sup> Recently, FERC executed a Memorandum of Understanding (“MOU”) with the U.S. Department of Transportation’s Pipeline and Hazardous Material Safety Administration (“PHMSA”), providing that PHMSA will take responsibility for determining whether a project will comply with PHMSA’s rigorous siting standards for LNG facilities.<sup>18</sup>

In order to comply with NEPA, FERC initially determines whether it will prepare an environmental impact statement (“EIS”) to evaluate the project or if it will prepare an environmental assessment for the project. An EIS is a very thorough and lengthy document that evaluates potential direct, indirect, and cumulative impacts of the project. An environmental

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<sup>17</sup> FERC usually contracts with vendors to supplement FERC staff’s resources to evaluate complex environmental and engineering details. The project applicant pays the costs for this third-party contractor, but it is FERC that supervises the contractor, not the applicant. The applicant has no authority to direct the contractor’s work or interfere in the review process. See FERC, *Handbook for Using Third-Party Contractors to Prepare Environmental Documents* (2016), available at <https://www.ferc.gov/industries/hydropower/enviro/tpc/tpc-handbook.pdf>.

<sup>18</sup> FERC, *Memorandum of Understanding Between the Dep’t of Transp. and the Fed. Energy Regulatory Comm’n* (2018), available at <https://www.ferc.gov/legal/mou/2018/FERC-PHMSA-MOU.pdf>. PHMSA has established siting standards for LNG facilities under 49 C.F.R. Part 193. In the past, FERC staff had been responsible for determining whether an LNG project complied with PHMSA’s siting rules for LNG facilities. Under the recent agreement between the agencies, PHMSA has taken responsibility for determining whether the LNG facility will comply with federal standards for LNG facility siting.

assessment (“EA”) is a less searching document that agencies use to determine whether they should prepare a full EIS or whether the EA is enough to comply with NEPA’s requirements. Usually an EA is used for small projects with fewer impacts or modifications to existing facilities.

FERC’s preparation of an EIS is subject to prescriptive regulations and requires solicitation of public comments to scope the issues in the EIS. FERC staff prepares a draft EIS for input by coordinating agencies and public comment, then issues a final EIS that considers and responds to these comments.<sup>19</sup> At this stage, FERC often proposes mitigation measures and considers alternatives to mitigate potential environmental impacts.<sup>20</sup>

Following completion of the FERC staff-led NEPA review process, the FERC commissioners consider the application.<sup>21</sup> There is no deadline by which the commission must render a decision on an LNG project application, but it usually acts on an application for an LNG project 4-6 months after completing the NEPA environmental review.

### *iii. Request for Rehearing*

Within 30 days following FERC’s decision on the application, a party to the proceeding may ask FERC to rehear and reconsider some or all of its decision.<sup>22</sup> This part of the process is an opportunity for parties aggrieved by FERC’s decision to request that FERC reconsider some or all of its order. In the alternative, a party can request that FERC clarify its decision on certain

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<sup>19</sup> See generally 18 C.F.R. Part 380.

<sup>20</sup> See, e.g., Port Arthur LNG, LLC, 167 FERC ¶ 61,052 at P. 26 (2019) (“All adverse impacts from construction and operation of the facilities will be reduced to less than significant levels if the projects are constructed and operated in accordance with applicable laws and regulation and the environmental mitigation measures recommended in the final EIS and adopted by this order”).

<sup>21</sup> The Commission may not issue an order on the application until at least 30 days after the issuance of the final NEPA document. 40 C.F.R. § 1506.10 (b) (2).

<sup>22</sup> 15 U.S.C. 717r (a).

points. Although a party must request rehearing within 30 days of FERC's initial order, in practice there is no deadline by which the Commission must act on a request for rehearing.<sup>23</sup>

If a party remains dissatisfied with FERC's action on rehearing, the party may seek judicial review from a U.S. appellate court. Within 60 days of FERC's order on rehearing, the party may file a petition for review of FERC's action with the U.S. Court of Appeal for the circuit in which the project or action at issue in the FERC proceeding will take place or with the U.S. Court of Appeals for the District of Columbia.<sup>24</sup> The parties and FERC brief their cases before the court and the court renders a decision as in any other agency appeals process.<sup>25</sup> The court does not have a deadline by which it must issue a decision on the petition for review.

#### **b. Role of Other Federal and State Agencies**

Other federal and state agencies support FERC in the NEPA review process for LNG projects by serving as cooperating agencies. A cooperating agency is a federal agency that has jurisdiction over some aspect of the project by law or by special expertise with respect to a project's specific environmental or safety impact.<sup>26</sup> A state or local agency with similar characteristics, or when the effects are on a reservation, a Native American Tribe, also may be a cooperating agency through an agreement with the lead agency.<sup>27</sup> These agencies consult with FERC throughout the environmental review process and provide comments on the FERC staff-issued draft EIS ("DEIS") that FERC then incorporates in the FEIS. Many of them also issue permits or complete consultations covering various environmental impacts. When FERC issues

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<sup>23</sup> The NGA requires that FERC issue a decision on a request for rehearing within 30 days. In practice, FERC usually issues a "tolling order," which acts to extend indefinitely the time by which FERC must act on the pending request for rehearing.

<sup>24</sup> 15 U.S.C. 717r (b).

<sup>25</sup> FED. R. APP. P. 15(a).

<sup>26</sup> 40 C.F.R. § 1501.6 (2018).

<sup>27</sup> 40 C.F.R. § 1501.6 (2018).

its order authorizing an LNG project, FERC always includes a condition requiring that a project developer receive all federal authorizations prior to commencement of construction. Therefore, cooperating agencies play an essential role in the regulatory process for LNG projects.

For LNG projects, the U.S. Coast Guard (“USCG”), U.S. Army Corps of Engineers (“Corps”), the U.S. Fish & Wildlife Service (“USFWS”), and PHMSA are the most engaged cooperating agencies because they have permitting or consultation authority over LNG projects. Depending on the scope of a particular project’s environmental impacts, FERC may ask other agencies to participate as cooperating agencies, but this paper focuses on these four agencies because of their prominent role for all LNG projects. At the state level, state environmental agencies (e.g., the Texas Commission on Environmental Quality or “TCEQ”), and state historic preservation offices (e.g., the Texas State Historic Preservation Office or “TxSHPO”) always serve as cooperating agencies in part because they are responsible for authorizations issued pursuant to federal law. This makes for a robust environmental and safety review process that requires the cooperation and coordination of numerous federal and state agencies, as further detailed below.

#### *i. Federal Agencies*

The USCG is responsible for issuing a Letter of Recommendation indicating whether the waterway is suitable for accommodating the type and frequency of LNG marine traffic associated with the project.<sup>28</sup> On or before a project submits its request to initiate pre-filing with FERC, an LNG project must submit a Letter of Intent to build the LNG export facility with a Preliminary Water Suitability Assessment.<sup>29</sup> On or before a project submits its application to

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<sup>28</sup> See generally 33 C.F.R. Part 127 (2018).

<sup>29</sup> 33 C.F.R. § 127.007 (2012).

FERC, the project must submit to the USCG a Follow-On Waterway Suitability Assessment.

The USCG bases its Letter of Recommendation on the information provided in these documents, various other information on the waterway, and USCG's own independent analysis.

The USFWS is responsible for working with FERC to ensure the project complies with Section 7 of the Endangered Species Act ("ESA Section 7")<sup>30</sup> and the Migratory Bird Treaty Act ("MBTA").<sup>31</sup> The National Marine Fisheries Service ("NMFS") also has responsibility for compliance with ESA Section 7 for marine species. The ESA's purpose is to ensure that actions authorized by a federal agency do not jeopardize the existence of federally listed threatened or endangered species. FERC works with the USFWS and NMFS to determine whether such species or its critical habit is within the project area and if so, the likelihood that the project will affect the species. Depending on the likelihood of an impact, FERC will engage the USFWS or NMFS in an informal consultation for a "may affect, not likely to adversely affect" determination, or a formal consultation for a "may affect, likely to adversely affect" determination, the purpose of which is to minimize the potential impacts. The formal consultation process results in the issuance of a Biological Opinion in which the USFWS or NMFS determines whether the project will jeopardize the continued existence of the species. If the agency determines that the project will not jeopardize the species' continued existence, USFWS will issue an Incidental Take Statement ("ITS") with the Biological Opinion that includes the reasonable and prudent measures that USFWS has deemed necessary to limit incidental take of the species that may result from the project.

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<sup>30</sup> 16 U.S.C. §§ 1531-1544 (2012). *See* 50 C.F.R. Subpart B (2018).

<sup>31</sup> 16 U.S.C. § 703-712 (2012).



Similarly, the MBTA protects migratory birds by prohibiting the intentional take or killing of individual migratory birds, their eggs and chicks, and active nests. To the extent that a project may affect migratory birds, in consultation with the USFWS, the project developer creates a Migratory Bird Conservation Plan for avoiding or minimizing impacts on migratory birds.

PHMSA has responsibility for enforcing safety regulations and standards related to the design, construction, and operation of LNG facilities under the Natural Gas Pipeline Safety Act,<sup>32</sup> known as the Part 193 Subpart B Review.<sup>33</sup> After conducting its review, PHMSA issues a Letter of Determination that sets forth its analysis and conclusions for the 193 Subpart Review. The Letter of Determination is one of the factors FERC considers when deciding whether to authorize the construction and operation of an LNG export project.

The Corps is responsible for regulating (1) the discharges of dredged or fill material into waters of the United States and (2) structures or work in navigable waters of the United States, under section 404 of the Clean Water Act (“CWA”)<sup>34</sup> and section 10 of the Rivers and Harbors Act of 1899.<sup>35</sup> An LNG project requires a Section 404/10 permit in order to construct the terminal. There are two main types of Section 404 permits: the individual permit, which is required for projects with impacts projected to exceed certain thresholds, and the general permit, which authorizes activities minor in scope with minimal projected impacts. LNG projects typically receive general permits. During the permitting process, the Corps will review the project’s formal application, consider FERC’s conclusions in the FEIS, and work with the

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<sup>32</sup> 49 U.S.C. §§ 60101-60141.

<sup>33</sup> 42 U.S.C. § 193 Subpart B.

<sup>34</sup> 33 U.S.C. § 1344 (2012).

<sup>35</sup> 33 U.S.C. § 403 (2012).

project to develop appropriate mitigation for the project's unavoidable impacts on aquatic resources, including wetlands. The mitigation review process is a robust process that requires that the public and other federal and state agencies have an opportunity to comment on the proposed mitigation.<sup>36</sup> In Texas, this includes the Texas Parks and Wildlife Department.

*ii. State Cooperating Agencies*

LNG projects also require a certificate under Section 401 of the CWA ("401 Certification") that is related to the Corps' 404 permit. By issuing a 401 Certificate, the responsible agency certifies that any discharges from the facility will comply with the CWA's water quality standards.<sup>37</sup> While the Environmental Protection Agency ("EPA") oversees a state's implementation of CWA Section 401, the state environmental agency is responsible for the 401 Certification itself. In Texas, the Texas Railroad Commission administers the 401 Certification program for LNG export facilities.

State environmental agencies also have responsibility for issuing permits under the Clean Air Act ("CAA").<sup>38</sup> Pursuant to its authority under the Clean Air Act, the EPA has developed regulations for major sources of air pollution and delegated its authority for implementing these regulations to state and local agencies, including compliance with Title V operating permit requirements and the Prevention of Significant Deterioration ("PSD") Review. State and local agencies also have the authority to develop regulations for non-major sources. In Texas, TCEQ is responsible for issuing CAA permits. Pursuant to the NGA, judicial review of the state issuance of a consolidated permit for PSD, Title V, and a non-major source is exclusively within

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<sup>36</sup> 40 C.F.R. § 230.94 (2018).

<sup>37</sup> 33 U.S.C § 1341 (2012).

<sup>38</sup> 42 U.S.C. §§ 7401 - 7431 (2012).

the jurisdiction of the United States Courts of Appeals because such issuance is made pursuant to Federal law.<sup>39</sup>

Finally, State Historic Preservation Offices (“SHPO”) are responsible for completing the National Historic Preservation Act Section 106 (“NHPA Section 106”)<sup>40</sup> consultation, which is overseen by the federal Advisory Council on Historic Preservation (“ACHP”). To complete this consultation, the project developer works with the SHPO (or in the case of Native American cultural resources, the Tribal Historic Preservation Officer (“THPO”)) to complete cultural resource surveys in the project’s impact area. If a project will have or may adversely affect historic properties, the Section 106 regulations require FERC to consult with the SHPO/THPO to develop a Memorandum Agreement or Programmatic Agreement that sets out the measures to avoid, minimize, or mitigate these impact.<sup>41</sup> A Programmatic Agreement requires the ACHP’s participation in the agreement negotiation process, while the Memorandum Agreement does not. Projects also typically develop Unanticipated Discovery Plans that set forth the policy and procedures for handling cultural resources found during construction.

The inclusion of the cooperating agencies in FERC’s review of an LNG project ensures that the agencies with the relevant expertise are opining on the project’s impacts in the areas in which these agencies are experts. These agencies also play a fundamental role in issuing federal authorizations that are prerequisites to a project’s ability to construct. Therefore, it is in an LNG project developer’s best interest to engage with cooperating agencies early in the project review process and maintain open lines of communication throughout.

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<sup>39</sup> 42 U.S.C. § 717r (d)(1) (2005).

<sup>40</sup> 54 U.S.C. §§ 300101 - 307108 (2012).

<sup>41</sup> 36 C.F.R. § 800.6(b) (1) (i-iv) (2012); 36 C.F.R. § 800.14(b) (2012).

### **c. The U.S. Department of Energy**

The 1977 Department of Energy Organization Act (“DOE Act”) established the DOE and, among other things, dissolved one of its predecessor, the Federal Power Commission.<sup>42</sup> The DOE is a federal cabinet-level agency, regulating policies that deal with energy and nuclear materials.<sup>43</sup> Under the DOE Act, Congress specifically assigned certain authority to FERC and the DOE separately. While FERC holds authority over construction, siting, operation, and any changes to LNG terminals, DOE holds the authority under Section 3 of the NGA to approve or deny applications for the import or export of the LNG commodity.<sup>44</sup> Such authority is specifically vested within the DOE’s Office of Fossil Energy. While the authority for imports and exports of natural gas is limited in scope within the regulations, DOE relies on positions articulated in policy statements, agency guidance documents, and agency orders to establish and modify specific rules and requirements.

#### *i. Standard of Review*

To approve an application for authorization to export LNG, DOE must find the application is within the “public interest.”<sup>45</sup> Section 3(a) of the NGA creates a rebuttable presumption that imports and exports are in the public interest.<sup>46</sup> Therefore, to successfully challenge the authorization, a party must overcome this presumption. Pursuant to DOE regulations, an applicant for authorization must address “the lack of a national or regional need

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<sup>42</sup> 42 U.S.C. §§ 7101-385s-16; § 7131.

<sup>43</sup> The stated mission of the DOE is “to ensure America’s security and prosperity by addressing its energy, environmental and nuclear challenges through transformative science and technology solutions.” Mission, Dep’t of Energy, [www.energy.gov/mission](http://www.energy.gov/mission) (last visited July 16, 2019).

<sup>44</sup> 15 U.S.C. § 717b.

<sup>45</sup> 15 U.S.C. § 717b (a).

<sup>46</sup> See *Sierra Club*, 867 F.3d at 203 (“We have construed [NGA section 3(a)] as containing a ‘general presumption favoring [export] authorization.’”) (quoting *W. Va. Pub. Serv. Comm’n v. U.S. Dep’t of Energy*, 681 F.2d 847, 856 (D.C. Cir. 1982)).

for the gas.”<sup>47</sup> In recent years, DOE’s review of LNG export applications, among other things, has focused on:

(i) the domestic need for the natural gas proposed to be exported, (ii) whether the proposed exports pose a threat to the security of domestic natural gas supplies, (iii) whether the arrangement is consistent with DOE’s policy of promoting market competition, and (iv) any other factors bearing on the public interest, as determined by DOE.<sup>48</sup>

The public interest standard applied is articulated in the DOE orders issued.<sup>49</sup>

## *ii. Export Applications Overview*

Pursuant to the DOE regulations, applications for authorization to export LNG must be filed at least ninety (90) days in advance of the proposed export.<sup>50</sup> This is true both for applications for export to Free Trade Agreement (“FTA”) nations and non-FTA nations. Pursuant to Section 3(c) of the NGA,<sup>51</sup> applications for authorization to import and export natural gas, including LNG, from a nation with which there is an active FTA requiring national treatment for that trade is deemed to be in the public interest and does not require public notice in the Federal Register. Authorizations for exports to FTA nations take approximately six months. Alternatively, the export of LNG to non-FTA countries is presumed to be in the public interest, but requires a more thorough review, and notice of the non-FTA application is published in the

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<sup>47</sup> 10 C.F.R. § 590.202 (b) (6).

<sup>48</sup> *Port Arthur LNG, LLC*, DOE/FE Order No. 4372 at 22, FE Docket No. 15-96-LNG, May 2, 2019.

<sup>49</sup> *See id.* at 20-22.

<sup>50</sup> 10 C.F.R. § 590.201(b).

<sup>51</sup> 15 U.S.C. 717b(c).

Federal Register for public comment.<sup>52</sup> Authorization to import or export to non-FTA nations includes additional requirements and generally involves a longer processing time.

The two types of export permits issued by the DOE are the Blanket (Short-term) Authorization or the Long-Term Authorization.<sup>53</sup> The Short-Term/Blanket Authorization is active for no longer than two years and is generally used for spot market transactions. Application and processing for the short-term authorization is simple and routine.

The Long-Term Authorization is for any authorization sought that is longer than two years. DOE expects that traditional long-term LNG export contracts should be applied for and authorized pursuant to its Long-Term Authorization guidelines. Applications for long-term authorization must include “(1) the identity of the supplier or purchaser of the natural gas to be imported and/or exported; (2) the name of the U.S. transporter(s); (3) the point(s) of entry or exit on the international border; (4) the geographic market(s) served; (5) the start date.” The application must include a statement of the desired action; justification for such an action that includes why the action is not inconsistent with the public interest; and a statement with a signed opinion from legal counsel that explains the applicant’s corporate powers and how export of LNG is within those powers. Additional regulatory requirements include, when applicable, the scope of the project (i.e., volumes of natural gas, dates of commencement and completion, and facilities to be used or constructed), source and security of the commodity, identification of all participants to the transaction, all relevant contracts, all relevant purchase agreements, and terms of the transaction. Regulations require that the applicant provide potential environmental

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<sup>52</sup> 15 U.S.C. § 717b(a); App. at 1.; *see also Policy Statement on non-FTA Natural Gas Export Authorizations*, DOE Office of Fossil Energy, June 21, 2018, <https://www.energy.gov/fe/articles/policy-statement-non-fta-natural-gas-export-authorizations>.

<sup>53</sup> *How to Obtain Authorization to Import and/or Export Natural Gas and LNG*, DOE, <https://www.energy.gov/fe/services/natural-gas-regulation/how-obtain-authorization-import-and-or-export-natural-gas-and-lng> (last accessed July 16, 2019).

impacts of the project and DOE relies on FERC's NEPA environmental review to satisfy its obligations. Applicants may obtain confidential treatment for commercially sensitive information from the DOE.

*iii. DOE Decision*

In most authorization orders, DOE imposes conditions on LNG export license holders. Common conditions include that the project commence operations no later than seven years from the date of the order, and submission of semi-annual reports on the project's progress. The DOE previously included a clause in export authorization orders that appeared to allow for revocation of an export license in "the event of unforeseen developments of such significant consequence as to put the public at risk."<sup>54</sup> However, while DOE "preserves its authority to take action as necessary or appropriate to carry out its duties under the NGA,"<sup>55</sup> it issued a policy statement clarifying that it does not intend to rescind LNG export authorizations noting that it "does not foresee a scenario" where it would take such an action."<sup>56</sup>

After issuance of an LNG export license, the DOE requires the license holder to submit monthly reports that include what imports and/or exports have been completed and for each listing the country of origin or destination; points of entry or exit; volumes delivered at each point; the price; and the supplier.

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<sup>54</sup> See *Sabine Pass Liquefaction, LLC*, DOE/FE Order No. 2961, FE Docket No. 10-111-LNG, May 20, 2011, at n. 45, [https://fossil.energy.gov/ng\\_regulation/sites/default/files/programs/gasregulation/authorizations/2011/orders/ord2961.pdf](https://fossil.energy.gov/ng_regulation/sites/default/files/programs/gasregulation/authorizations/2011/orders/ord2961.pdf).

<sup>55</sup> *Policy Statement on non-FTA Natural Gas Export Authorizations*, DOE Office of Fossil Energy, June 21, 2018, <https://www.energy.gov/fe/articles/policy-statement-non-fta-natural-gas-export-authorizations>.

<sup>56</sup> *Id.*

### **III. CONCLUSION**

The federal regulatory process for authorization of LNG export facilities and the LNG commodity is robust and searching, examining potential environmental, social, economic and safety issues associated with the development of a proposed LNG import or export facility. Multiple federal, state and local agencies participate in the process, which provides for frequent opportunities for public engagement and input. Ultimately the determination is a balancing of interests consistent with the public interest requirements of the federal NGA.





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## **RESPECT BIG BEND: A PROJECT TO CONSERVE THE GREATER BIG BEND REGION**

### **USING ENGAGEMENT, ECONOMIC DEVELOPMENT AND SCIENCE TO GUIDE ENERGY DEVELOPMENT AND PROTECT COMMUNITIES**

**Melinda Taylor**

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#### **SUMMARY**

The greater Big Bend region of West Texas is characterized by wide-open spaces, dark, star-filled night skies, unique biological resources, and fiercely independent residents. Some of Texas' largest intact historic ranches are in the region, as well as the state's two national parks. Until recently, the region has been mostly untouched by the intense energy development that has shaped the communities that straddle the Permian Basin, where vast fields of oil wells and their associated networks of roads and pipelines have dominated the landscape for decades. But the character of the greater Big Bend region is beginning to change. Apache Corporation's 2016 announcement of a major new oil and gas play in the Alpine High in Reeves County, and the explosive growth in wind farms and utility-scale solar facilities in Pecos County and elsewhere, signal the possibility of an imminent transformation, a transformation with profound implications for the communities, landowners, and natural resources of the region.

Respect Big Bend (RBB) was launched by the Cynthia and George Mitchell Foundation in 2018 to protect the natural resources and unique communities of the greater Big Bend region through a collaboration based on sound science, community outreach and education, landscape-scale planning, and economic development. The goal is to create a blueprint for energy development that avoids the environmental and economic pitfalls of other energy plays, such as the Eagle Ford in South Texas, and creates "win-win" solutions. The RBB collaboration includes the Borderlands Research Institute at Sul Ross State University, The Nature Conservancy, Texas Agricultural Land Trust, the Environmental Defense Fund, the Bureau of Economic Geology at the University of Texas, the Nicholas Institute of Environmental Policy at Duke University, Hudson Pacific, a communications consulting firm, and Adamantine, an energy consulting firm.

The coalition identified four primary goals and activity tracks for the RBB project:

- 1) Build a knowledge base and design informational materials through a social media and outreach campaign;
- 2) Collect input from the affected communities and other stakeholders involved through extensive engagement;
- 3) Combine inputs from the campaign and stakeholder engagement with research and data to formulate a blueprint for energy development that offers win-win solutions.
- 4) Integrate community values and goals for economic development with a regional entrepreneurial hub to create clear pathways for a regional development road map.

The mission of the RBB program is to inspire and empower all stakeholders to conserve the unique resources and protect the iconic communities of the greater Big Bend region of Texas while developing

energy responsibly. The ecological value of the Region, coupled with its low population size and emerging value to the energy sector, warrants a strategic approach to regional conservation planning. A coalition of conservationists, energy leaders, and communication specialists has assembled to conduct the RBB.

## **I. Background**

Within the last decade, hydraulic fracturing and directional drilling have led to an oil and gas renaissance in Texas, particularly in the Permian Basin. The result is a higher level of energy independence for the nation and lower energy prices, but the boom has also raised concerns about groundwater and surface water contamination, water usage, induced earthquakes, and fugitive methane emissions. These issues receive attention from the media the government and the public. Often unacknowledged are the landscape impacts that accompany hydrocarbon extraction. Hydraulic fracturing, which is used in the majority of new wells drilled in the Permian Basin, requires three times as much land as conventional drilling (three acres per pad, compared to a fraction of an acre for a conventional well). In addition to the pads, new development requires roads, pipelines and other infrastructure that also affect the land. These land use changes impact people, ecosystems, and habitats, as well as other ecosystem services, like rangeland and water needs.

Intensive energy development also brings change to the rural communities nearby. Increased development activity can have positive economic impacts: an increase in local tax revenue and high-paying jobs for some local residents. But there are negative impacts, as well. Increased truck traffic produces substantial wear and tear on farm-to-market roads that were not designed for the industrial loads to which they are now subject. An influx of workers from afar leads to housing shortages, overcrowding of schools, price inflation, and, in some cases, higher levels of crime. We know from focus group discussions that local residents miss the attributes of their communities that drew them to West Texas in the first place: peace and quiet, solitude, dark skies, wide-open vistas, and the small-town culture of their communities. They express some resentment that they had no say in the shape of the energy development taking place in their midst, and they note that most of the benefits of development are realized by urban citizens in other parts of the state and nation, not the local communities. Residents feel powerless over their rapidly changing communities and life style and are stymied by their lack of trusted brokers of balanced information.

At the same time that oil and gas development is increasing in West Texas, renewable energy sources are also proliferating across the landscape. Texas produces much more wind energy than any other state – over 23,000 MW of installed capacity currently – and is one of the fastest growing producers of solar energy, as well. There are more than 6,000 MW of new wind power under construction, with another 1,800 MW in an “advanced development” stage, according to the Electric Reliability Council of Texas (ERCOT), the state’s electric grid operator. Solar generation capacity is predicted to exceed 2,000 MW early this year with a whopping 43,000 MW of solar construction planned for the next twenty years. Half of the planned projects are slated for Pecos County in West Texas. Like oil and gas, wind turbines and utility-scale solar farms and their associated transmission lines and roads alter the landscape. In the coming decades, energy sprawl from both renewable and fossil fuel development will be the largest driver of land use change in the United States.

To minimize the potential impacts on communities, ecosystem services, biodiversity, land, and water from energy sprawl, the first step of the RBB is to understand the patterns of landscape alterations that will occur with no intervention, and then explore alternatives through a landscape scale, community-based planning process. Through this project, we will use the planning process in West Texas to explore the vexing, yet crucial question: how can we expedite responsible energy development and still maintain functional and connected ecosystems and their associated services and wildlife values, and preserve the character of rural communities? At the same time, to help ensure that boom-and-bust cycles of energy development and single-industry vulnerabilities do not complicate or skew economic development in the Region, the RBB includes an economic development roadmap research and design component. Finally, to catalogue the ongoing process, challenges and impacts of the RBB project, a continual case study effort will commence and run through the life of the project. Outputs from the case study will provide guidance for other regions that might embark on a similar regional conservation planning and economic development endeavor.

## **II. A Case for the Big Bend**

The greater Big Bend region is one of the most picturesque and biologically diverse regions of the world. Mountain ranges erupt from the desert floor and exceed elevations of 8,000 feet. This contrast in elevation greatly affects the diversity that occurs there. From desert grasslands to cienegas to ponderosa pine forests, plant communities and plant species are diverse with over 2,000 known species. These diverse habitats also support a large variety of wildlife species. The region supports over 500 species of birds, over 170 species of reptiles and amphibians, and over 120 species of mammals.

Located in Texas where private property rights and heritage are paramount to the Texas lifestyle, the Region is considered the most conserved ecoregion in the state. This classification comes from the proportion of acreage of private lands to public lands, with some of the largest tracts of public lands being the Big Bend National Park (801,000 ac), Big Bend Ranch State Park (311,000 ac), and Black Gap Wildlife Management Area (103,000 ac). Despite these large public tracts, the Region is known for its expansive private lands and ranches.

Notwithstanding the tremendous conservation value, the Region is experiencing unprecedented pressures on its natural resources. Population growth, habitat fragmentation, and invasive species coupled with frequent droughts make conservation and management of the natural resources especially challenging. Most recently the greater Big Bend region has been discovered as prime real estate for energy development and associated groundwater development. Energy projections suggest that energy development in the Region is only just beginning. Estimates for the Region are staggering with an estimated 75 trillion cubic feet of gas, 3 billion barrels of oil, \$1 billion invested in solar, and 450 square miles of wind turbines ready for development. Bordering the Permian Basin, one of the most productive energy arenas in the world, the geographic footprint of the energy sector has slowly worked its way into the Region. Energy plays in the Delaware Basin and the Alpine High, and associated infrastructure like the Trans-Pecos Pipeline and transmission lines for renewable energy installations, are recent activities in the Region that have brought conflict and impacted ecological integrity.

The Region is also one of the least populated regions of the state. It consists of nine counties (31,748 mi<sup>2</sup>) west of the Pecos River and is populated by about 850,000 people. However, more than 90% of the

Region's residents live in the county of El Paso, leaving approximately 80,000 residents distributed across the remaining western counties with a density of about 1 person for every 2.63 square miles. Because of the low population density, the voice of the greater Big Bend region amounts to no more than a whisper when it comes to representation and rural policy matters.

RBB will use a sophisticated, multi-layered, interdisciplinary approach to identify the most important natural resources and community values in the Region and mechanisms for protecting them, and will generate public support for sustainable energy development. The RBB coalition partners will execute a landscape-scale conservation planning process and engage local stakeholders, energy operators, landowners, and state and local policymakers in discussions about solutions. RBB will produce an analysis of economic development opportunities for the region and a set of legal and policy tools to protect the Region while encouraging responsible energy development.

### **III. The Power of Planning**

Regional conservation planning undertaken across geographies and multiple energy sectors will empower local communities and facilitate fully-informed development decisions by the energy industry. Regional planning changes the old method of development by inverting the timing and scale at which biodiversity and other societal values are considered by industry. Through this process, the communities and industry jointly consider the potential impacts of multiple projects before they have been individually planned and are moving toward implementation. Regional planning looks at the bigger geographic picture and coordinates individual projects to avoid, reduce, and then mitigate impacts. Regional, rather than site-based planning, results in more effective conservation outcomes, promotes a process that encourages companies to coordinate, and provides cost savings to conservation and industry. Scenario modelling is an important component of regional planning because it allows decision makers to proactively examine the cumulative consequences of development.

The planning process will be based on The Nature Conservancy's Development by Design (DbD) approach that applies landscape-level conservation science to mitigate decision-making around infrastructure development. The process is designed to identify potential conflicts and tradeoffs between development and conservation in advance, steer impacts away from areas of high conservation value, and direct any conservation guidance and actions to areas that will support significant conservation outcomes. Critical to the process is input from the beginning from the landowners and communities of West Texas about the attributes of the region that they value the most.

The DbD planning process involves three primary activities:

#### **A. Identify resources and functions within the greater Big Bend landscape critical to people and to the long-term health of lands, waters, and the climate.**

Through a stakeholder engagement process, with input from experts, we will identify conservation targets and establish goals for those targets. The targets and goals may reference individual species, habitats and natural community types, priorities for ecosystem services, or other values. Once the priorities have been selected, the team will assemble data on the spatial distribution of the priority resources.

In addition to the biological resources, the plan will also identify important social and cultural values. As in the selection of biodiversity targets, we will rely on consultation with stakeholders and input gathered from a broad engagement process. A preliminary list of services that may be included in the plan is: tourism; open space; dark skies; hunting; recreation; and grazing. Where possible, we will incorporate an economic assessment of these ecosystem services that can be used to determine how development trajectories may impact them.

**B. Determine how cumulative development activity – from energy infrastructure and other sectors – affect conservation resources and functions and community values over time.**

In addition to identifying the conservation, social, and cultural values to be protected in the region, we will map and assess existing and proposed energy and development projects. Understanding future patterns of development will enable us to identify potential conflicts between a conservation portfolio and development impacts and allow us to propose alternative development scenarios that reduce the conflicts.

To project future development patterns, we will use two related methods to assess landscape alterations needed for oil and gas, solar, and wind development. The first method will analyze trends in landscape alteration due to infrastructure development since 2008, when hydraulic fracturing and horizontal drilling altered the economics of unconventional O&G development, and before widespread solar and wind energy deployed in the region. The second method for projecting landscape alteration from oil and gas involves a more in-depth analysis of geologic formations and their potential for hydrocarbon extraction as target formations.

For projections of land impacts from solar and wind energy sources, we will test at least two methods to project a “firm” future footprint. We will base our projections on information associated with applications for either an interconnection to the ERCOT grid (solar) or to the Federal Aviation Administration for an obstruction evaluation (wind). Other future projections of both solar and wind developments will involve developing models to predict potentially suitable sites.

With both a spatial projection of a “Business as Usual” development pattern and the distributions of conservation and cultural resources in the region, we will have the tools to assess how development may impact those values, if development patterns are unaltered.

**C. Characterize development opportunities and strategies for addressing trade-offs and improving economic, social and environmental outcomes.**

Applying spatial conservation planning software to development planning is a recent but growing phenomenon. We will use conservation planning software to identify potential high priority sites for protection that maximize conservation gains for a suite of species or habitat features, are cost-effective, and meet other criteria, such as specific land ownership type or geographic location.

In addition, we will work with stakeholders to identify a list of potential conservation actions that can be considered in this planning exercise. Where possible, we will include costs associated with each conservation activity.

Finally, we will produce a conservation vision for the region that maintains large, resilient ecosystems, important community values, and options for sustainable energy development. Ultimately, the vision will benefit local governments, businesses, communities, and landowners in several ways: the vision will inform strategies for avoiding impacts to priority areas and steer project design toward areas of lower social and environmental conflict; and it will incentivize interventions for long-term landscape resilience, such as ensuring functional watersheds for clean drinking water, connected habitat for species, and buffers against climate effects.

#### **IV. Stakeholder Engagement**

The success of this initiative depends on identifying, communicating with, and engaging strategic partners from the communities, landowners, energy industry, and local and state officials. For the plan to ultimately be endorsed by the affected constituencies, it must reflect the most accurate data about the natural resources on the landscape, the values of the communities and landowners, and the realities of energy production. We have developed an engagement strategy for each of the constituencies in the region.

Our objective with the stakeholder outreach activities is to ensure that the conservation plan reflects the highest priorities of the people who live in the region, incorporates the best scientific information available, and includes realistic recommendations for responsible energy development.

Outreach to the various stakeholders will be carried out through a mix of formal and informal processes. We established a stakeholder advisory committee (SAG) to provide advice and serve as a sounding board during the conservation planning process. The SAG consists of representatives from the energy sector (oil and gas, wind, and solar), community leaders, and local landowners. The SAG meets regularly with the Respect Big Bend science team over the next twelve months and the SAG's input will be incorporated into the plan over the next year.

In addition to the SAG, the Borderlands Research Institute (BRI) has lead responsibility for conducting extensive outreach to regional landowners and local community members. BRI hired Billy Tarrant, a former Texas Parks and Wildlife Department official, as Associate Director of Stewardship Services to serve as the "face and voice of West Texas" for this effort. The Associate Director of Stewardship Services is primarily responsible for communicating and meeting with private landowners, mineral owners, community members, and conservation partners. Methods of stakeholder engagement will vary considerably, ranging from one-on-one meetings to organizing broader community forums (town hall meetings) and convening workshops and seminars periodically to focus on specific issues.

One of the primary goals of the stakeholder outreach activities is to elicit information about the values that the stakeholders place on the landscape, communities, and services of the region. As we gather that information, we will also identify deficiencies in knowledge about energy development, natural resource conservation, and economics in the region. Once the gaps are identified, we will develop outreach and education programs to address the deficiencies.



At the same time that BRI is engaged in outreach to landowners and community members, other members of the team will be executing strategies designed to solicit input and build support from energy companies and state leadership.

## **V. Legal and Policy Analysis**

To explore potential policy and legal mechanisms to protect the region, we will analyze the current governance system for accessing mineral and land rights, permitting and siting for energy development. The Nicholas Institute for Environmental Policy Solutions at Duke University and the University of Texas School of Law will conduct this initiative. They will develop a suite of interventions that might reduce impacts of energy development, including both substantive requirements or best practices to reduce impacts, and the mechanisms for adopting them (including voluntary pledges, incentives, community benefits agreements, funder stipulations, and permit conditions). They will generate research and information that should inform this project. The legal and policy research activities will highlight the following themes:

- A. Determine how state, regional, and local regulations affect how and where energy exploration and development and infrastructure occurs.
- B. Identify what opportunities remain for encouraging landscape planning once a region of a play is leased for development.
- C. Investigate what state, regional, or local shale oil and gas regulations address oil and gas exploration and development in the Region.
- D. Examine what role leases play in energy siting, and how different combinations of property rights (split or intact estates, public mineral interests, wind rights) affect the legal landscape.
- E. Characterize how well the current energy governance landscape addresses regional concerns such as potential impacts to water resources and dark skies.
- F. Ascertain if regulatory or voluntary standards or practices already in use in Texas might mitigate concerns or address development at a broader scale.
- G. Identify opportunities to use existing legal or regulatory tools in new or innovative ways to infuse better planning and address the impacts associated with intense energy development.
- H. Research whether financial institutions backing energy development have environmental, social, and governance (ESG) goals that might be leveraged to reduce impact or encourage landscape planning.

## **CONCLUSION**

RBB is a multiyear initiative designed to protect the iconic communities and natural resources of the greater Big Bend region from the harm that invariably results from unplanned energy sprawl. But if it is successful, the conservation plan that the coalition will produce, along with the economic, legal, and policy tools it will develop, have the potential to create a new paradigm for energy development in Texas.

# David Gray, Acting Administrator for EPA's South Central Region (Region 6)

David Gray



David Gray serves as the Acting Regional Administrator for EPA Region 6. His responsibilities include overseeing the states of Arkansas, Louisiana, Oklahoma, New Mexico, and Texas, and 66 Tribal Nations.

Mr. Gray has more than 30 years of experience in EPA's Region 6 as a leader with oversight for planning and management of the technical and administrative aspects of Region 6 activities. Before becoming Acting Regional Administrator, Mr. Gray served as the Region's Deputy Regional Administrator. He also served as Director of External Affairs for 20 years, overseeing the region's government and public affairs programs and focusing on policy implementation in the five states that make up Region 6. During his career, Mr. Gray has gained extensive experience in overseeing crisis communication programs during nationally significant incidents including EPA's response to Hurricane Katrina, Deep Water Horizon and most recently Hurricane Harvey.

# Emily Lindley

**Emily Lindley of Austin was appointed to the TCEQ by Gov. Greg Abbott effective Aug. 20, 2018.**

## About Emily Lindley



Lindley most recently served as the chief of staff for the EPA Region 6. As chief of staff, she served as an advisor to the regional administrator who oversees Arkansas, Louisiana, New Mexico, Oklahoma, Texas, and 66 tribal nations. Prior to serving at EPA, she worked for over 10 years at the TCEQ, most recently as the special assistant to the Deputy Executive Director.

While at the TCEQ, Lindley also served as a special assistant to the Office of Water's Deputy Director who oversees water permitting, water quality planning, and water supply related functions including Utilities and Districts for the state of Texas. Previously, she worked in the TCEQ's Office of Intergovernmental Relations as a government relations liaison, and in the Office of Public Assistance as a program specialist. In this role, she helped Texans in understanding the public participation process and answered questions about permitting issues.

Lindley was appointed to the Texas Environmental Flows Advisory Group by Gov. Abbott on Sept. 25, 2018. She is a member of the Austin Women's Symphony League, the Baylor Women's League of Austin, and is a weekly driver for Meals on Wheels. Lindley received a Bachelor of Arts in social work from Baylor University and completed the Governor's Executive Development Program at The University of Texas at Austin L.B.J. School of Public Affairs in 2016.

## **Bio for Kenneth E. Wagner**

Kenneth Wagner serves as Oklahoma's Secretary of Energy and Environment where he was appointed in 2019 by Oklahoma's new Governor J. Kevin Stitt. In this role, he is responsible for over 30 state agencies, boards, compacts, and commissions as well as advancing policies that encourage economic growth, sensible regulation that fosters responsible energy production, protects natural resources, and ensures clean air, land and water for all Oklahomans.

Previously, Mr. Wagner served as the Senior Advisor to the Administrator for Regional and State Affairs within USEPA's Office of the Administrator where he also served as Director of the Office of Regional Operations. In his duties at EPA, he served as the Administrator's designee to all 10 regions before regional administrators were appointed, and he continued to coordinate all 10 U.S. EPA Regional Administrators and served as an advocate for the regions at headquarters with all the assistant administrators for each national program and the Administrator's office.

In addition to his regional duties, he served as the main point of contact in the Administrator's Office with all 50 states' top environmental regulators and tribal governments. He lead the efforts to reform and redefine the federal-state relationship and its efforts around cooperative federalism. Mr. Wagner was helped lead numerous policy initiatives for the Administrator.

He was appointed and previously served at the Administrator's Designee on the Gulf Coast Eco System Restoration Council, also known as the RESTORE Council. EPA and Acting Administrator Wheeler was appointed by President Trump as Chairman of the RESTORE Council which was responsible for implementing the RESTORE Act and administering billions of dollars of settlement funds that were paid by BP as a result of the Deep Water Horizon oil spill. During his time at RESTORE, Wagner served as the Chair governing all business and executive meetings of the five gulf states and six federal agencies making up the Council.

Mr. Wagner was also closely involved in the Office of Research & Development's initiative to better partner with states to solve every day environmental challenges and make their vast inventory of research more readily accessible for states, tribes and the public. He also coordinated the intra-agency working group to tackle the waste discharges entering the U.S. from our border neighbors in Mexico, and assists the Administrator in his goal of bringing certainty to the American people by returning the Agency to its core mission: improving water quality, accelerating land clean ups, modernizing aging water infrastructure and bringing the country back into air attainment by improving air quality.

Before joining the Agency he came from the private sector where he practiced law and held private business interests for nearly 25 years. He was a founding member and managing partner of a successful mid-sized law firm in Tulsa, Oklahoma where he practiced and managed a diverse practice that included commercial, energy and environmental matters. In addition to running a successful law firm, he was involved in numerous successful business and commercial

ventures, including being a minority partner in Oklahoma's Triple-A baseball team based in Oklahoma City from 2003 to 2010.

He received his degrees from the University of Oklahoma and the University of Tulsa College of Law.

**Jason A. Hill, Deputy Solicitor for Energy & Mineral Resources, Department of the Interior**

Jason A. Hill currently serves as the Deputy Solicitor for Energy & Mineral Resources. In this capacity he is the principle adviser to the Solicitor for issues that arise from energy and mineral resources law such as coal leasing, OCS oil and gas leasing, prototype oil shale leasing, geothermal resource leasing, onshore oil and gas leasing, other minerals leasing, renewable energy projects on federal land, administration of the Mining Law of 1872, royalty management, and implementation and enforcement of the Surface Mining Control and Reclamation Act of 1977. Prior to this role, Mr. Hill served as Senior Counselor to the Director of the Bureau of Land Management. Before joining the Administration, Mr. Hill served as a trial attorney with the Natural Resources Section of the Department of Justice's Environment and Natural Resources Division for a decade, where he defended a wide-range of cases challenging federal land management decisions, and developed an expertise litigating extractive mineral cases. Prior to his work for the government, Mr. Hill practiced law in Houston for 7 years. Mr. Hill earned an LL.M. in Environmental and Natural Resources Law from Lewis & Clark College of Law, a J.D. from the University of Houston Law Center, and B.A. and M.E.S. degrees in Environmental Studies from Baylor University.



# **National Environmental Policy Act Streamlining**

**Department of the Interior**

**Jason A. Hill  
Deputy Solicitor for  
Energy & Mineral Resources**







# Department NEPA Review

- Goal of Supporting E.O. 13807, to *Establish Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects.*
- The Deputy Secretary issued Secretary's Order 3355 on August 31, 2017 to ensure that the Department's NEPA documents achieve NEPA's purpose.







# Secretary's Order 3355

## Purpose:

- To **foster excellent decision making** based on an understanding of environmental consequences – NOT to generate paperwork – even excellent paperwork.

## Goals:

- Enhance and modernize the Department's NEPA processes
- Bring focus and greater discipline to NEPA documentation
- Identify opportunities to increase efficiencies
- Accountability





# The Case for Change

- DOI conducted a representative review of its standard and unusually complex EISs and found:
- Standard EISs averaged **497 pages**
  - Minimum of 137 pages
  - Maximum of 948 pages
- Unusually Complex EISs averaged **2,111 pages**
  - Median number of pages 916
  - Minimum of 355 pages
  - Maximum of 16,243 pages
- EIS took 3.5 years or longer to be completed.



# S.O. 3355 Guidance Memos



- Secretary's Order 3355
- Deputy Secretary Memos:
  - Additional Direction for Implementing SO 3355
  - NEPA Document Clearance Process
  - Compiling Contemporaneous Decision Files
  - Additional Direction for Implementing SO 3355 for Environmental Assessments
  - Forthcoming - Additional Direction for Implementing SO 3355 for Categorical Exclusions and Actions Exempt from NEPA
  - Reporting Costs Associated with Developing Environmental Impact Statements
  - Standardized Intra-Department Procedures Replacing Individual Memoranda of Understanding for Bureaus Working as Cooperating Agencies
- Questions and Answers Related to Deputy Secretary Memorandums



# S.O. 3355 Page Guidance



- Establishes page count guidelines to help with EIS readability and timeliness.
  - 150 pages for standard EISs
  - 300 pages for unusually complex EISs
- EISs exceeding 150 pages requires a waiver approved by the Deputy Secretary's office.



# Department Timelines

Environmental reviews commence with the goal of issuing the ROD within **1 year of publishing the NOI**.

**Timelines** consistent with these goals must be **established before issuing a NOI**.

For EIS begun after Aug. 31, 2017:

- 1 year from issuance of a NOI to complete Final EIS;

For EIS begun before Aug. 31, 2017:

- Complete EIS/issue ROD no later than April 27, 2019;

Exceeding timelines requires a **waiver** approved by the Office of the Deputy Secretary.





# Pre-NOI and EIS Timelines



- Ensure that proponent **applications are complete**.
- Ensure that all team members, including **contractors**, stay within the project guidelines.
- Identify **preliminary Purpose and Need** and a range of reasonable alternatives.
- Identify **issues** that will likely need to be addressed.
- Identify and begin collection of needed **data**.
- Identify and begin writing **affected environment**.
- Identify **methodologies** for analysis.



# Environmental Review Framework

Initiate Action:

- Bureau proposal
- Applicant proposal

Determine appropriate level of NEPA: CE, EA, or EIS

If EIS, determine appropriate framework and begin work pre-NOI to ensure effective NOI & timely EIS

1 / 2 YEARS

Issue NOI:  
Public  
Scoping  
(30 Days)

Complete  
Drafting &  
Publish  
DEIS

Public review of  
DEIS (45 days)

Review  
Comments  
&  
complete  
drafting of  
FEIS (Min.  
90 days  
after  
publication  
of DEIS)

Publish FEIS  
(30 day)

ROD issued

Within 90 Days

All Authorizations/Permit Decisions Completed



# 1-YR EIS Timelines: Department Review/Approval

- Implemented a notification and **concurrent briefing schedule** at 6 key points in the development of an EIS:
  - Initial Action Notice
  - NOI
  - Draft EIS Development\*
  - Draft EIS\*
  - Final EIS\*
  - ROD
- “Briefing Materials” are circulated 5 business days prior to the briefing.
- Review Team members **read the material before the briefing** and come with discrete questions.







# 1-YR EIS Timelines: Department Successes

- A majority of EIS documents are approved in the briefing and are completed in an average of **30 minutes**.
  - Previous processes may have taken **1 to 4 months**.
- The briefing schedule is currently **decreasing** Department review times across a project's life cycle by **3 to 12 months**.
- Review team members come with **discrete questions** that **focus on significant environmental issues**.
- There are **growing pains**, but project teams that have participated in the briefing process **uniformly appreciate** its nimble efficiency.





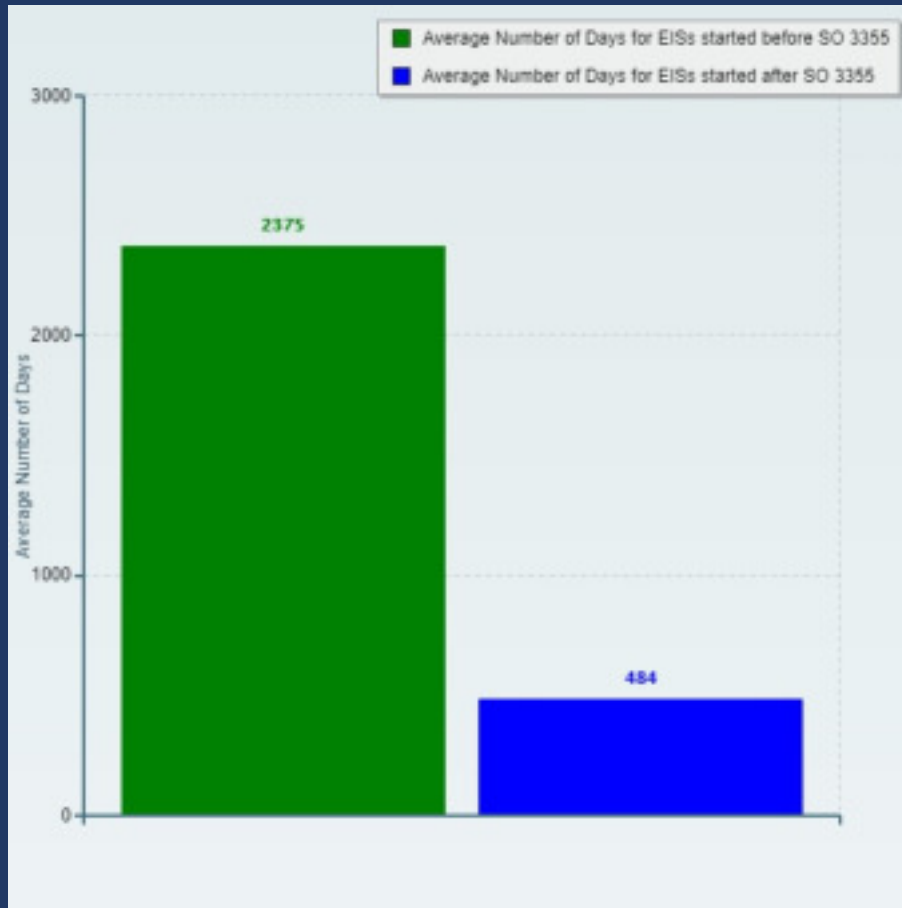
# Improved Clearance Times

EIS Projects - Time from Submission to Publication under OLD Process			
Project Name	Date Submitted to WO	Date Published in FR	Total Days
Central Coast Field Office Draft Resource Management Plan Amendment for the Oil and Gas Leasing and Development	9/17/2015	1/6/2017	477
Gold Bar Mine Project DEIS	12/13/2016	3/3/2017	80
Craters of the Moon National Monument and Preserve Proposed Management Plan Amendment	3/22/2017	5/26/2017	65
Normally Pressured Lance Natural Gas Development Project	4/24/2017	7/7/2017	74
Greater Phoenix Project	4/14/2017	9/1/2017	140
Gold Bar Mine Project	7/10/2017	10/6/2017	88
Sonoran Desert National Monument Target Shooting Proposed Resource Management Plan Amendment and Final Environmental Impact Statement	5/16/2017	10/20/2017	157
Palen Solar Project (formerly Palen Solar Power Project)	6/27/2017	10/27/2017	122
Ray Land Exchange Plan Amendment Draft Supplemental Environmental Impact Statement	3/28/2017	11/17/2017	234
Greater Mooses Tooth 2 DSEIS NOA	1/29/2016	10/4/2017	614
Average # of Calendar Days:			205
EIS Projects - Time from Submission to Publication under New Process per April 2018 Dep Sec Guidance			
Project Name	Date Submitted to WO	Date Published in FR	Total Days
Gemini Solar Project, NV NOI	6/21/2018	7/13/2018	22
Bakersfield SEIS and Potential RMPA NOI	7/18/2018	8/8/2018	21
Willow Master Development Plan EIS NOI	7/20/2018	8/7/2018	18
San Pedro Riparian NCA DEIS NOA	5/31/2018	6/29/2018	29
Carlsbad Draft RMP and EIS NOA	7/13/2018	8/3/2018	21
Desert Quartzite Solar Project DEIS NOA	7/25/2018	8/10/2018	16
Bears Ears NM NOA Draft MMP and EIS	7/13/2018	8/17/2018	35
Grand Staircase Escalante NM NOA Draft MMP and EIS	7/13/2018	8/31/2018	49
Ten West Link NOA for Draft EIS with RMPA in AZ and CA NOA	7/18/2018	8/31/2018	44
Greater Phoenix Mine FEIS NOA	7/13/2018	8/3/2018	21
Greater Mooses Tooth 2 FSEIS NOA	8/17/2018	9/5/2018	19
Average # of Calendar Days:			27

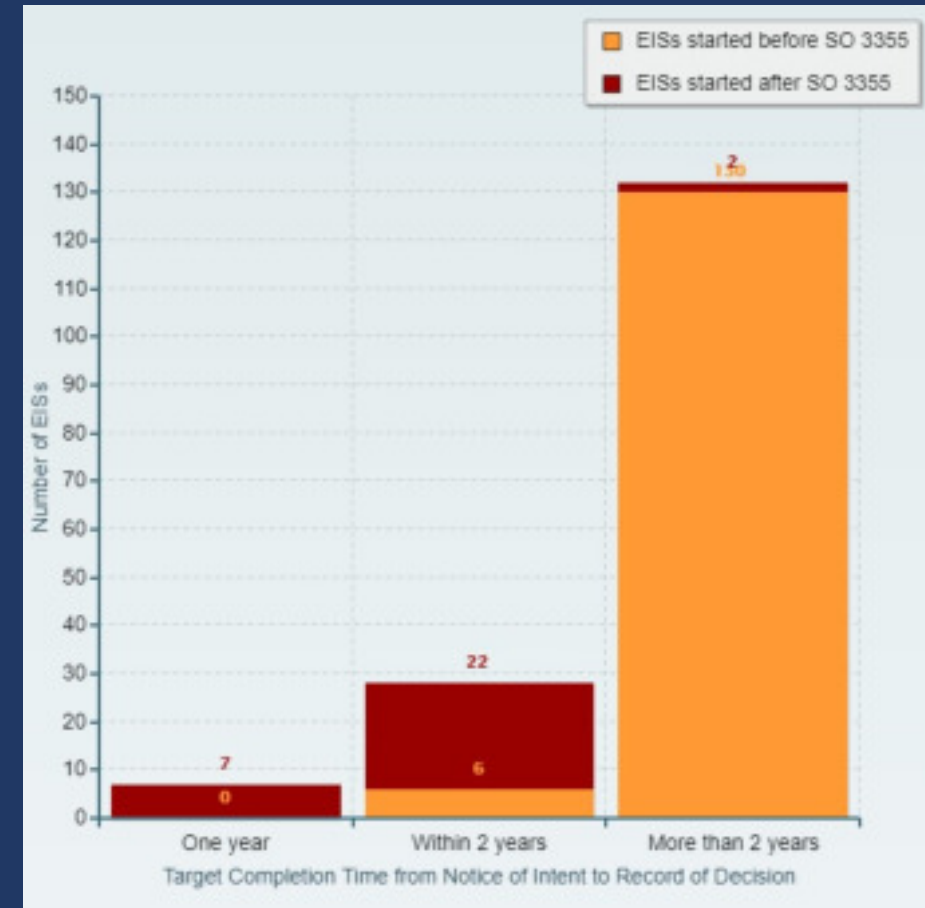


# EIS Completion Times Before and After S.O. 3355

Average Number of Days from NOI to ROD



Target Completion Time for EISs





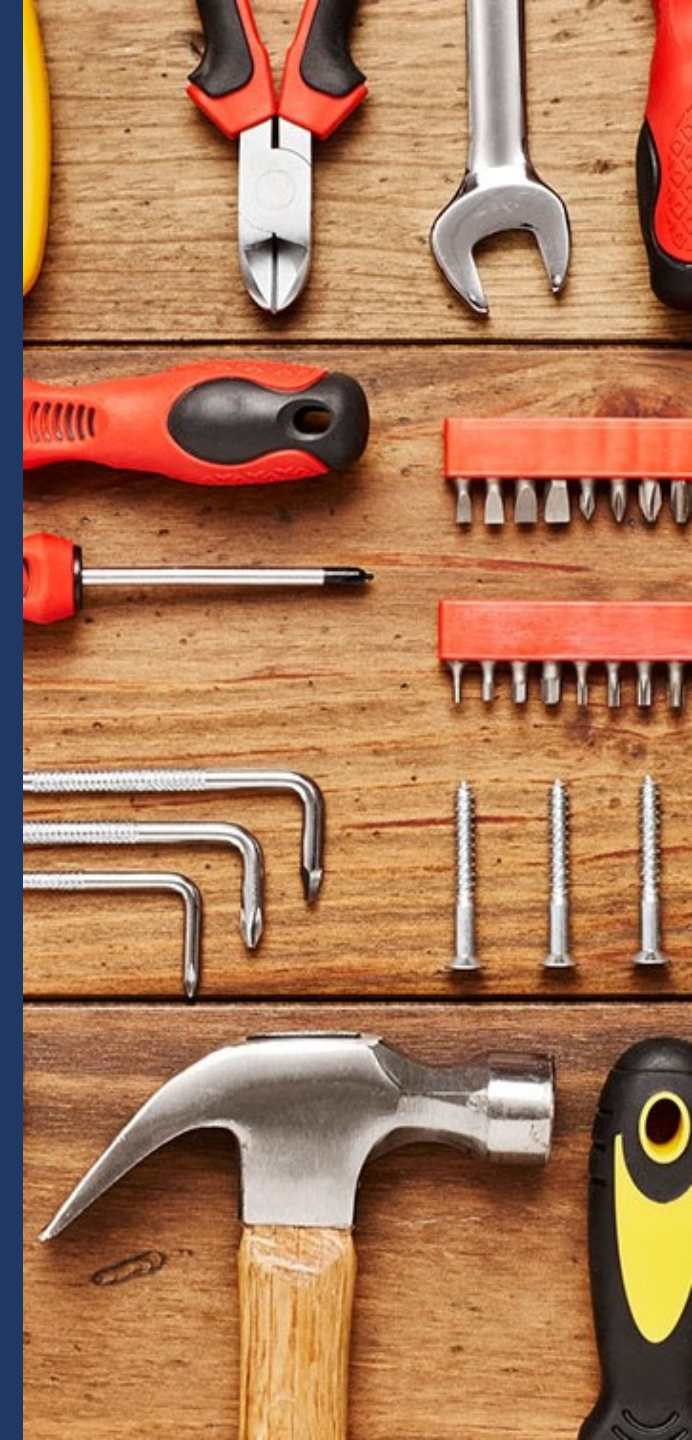
# S.O. 3355 & Environmental Assessments

- S.O. 3355 asked Bureaus to recommend guidelines for streamlining EAs.
- Time and Page Goals to complete an EA:
  - Time
    - Within **180 days of commencement**
      - EAs commence once a Bureau receives a complete application from a project proponent, receives or obtains sufficient information to analyze the proposed action, publishes a notice of proposed rulemaking in the federal register, or internally determines to pursue action planning.
  - Page
    - Ideally, according to CEQ's guidance – **10-15 pages**;
    - Otherwise within the Department's practice – **30-40 pages**.
    - EA project teams that expect to **exceed 75 pages** must consult with the Office of the Solicitor and their Bureau Director to find the best path forward.



# Management Tools for Streamlining NEPA Compliance

- Improve **communication** between the Field, Regions, Bureaus, and HQ;
- Identify and **eliminate inefficient** processes;
- Utilize **technology** to achieve efficiencies and improve management;
- Create a dedicated **management team**;
- Change **culture**; and
- **Institutionalize** improvements.







# Improving Communications

- Conducted a 2 ½ day **work shop** with NEPA practitioners to obtain input on achieving S.O. 3355's goals.
- Established **regular meetings** with Bureaus and DOI NEPA leadership to ensure continued momentum on S.O. 3355 and E.O 13807/OFD.
- Established DOI NEPA Community of Practice monthly **newsletter** and blog.
- Leadership meets with **field and regional** NEPA staff while on travel.
- Require an **attorney** to be part of the project team when DOI is the Lead Agency for an EIS.
- Updated and elevated DOI's NEPA website with **streamlining tools** to improve information sharing with the public. <https://www.doi.gov/nepa>



# Eliminating Inefficient Processes

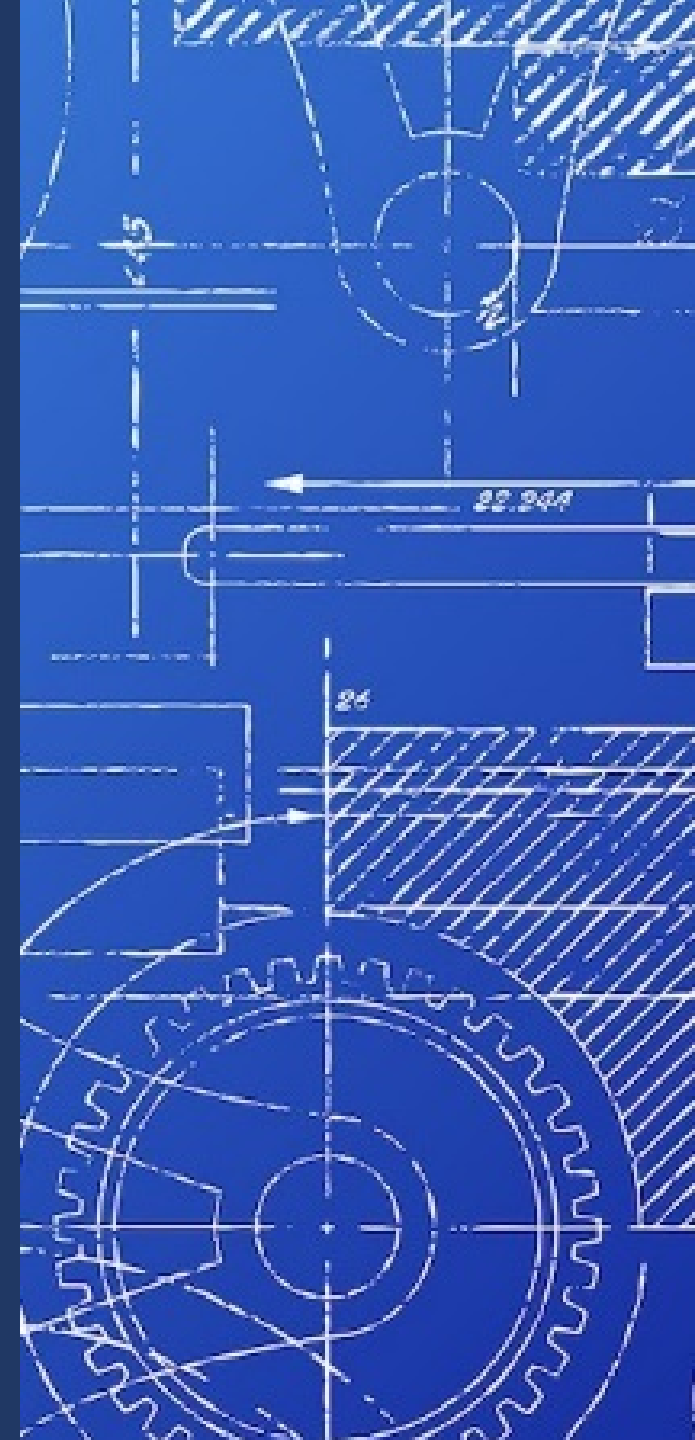
- Established a streamlined NEPA **document clearance** process that improves leadership visibility on projects and significantly reduces document approval time.
- Ensure that **Bureau approval** processes reflect these efficiencies.
- **Standardized Intra-Department procedures** for Bureaus serving as cooperating agencies.
- **Eliminated** the need to develop **Intra-Department MOUs**.





# Institutionalizing Improvements

- **Review** of DOI and Bureau NEPA procedures to identify opportunities to create efficiencies.
- Updating all bureau **handbooks**.
- Preparing Department level **training** on NEPA that will be provided in person and on-line.
- Reviewing all existing **Categorical Exclusions** and preparing new CEs.
- Directing use of **statutory CEs**.
- **Streamlining regulations** that impact NEPA review.







# Streamlining Library

[Secretary Order 3355 - Streamlining National Environmental Policy Reviews and Implementation of Executive Order 13807](#)

[Deputy Secretary Memo - Additional Direction for Implementing SO 3355](#)

[Deputy Secretary Memo - NEPA Document Clearance Process](#)

[Deputy Secretary Memo - Compiling Contemporaneous Decision Files](#)

[Deputy Secretary Memo - Standardized Intra-Department Procedures Replacing Individual Memoranda of Understanding for Bureaus Working as Cooperating Agencies](#)

[Questions and Answers Related to Deputy Secretary Memorandums \(dated April 27, 2018\)](#)

[DOI Bureau Contacts](#)

Compiled all available Department and Bureau Categorical Exclusions into one document for ease of reference. Tips for Streamlining NEPA, and additional tools, available at <https://www.doi.gov/nepa>



# Questions?

Tucker Henson is an Assistant Regional Counsel at EPA, Region 6. Tucker graduated cum laude from Lewis and Clark Law School and Southwestern University and has served as a member of the Superconference Planning Committee since 2014.

## Steven Cook Bio

Steven Cook joined the U.S. Environmental Protection Agency (EPA) in February 2018 as the Deputy Assistant Administrator (DAA) for the Office of Land and Emergency Management. In addition to his DAA responsibilities, Steven became Chair of the Superfund Task Force in May 2018. Prior to coming to EPA, he was in-house counsel at LyondellBasell, a large, multi-national chemical and refining company where he oversaw the health, safety, environmental and security legal work on a global basis. As an adjunct professor, Steven has taught courses at the University of Houston Law Center covering the Clean Air Act, enforcement, and the intersection of environmental and bankruptcy law.

Steven's educational background includes a B.S. degree in chemical engineering from Brigham Young University (BYU) and later a J.D. from the J. Reuben Clark Law School at BYU. In addition, he also obtained a Master of Business Administration from the University of Texas – Austin.

# Texas Environmental Superconference



“ CERCLA Issues”

**Steven Cook**

Deputy Assistant Administrator  
Office of Land and Emergency Management  
United States Environmental Protection Agency

# Status of Risk Management Plan (RMP) reconsideration proposed rule

- Proposed rule published on May 30, 2018
- Public hearing held on June 14, 2018
- Public comment period ran through August 23, 2018
- EPA received 77,360 public comments on the proposal
  - Several mail campaigns included ~76,355 letters and signatures
  - Remaining comments included 987 submissions with unique content
- Final rule expected to be published Fall 2019
- Proposed rule, regulatory impact analysis, and fact sheet available at <https://www.epa.gov/rmp/proposed-risk-management-program-rmp-reconsideration-rule>



# EPA Regional Reorganization

Regional Administrator & Deputy Regional Administrator

Immediate Office:  
Environmental Justice  
Nat'l Environmental Policy Act  
Public Affairs  
Tribal & International Affairs

Air & Radiation  
Division

Mission Support  
Division

Enforcement &  
Compliance  
Assurance Division

Regional Counsel

Land, Chemicals &  
Redevelopment  
Division

Superfund & Emergency  
Management  
Division

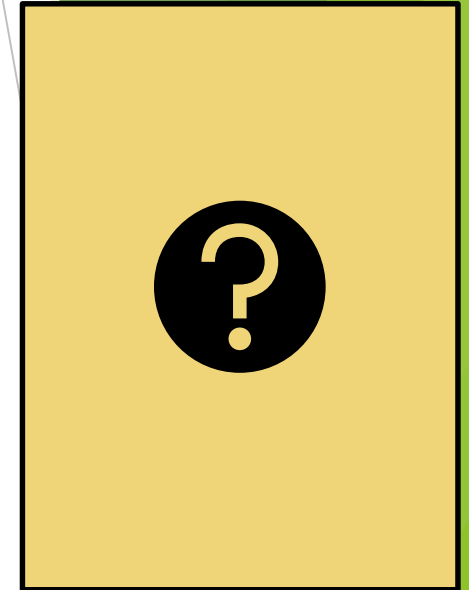
Water  
Division

Laboratory  
Services and Applied  
Science Division



# Superfund Task Force (SFTF)

- **Two year effort** to speed up the Superfund cleanup process and promote community revitalization
  - Administrator Priority
  - Staff recommendations delivered July 2017
  - Final Report – September 2019
- **Recommendations from 100+ EPA experts:**
  - Streamline management processes
  - Clarify technical policy
  - Address liability concerns
  - Expedite settlement agreements
  - Create incentives to reduce EPA oversight
  - Encourage 3<sup>rd</sup> party development
  - Provide more certainty on cleanup requirements, timing and potential reuse





# Superfund Task Force - Accomplishments

## ► Administrator Emphasis List

- Elevates legal, technical, and administrative site roadblocks for attention
- Site specific, short-term milestones to keep SF process moving

## ► Human Exposure Status / Dashboard

## ► Moving Sites to NPL Deletion / Partial Deletion

- In FY18, EPA completed deletion activities at 22 sites, the largest number of sites in 13 years
- In FY19, EPA intends to exceed last year's achievements

## ► Expanding use of Adaptive Management

## ► Promoting Redevelopment

- Outreach to stakeholders on sites that are ready for reuse with good potential for development

## ► Action Plan to Improve Risk Communication

- Conducted over 20 listening sessions to get input from:
  - Community groups, NEJAC, NGOs, PRP groups and developers
  - States, Tribes, EPA staff and regions, regulatory partners
- FY20 focus on evaluating effectiveness of EPA risk communications with communities at challenging Superfund sites



# Beyond SFTF: Making our Accomplishments Stick

*(It's Not Just About the Memos)*

- Integrating Performance Measures into the Superfund Program
- EPA Portfolio Review of all sites on the NPL
- National Remedy Review Board (Recommendation 4)
- Groundwater Restoration (Recommendation 6)
- Federal Family (Recommendations 15 and 18)
- Program Choice



# Adaptive Management: Getting it Done Faster and More Effectively

- ▶ Lessons learned from the pilot efforts will be used to develop a more detailed adaptive management directive and training in FY 2020
- ▶ EPA is developing a SharePoint site for regional use to share case studies and templates for adaptive management
- ▶ EPA will continue to encourage regions to consider employing adaptive management at sites



# Promoting Redevelopment in FY2020

- ▶ Further develop the prototype Superfund redevelopment interactive map
- ▶ Continue site redevelopment training for EPA staff on the importance of understanding future use early in the cleanup process
- ▶ Outreach to local community
- ▶ Opportunity Zones



# Why is Effective Risk Communication Important?

Effective risk communication can help community stakeholders understand:

- ▶ what is and what is not a concern associated with a site
- ▶ how EPA is working with the responsible party to address these concerns
- ▶ how the community can learn more about and participate in the decision-making process
- ▶ what “cleanup” means within the context of the site

*What our Stakeholders are saying...*

“I believe the relentless references to “**cleaning up**” the site by many stakeholders inadvertently produced a false impression of what was possible or indeed feasible.”

“Use a forward-thinking approach to integrate redevelopment options into superfund sites that generally support and are protective of health and safety where feasible. Be sure that the community at large is comfortable and can trust technical assistance providers.”

“First and foremost, successful community engagement and risk communication require the establishment of **trust** between agencies and the public. Team members need to be aware of other issues or local history that may influence the level of trust at a site.”



# Getting Superfund Risk Communication Right

► In FY2020 EPA expects to:

1. Develop criteria for prioritizing risk communication efforts
  - Starting with post construction, “Long-Term Stewardship” Sites
  - Identify types of sites and situations that pose communication challenges
2. Conduct targeted outreach and evaluations at a range of **Focus Sites**
  - Use listening sessions, focus groups, surveys
  - Test new and existing processes, tools, strategies and technical assistance
3. Apply lessons learned from this effort to all phases of Superfund
4. Start a national dialogue and build partnerships on risk communication
5. Develop measures of risk communication improvement for use in FY21
6. Prepare a report of analysis and findings





## **Ty'Meka M. Reeves-Sobers**

### **Environmental Transactions, Kirkland & Ellis LLP**

Ty'Meka Reeves-Sobers is an associate in the Houston office of Kirkland & Ellis and a member of the Environmental Transactions Practice Group. Ty'Meka's practice focuses on advising clients on environmental risks and issues in connection with a variety of complex corporate transactions. She also counsels clients on environmental crisis response and management strategies. Ty'Meka's experience also includes counseling clients on a wide range of environmental state and federal regulatory compliance matters, including those involving federal and state fuel regulatory issues, contaminated property issues, renewable energy, water quality, water rights, air, and waste issues.

Ty'Meka received her B.A. in Legal Studies from Ursuline College and a J.D., with honors, from the University of Texas School of Law. While in law school, Ty'Meka worked in the school's environmental clinic and clerked for the administrative law judges at the Texas State Office of Administrative Hearings.

Ty'Meka is the co-author of the "Fuels" chapter of the Texas Environmental Law treatise and also co-authored the U.S. Environmental Regulation chapter of "Getting the Deal Through: Environmental & Climate Regulation 2019."

Matthew Dobbins is a Senior Associate in the Environmental and Natural Resources Group in the Houston office of Vinson and Elkins. Matthew's practice focuses on complex regulatory counseling, remedial issues, environmental litigation, climate change, and transactional support. He frequently directs environmental, health, and safety compliance audits on behalf of clients and advises on air quality, water quality, CERCLA, RCRA, and fuel quality regulations, as well as state and federal remediation requirements. He has a particular focus on helping clients navigate property transfer statutes, such as the New Jersey Industrial Site Recovery Act, to avoid unnecessary transaction delays. He also counsels clients on compliance with pipeline safety regulations. With respect to environmental litigation, Matthew routinely both defends and pursues environmental indemnification claims on behalf of clients, and also has experience responding to industrial incidents. In addition, Matthew has extensive experience advising clients on the resolution of environmental liabilities identified in the course of transactions, including risk-counseling and assessing barriers to entry, obtaining environmental or representation and warranties insurance, and the drafting and negotiating of the environmental terms in various types of agreements.



# ENVIRONMENTAL DEAL KILLERS IN TRANSACTIONS

Texas Environmental Superconference  
August 2019

Ty'Meka Reeves-Sobers  
Kirkland & Ellis

Matthew Dobbins  
Vinson & Elkins

## GETTING THE DEAL DONE

### SCOPING ENVIRONMENTAL DUE DILIGENCE

- Non-environmental constraints often **impact the scope** of environmental due diligence for a transaction
  - Financial considerations (e.g., taxes, revenue reporting)
  - Exclusivity periods
  - **Unsophisticated sellers** easily overwhelmed by due diligence process
- Type of deal may also impact scope of due diligence
  - Public M&A vs. Private M&A
  - Capital markets transaction vs financing transaction



# ENVIRONMENTAL DUE DILIGENCE

## TRADITIONAL TOOLS

- Focus of traditional tools is on identifying compliance and remedial liabilities
  - Desktop evaluation: search of **publicly available databases** for compliance and spill information
  - Phase I Environmental Site Assessment (ESA): **Non-invasive** visual site assessment
  - Phase II ESA: limited soil and/or groundwater sampling
- Limitations
  - Not always well suited for identifying risks **outside of compliance and remedial liabilities**



# DO ENVIRONMENTAL DEAL KILLERS ACTUALLY EXIST?

## KEY FACTORS TO CONSIDER



## CATEGORIES OF ENVIRONMENTAL DEAL KILLERS

- Conduct that is potentially criminal in nature
- Legacy contamination issues, off-site waste liability, and toxic tort exposure
- Physical risks such as weather, flood risks, and fires/explosions
- Environmental violations leading to suspension or debarment
- Increased regulatory scrutiny (e.g., certain contaminants/pollutants, new or proposed legislation)

## POTENTIAL DEAL KILLERS

### WHAT TO WATCH FOR – CRIMINAL CONDUCT

- Conduct forming potential basis for **criminal violations** of environmental law
  - Numerous environmental statutes provide for criminal penalties
    - RCRA
    - CAA
    - CWA
- Monetary penalties
- **Reputational risks**
- Subject to ongoing compliance oversight and probation



## POTENTIAL DEAL KILLERS

### WHAT TO WATCH FOR – LEGACY LIABILITIES

- Analyzing legacy operations and potential risks may be just as critical as analyzing current operations
  - Former business lines with potential toxic tort/product liability
    - Ex: Talc mining
  - Facility located on a complex Superfund Site because of unaffiliated prior owners and operations
    - Ex: Industrial facility located at former smelting site or DOD munitions site





# POTENTIAL DEAL KILLERS – PHYSICAL RISKS

## LEGAL NEXUS THROUGH RISK MANAGEMENT

- Certain assets will be more prone to **physical risks**
  - Exposure to physical risks based on operational needs
    - Ex: energy production/generation and water/drought considerations
  - Exposure to physical risks based on **location**
    - Petrochemical, terminal facilities located in flood-prone or areas exposed to hurricanes
- Addressing physical risks become even greater concern if facility subject to certain environmental requirements
  - CAA **Risk Management Program & General Duty Clause**
  - Process Safety Management
- Legal requirements to identify hazards and mitigate them.





## POTENTIAL DEAL KILLERS – PHYSICAL RISKS

### “WHEN THINGS GO BOOM” DURING THE TRANSACTION

- Certain industries have increased risks of environmental incidents – some of which may occur while the transaction is ongoing
  - Ex: Explosion and fire at salt water disposal well
- **Materiality** determined by type of incident, assets affected, environmental impact, whether significant government involvement expected, costs to address, etc.



## POTENTIAL DEAL KILLERS

### WHAT TO WATCH FOR – SUSPENSION & DEBARMENT

- Collateral consequence of environmental violations/criminal conduct
  - Understand the categories and eligibility requirements
    - Suspension
    - Debarment
    - Statutory Disqualification – Mandatory for convictions under certain provisions of CWA and CAA
- Scope and Imputation
  - Suspension or debarment can be effective against specific individuals or facilities or imputed up the chain to cover entire organizations (including affiliates)
- Business interruption can be more costly than monetary penalties
  - Federal government maintains lists that are often reviewed by state and local governments making contract decisions



## NEUTRALIZING DEAL KILLERS

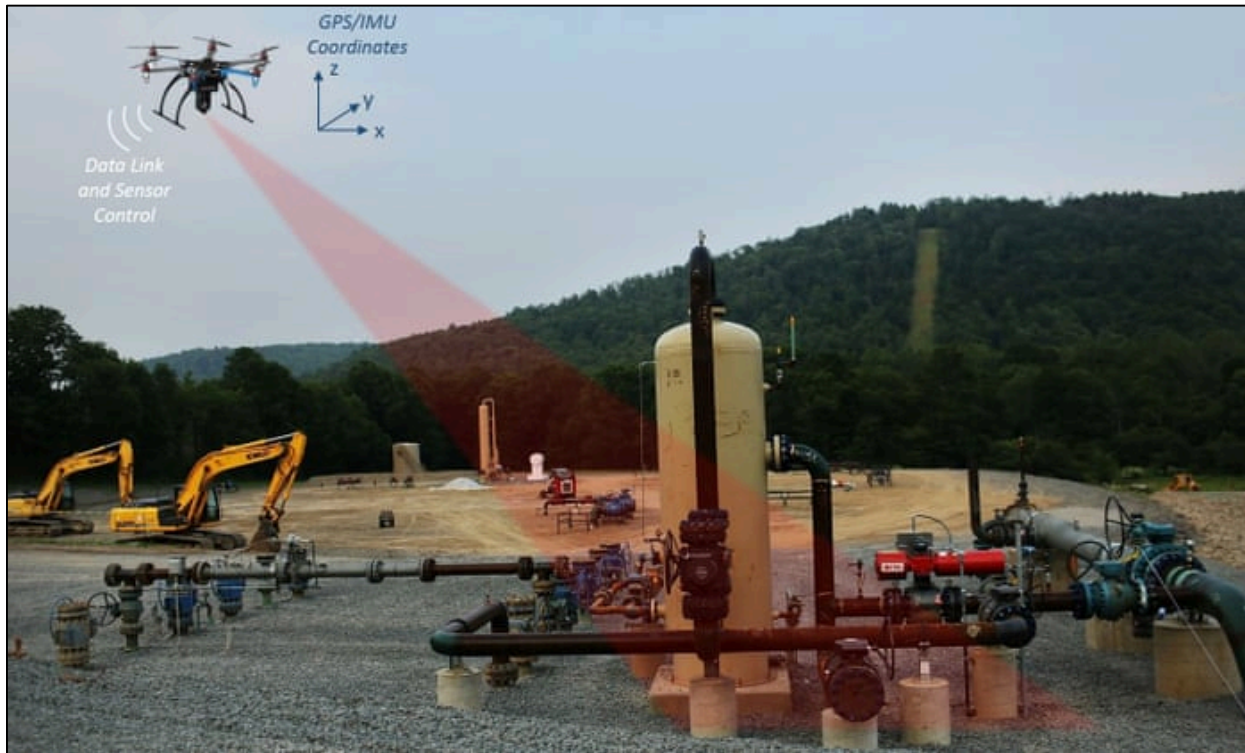
### TRADITIONAL ENVIRONMENTAL TRANSACTION TOOLS



- Standard contracting tools are often the first option when environmental issues crop up in transactions
  - Indemnities
    - Traditional protection for breaches of reps and warranties
    - Ensure indemnitor is solvent, reps are comprehensive, and survival period is adequate for potential liabilities
    - Consider a **special indemnity** for known environmental liabilities identified in diligence
  - Escrow
    - Also useful for **quantifiable**, known environmental liabilities
  - Rep & Warranty Insurance
    - Currently most popular tool for addressing environmental liability
    - Potential for **exclusion** of certain environmental issues from coverage

# NEUTRALIZING DEAL KILLERS

## NON-TRADITIONAL TOOLS – COMPLIANCE AUDITS



- If traditional environmental transactional tools will not help with deal killers, environmental attorneys must find more creative solutions
- Federal and state **environmental compliance audits** may represent one option
  - Many have specific provisions for new owners/acquirors
  - Allows party to take advantage of **pre-acquisition due diligence** for audit purposes
  - Potential privilege protections under state audits
  - Typically removes or reduces risk of civil penalty → reputational risk
  - Reduces chances of a **criminal referral** → lack of indemnity/insurance risk

## NEUTRALIZING DEAL KILLERS

### NON-TRADITIONAL TOOLS – COMPLIANCE AUDITS

- Compliance statutes and programs with explicit **new owner programs**:
  - EPA New Owner Audit Policy
  - EPA CAA Upstream New Owner Audit Policy
  - Texas Environmental Health and Safety Audit and Privilege Act
  - Oklahoma Environmental, Health and Safety Audit Privilege Act
- Not suitable for every purpose
  - Each comes with **limitations**
  - Pros and Cons



## NEUTRALIZING DEAL KILLERS

### NON-TRADITIONAL TOOLS – UNIQUE INSURANCE PRODUCTS



- More types of transactional insurance products exist than just reps and warranties insurance
- Best situation for Contingent Liability Insurance is when confronted with a known material risk that may or may not come to be, depending on how a particular event turns out
  - Protects against vicarious liability
  - Litigation risks
  - In certain situations can even be used for environmental risks



## NEUTRALIZING DEAL KILLERS

### NON-TRADITIONAL TOOLS – UNIQUE INSURANCE PRODUCTS

- **Pros**
  - Unique policy with lots of freedom to define coverage
  - Can be used to safeguard not just against the liability but the value of your investment
- **Cons**
  - Very **few insurers** in this market willing to cover environmental issues
  - Takes time to obtain
  - Can be very expensive based on limits and coverage period sought
  - Potentially only to be used as a **last resort**



**“WHEN INCINERATION GOES UP IN FLAMES”**  
**ENVIRONMENTAL DEAL KILLER HYPO**





## ENVIRONMENTAL DEAL KILLER HYPO

- Target: Waste Incinerator Plant
- Client: Private Equity Firm
- Key Facts:
  - Deal valued at **\$100 million**
  - Competitive Bid Process
  - **No material issues identified** in diligence, except air permit exceedance which had been resolved
  - Local legislation imposing stricter emissions limits on incinerators introduced **one week prior to signing**
- Environmental Deal Killer Toolkit
  - Traditional
    - Rep & Warranty Insurance
    - Special Environmental Indemnity
  - Non-Traditional
    - State/federal preemption litigation?
    - Trade group advocacy?
    - Others???



## KEEPING ENVIRONMENTAL DEAL KILLERS AT BAY

### TAKEAWAYS

- Ensure environmental counsel is consulted throughout the process
- Environmental teams integrated with deal team and client teams
- Make use of non-traditional tools to mitigate risks
- Examine technological developments to expand due diligence options and scope



## CONTACT US

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Amanda Halter is a Partner at Pillsbury Winthrop Shaw Pittman LLP, which operates worldwide across a diversity of practices and industries, including energy and natural resources, technology, financial services, real estate and construction. She is Managing Partner of the firm's Houston office, a member of the firm's Environment & Natural Resources practice section, and Co-Leader of the firm's Crisis Management Focus Team. She helps companies resolve environmental liabilities, develop and implement regulatory strategies, and diligence deals, as well as manage financial and reputational losses associated with corporate crises of all kinds. Her environmental experience includes an array of regulatory and litigation matters, including federal and state contamination investigations and remedial actions, natural resource damages assessments and claims, environment, health and safety compliance counseling, mass toxic tort actions, permitting and planning for large-scale industrial projects, deal diligence, and project impacts mitigation and restoration strategies. Outside the firm, Amanda served as Vice-President of the governing board of The Alliance for Multicultural Community Services, a refugee resettlement and disaster recovery nonprofit, for three years from 2015-2018 and now serves on its inaugural Advisory Board. She is a previous Co-Chair of the Houston Bar Association's Gender Fairness Committee (2017-2018) and a Fellow of the Texas Bar. She received her J.D. from The University of Texas School of Law and her B.A. in Philosophy and Environmental Policy from Rice University.

# EVOLVING ISSUES: Ethics & Law Practice

**Technology, Social Media,  
and Communication**

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**31<sup>st</sup> Annual Texas Environmental  
Superconference**

Austin, Texas – August 1-2, 2019

**LAWPAY<sup>®</sup>**

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AN AFFINIPAY SOLUTION



# The big changes- and continuing issues

1. Cybersecurity and Practice Technologies
2. Proliferation of Social Media
3. Mishandling the attorney-client relationship
4. The rise of A.I., freelancing, and “unbundled services”



# Part 1:

## Cybesecurity, or *“You’re Stealing my Act”*

# Ransomware and “Spoofing”



## Cyber-losses across the country are startling

- \$325 million to ransomware estimated in 2015
- \$11.5 billion in 2019
- \$6 trillion by 2021

Spearfishing attacks: Targeted attacks used to acquire confidential information or install malware

“Spoofing”: Getting a call or email from a familiar number or address being used by a hacker

With each breach, lawyers stand to lose sensitive information, business disruption, and the **complete loss of client trust.**

*Source: Cyber-Security Market Report*



# Understanding the problem



## 1. The “insider threat” is the most significant risk that firms take

- Giving all employees passwords and access to files means that your employees can take digital copies out of the office
- Disgruntled employees account for 20 percent of all lost or copied data which leave a business

## 2. 24/7 access from anywhere leads to leaks

- Unsecure Wi-Fi
- Lost devices

## 3. Reluctance to change passwords

## 4. Losing laptops, iPhones, and other equipment

# Is there a standard of care for lawyers?



- Most lawyers get sued on a “negligence” standard. Typically, that is: “Did the lawyer act in accordance with what a prudent lawyer did or would have done in the same circumstances?”
- At the present, there is no clear indication other than what a *reasonably prudent lawyer* would do or not do under the circumstances.
- **Texas:** See new Comment 8 to Disc. Rule 1.01, which requires lawyers in striving for competence and proficiency, to include “... ***the benefits and risks associated with relevant technology...***”. ***Sup. Ct. Order 19-9016 2-26-19***
- **BUT...CHECK YOUR OWN STATE STATUTES!**
- *Also, look at state/federal health and safety codes for “Duties of Custodians of Confidential information.”*

# Requiring technology CLE



An increasing number of states are recognizing the importance of specific training to improve lawyers skills, thus requiring CLE on technology.

Minnesota, Florida, California, and others have created CLE requirements.

Minnesota: A lawyer has a duty under the MRPC, not to knowingly reveal information relating to the representation of a client... and a duty to act competently to safeguard.

Texas: 2-26-2019 Supreme Court (19-1906) Order acknowledges that lawyers should have proficiency in technology.

# STRENGTHEN your passwords

Reggie Hirsch of Houston recommends:

Long phrases unique to you:

Ilovesfreshshashimitunawithalittlesoyandwasabi ← that is 44 letters

He also recommends you can adapt it to multiple uses by adding the name of the usage. Thus for email you add “EMAIL”.

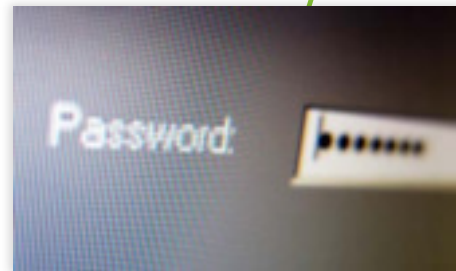
IlovesfreshshashimitunawithalittlesoyandwasabiEMAIL

or

IlovesfreshshashimitunawithalittlesoyandwasabiDELTA

If you want to check the strength of your own password, do it at:

<https://password.kaspersky.com/in/>



# EVERY ONE CAN DO THESE THINGS:



1. **Always** use strong passwords and/or use a password manager
2. **Secure** all **Wi-Fi networks** (even guest network requires password)
3. **Be wary** of visiting suspicious websites (look for the 'S' in "HTTPS")
4. **Turn on** Automatic Updates on your computer.
5. **Turn on** Anti-Virus protection on computer.
6. **Ask clients** if they have special security needs.

# Part 2:

## Dangers of Social Media

*“Peeking Behind the Curtain”*

# How do Lawyers Get in Trouble?

## Why attorneys need social media savvy

- Danger Area #1** | Disregarding confidentiality
- Danger Area #2** | Unethical information-gathering
- Danger Area #3** | Failure to assert client control
- Danger Area #4** | Evidence preservation and spoliation
- Danger Area #5** | Ethical conduct involving jurors
- Danger Area #6** | The impact of what YOU share
- Danger Area #7** | Reacting to online review or critics

# Social media by the numbers

- May 2018: Facebook and YouTube dominate
- 78 percent of all adult Americans have at least one social networking account; 58 percent have two or more
- 16 minutes of every hour spent online is spent on Facebook
- More Facebook profiles (5) are created every second than there are people born (4.5)
- More than 1 billion tweets are sent every 48 hours
- Every 60 seconds, over 293,000 status updates are posted on Facebook
- 4 million “likes” are generated every minute



# Social media posts are evidence!



## **Rule 3.1 of the ABA Model Rules of Professional Conduct:**

- A lawyer may not unlawfully alter or destroy evidence and cannot direct or assist others in doing so.

## **Allied Concrete Co. v. Lester, 736 S.E.2d 699 (Virginia 2013)**

- Wrongful death case; surviving husband told to “clean up” his Facebook page and then answer sworn interrogations that he didn’t have a Facebook account
- \$722,000 in sanctions
- Plaintiff’s counsel resigns from the practice of law and in June 2013 has his license suspended for five years by the Virginia Bar

## HOW TO RESPOND to an Online Review

- A lawyer may not reveal confidential information, as that term is defined in Rule 1.05, merely to respond to a former client's negative review on the internet.
- A lawyer may, however, post a response to a former client's negative review so long as the response is *proportional and restrained* and does not reveal confidential information or violate any other provision of the Texas Disciplinary Rules.
- For example, posting the following response, suggested in Pennsylvania Bar Association Formal Ethics Opinion 2014-200 (2014), would not violate the Texas Disciplinary Rules:
- *"A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point by point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events."*

# Protect yourself—the social media addendum



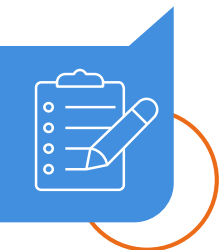
## ATTORNEY FEE CONTRACT ADDENDUM – Re: Use of Social Media

- Social Media and Blogging
- The success that [I][we][the Firm] achieve may depend in large measure on a client's personal credibility, appeal, appearance, and integrity by those who may be in a position to review those characteristics, including judges, hearing examiners, opposing counsel, and potential jurors. The amount of information which appears online may dramatically influence those judgments. Lawyers are additionally under a duty not to destroy existing evidence, nor counsel you to impermissibly change your presence except in permissible ways.
- Therefore, during the firm's representation of you, it is likely that we will review, with your assistance, your social media presence, which will include any and all of the following:
  - Personal and/or business websites
  - Professional profile accounts, such as LinkedIn
  - Facebook accounts for you and any close family member
  - Any internet blog or writings
  - Active or recent messaging apps including Twitter, Snapchat, YouTube, or other
  - Other social, professional, or membership where you have an internet presence
- Our goal in this review is to effect permissible options, such as increasing privacy options, to remove items, such as certain photos, or albums, or postings which may reflect poorly on your judgment, or may be misconstrued by the viewer. Under no circumstances may you or the firm take a false position that those postings did not exist, nor take steps to permanently destroy such pre-existing evidence.
- In certain situations, our advice may be to discontinue an account completely during this legal matter. Be aware that everything you post may be used against you, and your most regrettable post will be the one people often remember.

[cont'd to include sections on "Immediate Steps," "Communications from third Parties," "Blogging," and "Posting"]

# Takeaways

- Consider: you rarely need to use social media.
- As a lawyer, you're a trusted confidante. You have ethical duties.
- If you do use it, always tell the truth. If the truth will get you in trouble, you're likely using it inappropriately or unethically.
- Before using social media, consider every negative connotation that could be attached.
- Do NOT ask clients to post anything for your, or about you.



**Part 3:**  
**Client Communications**  
*“Gather ‘Round and Hear This”*

# What is the # 1 Grievance in the USA (and Canada)?



**“My Lawyer won’t communicate with me.  
I don’t know what is going on.”**

**Note:** Only @15% of malpractice suits are based upon lawyer error. Most of them are because you have made the client angry.

# Defining good, proactive communication

- Reply to client, court, or opposing counsel as soon as possible
- Send newsy updates even when nothing has happened
- Do your share of work
- Don't withhold bad news or try to "sugarcoat" it
- Keep after someone who is not communicating with you (best protection from grievances)



# Be a good teammate!

## The best way to avoid client complaints is:

- You and your client are on the same team—be a friend for life
- Always update the client in both good and bad situations
- Be the adult
- Be totally professional
- Keep your client's confidences





# **Part 4:**

## **A.I., Freelancing & Unbundled Legal Services**

# What does freelance mean?

## Freelance includes all of these other terms:

- Temporary lawyer
- Contract lawyer
- Freelance lawyer

Contract often implies attachment to a single firm while freelance means doing work for many different firms.



# Recommended terms

## It is safest to use written agreements:

- Scope of representation
- How billing is handled
- Who is supervising responsibility
- Conflicts
- Confidentiality

*See, generally, Tx Rule 1.04(f); Model Rule 4-101, and similar rules requiring client knowledge and consent.*



# Appropriate scope of supervision: hiring lawyer

## The duty of the hiring lawyer is to:

- Clearly define the scope of services
- Communicate in writing about each lawyer's responsibility for meeting deadlines, filings, arranging services, and other matters
- Periodically check in with the freelance lawyer
- Evaluate the freelance lawyer's experience
- Propose remedial actions, if necessary
- Be available for the freelance lawyer to ask questions, brainstorm, and discuss the matter

# Freelance vs. “unbundled” services

Unbundled (aka *limited scope*) representation is a product of the “gig economy” in the legal profession. Unbundled service is typically used for on-demand, efficient, and cost-effective representation.



# What might unbundled services include?

- Providing litigation support to *pro se* litigants
- Assisting *pro se* litigants with preparing pleadings or other documents
- Providing other non-litigation advice to *pro se* litigants
- Assisting clients with transactional matters

**Question:** can you offer temporary help to someone, eg. Filling out legal forms, on the condition that Client agree “NO ATTORNEY CLIENT relationship is formed”?

**Answer:** Nope. See, Tex Ethics Opinion 635, if your services involve the practice of law, you have formed that relationship.

## Disclosure and form consent

Hiring lawyers have an obligation to communicate to the client to the extent necessary to commit the client to make an informed decision regarding the freelance lawyer's retention. *See, Texas rule 1.04; eg. Colorado Rule 1.5*

This also includes the basis or rate of the fee and expenses that will be charged to the client.

# Takeaways

## Best practices:

- Pick your freelance lawyer with the knowledge that you'll likely be responsible for his/her work
- Always have a written contract defining duties and independent contractor status
- Check for conflicts and do not give or take access to all firm client files
- Be specific about deadlines, duties, and expectations
- Reveal associated lawyer to client and get approval of rate charged to client
- Avoid joint assumption of risks as freelance by providing freelance is paid no matter what

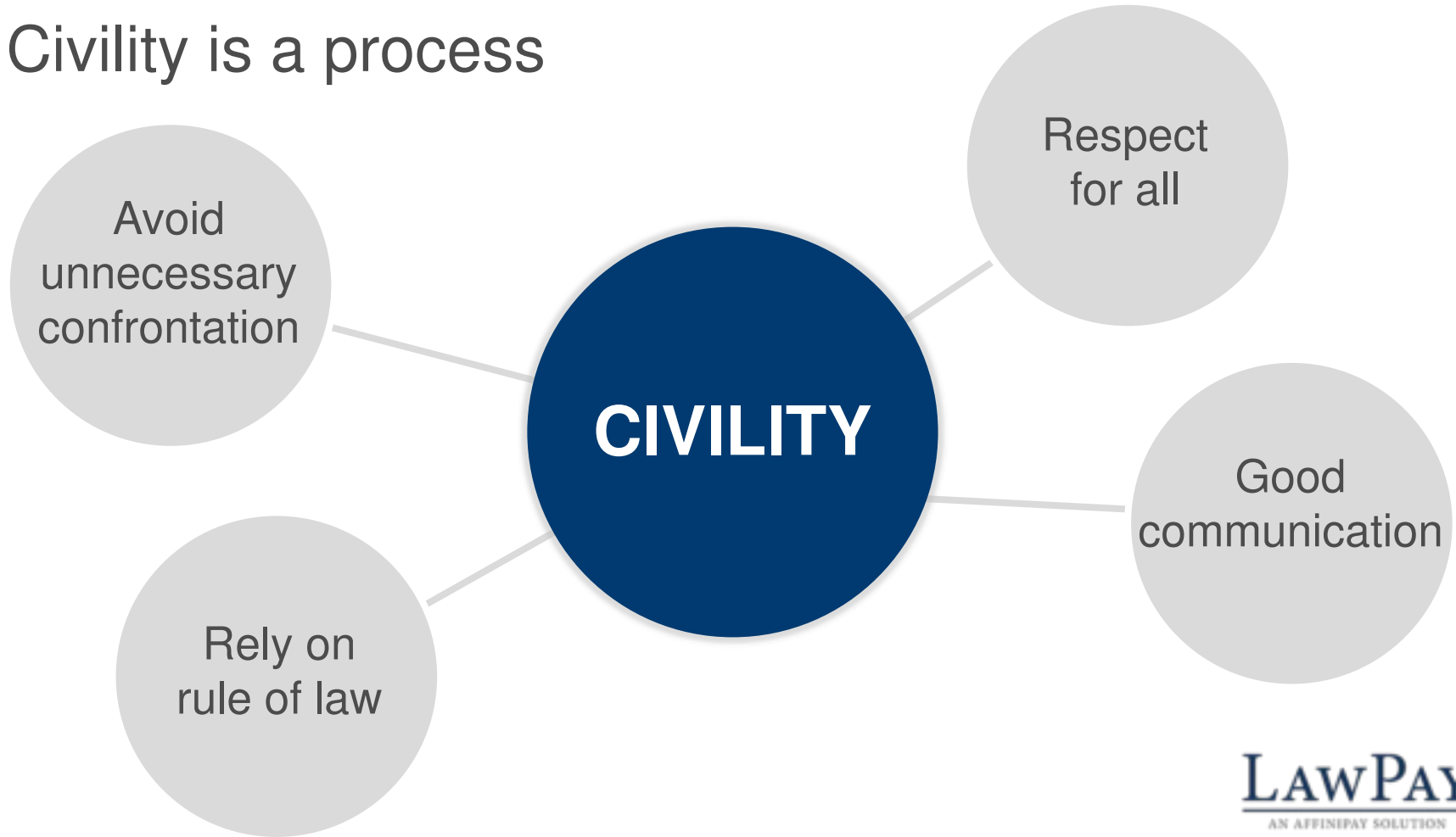


# Takeaways for Freelance

## **Best practices:**

- Be careful about what you promise, and the time frames.
- Always be courteous and prompt for meetings
- Always meet your specific deadline and duties as promised
- Always have a written contract defining duties and independent contractor status
- Don't accept access to all firm client files
- Make sure your hiring is approved if required under your rules
- Avoid joint assumption of risks as freelance unless agreed to in advance and approved by client.

# Civility is a process



# Your ethical responsibilities

## The 4 competing duties:

- To your client
- To your fellow lawyer
- To the administration of justice
- To yourself



# Improve and defend your profession

Support the fair administration of  
justice

Our Legal Profession will:

- Be courteous – if you are
- Be strong – if you are active in it
- Be a source of service – if you serve
- Be a source of resolution – if you share your talents



# THANK YOU!

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## James E Smith Short Bio

Jim Smith is a Shareholder with Crain, Caton & James, P.C. in Houston, Texas. His practice combines extensive trial and appellate work with a breadth of knowledge of state and federal environmental programs. First chair trial experience includes civil and criminal jury trials, as well as trials to courts, arbitrators, and administrative agencies (especially the Texas Commission on Environmental Quality and the United States Environmental Protection Agency).

He has been lead counsel in numerous appeals, including important precedent setting environmental cases before the Texas Supreme Court, several Texas Courts of Appeals, and the United States Court of Appeals for the Fifth Circuit. He has been selected as an arbitrator in multiple cases. Along with an extensive litigation practice, clients rely on his substantive knowledge of the environmental programs in support of complex transactions, and in compliance counseling involving every major environmental program.

Environmental cases make up most of his trial and appellate experience, but first chair experience also includes intellectual property, breach of contract, breach of fiduciary duty, and engineering design cases. As with his environmental practice, these generally have involved the oil production, petroleum refining, petrochemical and power generation industries.

Jim received his undergraduate degree in chemical engineering in 1978 from the University of Kansas, where he was selected for Tau Beta Pi. After practicing engineering for a major energy company, Jim attended the University of Texas School of Law and graduated, with honors, in 1982.

**TEXAS SUPERCONFERENCE AUGUST 2, 2019**  
***THE GREATEST SUPERCONFERENCE ON EARTH***  
**ETHICS-EVOLVING ISSUES “A *High Wire Act*”**  
**PRACTICING LAW FOR AN EXTENDED TIME IN A STATE WHERE NOT  
LICENSED**  
**AND**  
**TECHNOLOGY RELATED TIPS FOR NON-LAWYERS**

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## **ETHICS-EVOLVING ISSUES**

### **PRACTICING LAW FOR AN EXTENDED TIME IN A STATE WHERE NOT LICENSED**

**JAMES E SMITH**

#### **Issue**

A lawyer licensed only in Texas has a second home in another state. For the past several years, the lawyer has spent every July and parts of June and August at the second home and practices law from that location. The lawyer advises clients on environmental matters for operations in Texas but also across the country. On rare occasions, the lawyer advises clients that have operations in the state of the second home, generally regarding federal law and regulations.

What, if anything, can this lawyer do to comply with ethical obligations, both those imposed by Texas and those imposed by the state of the second home?

#### **Short Answer**

Texas acknowledges its lawyers may practice “in Texas” from a location out of state. Texas requires lawyers to know and comply with the requirements of the state of the second home. However, applicable requirements are not always clear and may be far from uniform on this issue.

#### **Analysis**

Key Texas Rules:

The relevant rules of the Texas Disciplinary Rules of Professional Conduct seem to be 505 and 805.

Rule 505:

A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Simply put, Texas lawyers who violate professional regulations in another state also violate Texas rules.

Texas Rule 805(a) may narrow Rule 505 to limit the authority for out of state actions to “misconduct”:



(a) A lawyer is subject to the disciplinary authority of this state, if admitted to practice in this state or if specially admitted by a court of this state for a particular proceeding. In addition to being answerable for his or her conduct occurring in this state, any such lawyer also may be disciplined in this state for conduct occurring in another jurisdiction or resulting in lawyer discipline in another jurisdiction, if it is professional misconduct under Rule 8.04.

However, “misconduct” appears to be broadly defined and to include unauthorized practice of law.

Comment 2 to Rule 8.05 advises Texas lawyers to know the applicable requirements when they practice outside Texas:

2. In modern practice lawyers licensed in Texas frequently act outside the territorial limits or judicial system of this state. In doing so, they remain subject to the governing authority of this state. If their activity in another jurisdiction is substantial and continuous, it may constitute the practice of law in that jurisdiction. See Rule 5.05.

### **Guidance from Other States**

Very few states provide particularly helpful guidance to what activities would constitute “substantial and continuous” activities. Below are comments regarding a few states; none of these comments constitute legal advice regarding the law in these jurisdictions.

#### **Ohio**

I discuss Ohio because a recent case addressed this issue; the case suggests the Texas lawyer in this scenario whose second home is in Ohio may have an issue unless the lawyer applied for admission in Ohio before or shortly after occupying the second home. *In re Application of Jones*, <http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2018/2018-Ohio-4182.pdf>

In *Jones*, a lawyer licensed in Kentucky applied for admission in Ohio. At the time, her firm had offices in both Kentucky and Ohio. A month after applying, she moved to Ohio and began practicing out of her firm’s Ohio office, although only on matters in Kentucky. Ohio’s Board of Commissioners on Character and Fitness recommended against her admission, on the grounds she was practicing in Ohio without a license and that her work at the Ohio office did not meet the definition of “temporary.”

The Ohio Supreme Court reversed the Board’s recommendation and approved her application for admission without examination. The Court seemed to accept her status was “temporary” because her plans would change if she was denied admission to the Ohio Bar; thus, her pending application to the Ohio Bar appears to have been a significant factor in the decision. Absent her pending application, it appears Ohio would have found her work in the Ohio office, even solely on matters in Kentucky, not to have been “temporary.”

Three Ohio judges concurred with the result, but said Jones was clearly not practicing on a “temporary” basis in Ohio. Rather, they argued application of Ohio’s licensing requirement to a lawyer handling only Kentucky matters from an office in Ohio was a violation of due process, because Ohio has no legitimate interest in preventing lawyers licensed in Kentucky from handling Kentucky matters, even if the lawyer is physically in Ohio.

## Colorado

Colorado is a popular state for second homes. The Colorado rules allow for lawyers to practice in their home states while temporarily in Colorado. Specifically, Rule 5.5 of the Colorado Rules of Professional Conduct states in pertinent part:

- (a) A lawyer shall not:
  - (1) practice law in this jurisdiction without a license to practice law issued by the Colorado Supreme Court unless specifically authorized by C.R.C.P. 204 or C.R.C.P. 205 or federal or tribal law;
  - (2) practice law in a jurisdiction where doing so violates the regulations of the legal profession in that jurisdiction;
  - (3) assist a person who is not authorized to practice law pursuant to subpart (a) of this Rule in the performance of any activity that constitutes the unauthorized practice of law; or
  - (4) allow the name of a disbarred lawyer or a suspended lawyer who must petition for reinstatement to remain in the firm name.

Comment 1 to Rule 5.5 states:

[1] The definition of the practice of law is established by law and varies from one jurisdiction to another. In order to protect the public, persons not admitted to practice law in Colorado cannot hold themselves out as lawyers in Colorado or as authorized to practice law in Colorado. Rule 5.5(a)(1) recognizes that C.R.C.P. 204 and C.R.C.P. 205 permit lawyers to practice law in accordance with their terms in Colorado without a license from the Colorado Supreme Court. Lawyers may also be permitted to practice law within the physical boundaries of the State, without such a license, where they do so pursuant to Federal or tribal law. Such practice does not constitute a violation of the general proscription of Rule 5.5(a)(1).

Rule 205.1 of the Colorado Rules of Civil Procedure (C.R.C.P.):

### **RULE 205.1. TEMPORARY PRACTICE BY OUT-OF-STATE ATTORNEY--CONDITIONS OF PRACTICE**

- (1) **Eligibility.** An attorney who meets the following conditions is an out-of-state attorney for the purpose of this rule:

- (a) The attorney is licensed to practice law and is on active status in another jurisdiction in the United States;
  - (b) The attorney is a member in good standing of the bar of all courts and jurisdictions in which he or she is admitted to practice;
  - (c) The attorney has not established domicile in Colorado; and
  - (d) The attorney has not established a place for the regular practice of law in Colorado from which the attorney holds himself or herself out to the public as practicing Colorado law or solicits or accepts Colorado clients.
- (2) **Scope of Authority.** An out-of-state attorney may practice law in Colorado except that an out-of-state attorney who wishes to appear in any state court of record must comply with [C.R.C.P. 205.3](#) concerning pro hac vice admission and an out-of-state attorney who wishes to appear before any administrative tribunal must comply with [C.R.C.P. 205.4](#) concerning pro hac vice admission before state agencies. An out-of-state attorney who engages in the practice of law in Colorado pursuant to this rule shall be deemed to have obtained a license for the limited scope of practice specified in this rule.
- (3) **Discipline and Disability Jurisdiction.** An out-of-state attorney practicing law under this rule is subject to the Colorado Rules of Professional Conduct; [C.R.C.P. 251.1 et seq.](#) (Rules of Procedure Regarding Attorney Discipline and Disability Proceedings); and C.R.C.P. 210 (Revocation of License). In addition to the forms of discipline contained in [C.R.C.P. 251.6](#), the attorney may also be enjoined from further practice of law in Colorado.

Colorado appears to accept out-of-state lawyers having a presence in Colorado to an extent beyond what other states would accept, based on the wording in Rule 205.1. Those meeting the definition of “out-of-state” lawyers “may practice law in Colorado,” provided they do not appear in courts except via pro hac vice admission. Further, the lawyer must not have “established a place for the regular practice of law in Colorado *from which the attorney holds himself or herself out to the public as practicing Colorado law or solicits or accepts Colorado clients.*” [emphasis added]

Colorado’s stated openness may be particularly important to some, as it appears Colorado requires lawyers licensed in another state to have passed the Multistate Professional Responsibility Examination (MPRE) within two years of applying for admission in Colorado.

The lawyer licensed in Texas apparently can practice from the second home in Colorado by avoiding “Colorado” clients and not advising clients regarding operations in Colorado, except in situations limited to federal law.

## Florida

Of course, Florida deals with lawyers having second homes. Florida is well known as hostile to lawyers from other states seeking admission. Rule 4-5.5 of Florida’s Rules of Professional Conduct provide

### **Rule 4-5.5. Unlicensed Practice of Law; Multijurisdictional Practice of Law**

(a) Practice of Law. A lawyer may not practice law in a jurisdiction other than the lawyer's home state, in violation of the regulation of the legal profession in that jurisdiction, or in violation of the regulation of the legal profession in the lawyer's home state or assist another in doing so.

(b) Prohibited Conduct. A lawyer who is not admitted to practice in Florida may not:

(1) except as authorized by other law, establish an office or other regular presence in Florida for the practice of law;

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in Florida; or

(3) appear in court, before an administrative agency, or before any other tribunal unless authorized to do so by the court, administrative agency, or tribunal pursuant to the applicable rules of the court, administrative agency, or tribunal.

(c) Authorized Temporary Practice by Lawyer Admitted in Another United States Jurisdiction. A lawyer admitted and authorized to practice law in another United States jurisdiction who has been neither disbarred or suspended from practice in any jurisdiction, nor disciplined or held in contempt in Florida by reason of misconduct committed while engaged in the practice of law permitted pursuant to this rule, may provide legal services on a temporary basis in Florida that are:

(1) undertaken in association with a lawyer who is admitted to practice in Florida and who actively participates in the matter; or

(2) in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer is authorized by law or order to appear in the proceeding or reasonably expects to be so authorized; or

(3) in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, and the services are not services for which the forum requires pro hac vice admission:

(A) if the services are performed for a client who resides in or has an office in the lawyer's home state, or

(B) where the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice; or

(4) not within subdivisions (c)(2) or (c)(3), and

(A) are performed for a client who resides in or has an office in the jurisdiction in which the lawyer is authorized to practice, or

(B) arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

The Comment to this rule states, in pertinent part:

Subdivision (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in Florida that are performed for a client who resides or has an office in the jurisdiction in which the lawyer is authorized to practice or arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within subdivisions (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers. When performing services which may be performed by nonlawyers, the lawyer remains subject to the Rules of Professional Conduct.

Subdivisions (c)(3), (d)(3), and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence this relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, for example, when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through regular practice of law in a body of law that is applicable to the client's particular matter.

Florida's rule and its comment appear to provide more clarity but also a narrower "safe harbor" for lawyers practicing out of a second home in Florida. Lawyers appear free to practice on matters for a client "who resides or has an office in the jurisdiction in which the lawyer is authorized to practice *or arise out of or are reasonably related* to the lawyer's practice in a jurisdiction in which the lawyer is admitted." [emphasis added] The use of "or" indicates the client need not have an office in the state where the lawyer is licensed, but if not, the matter must still be reasonably related to the lawyer's practice in the state where the lawyer is licensed.

#### Other States

Florida is one of almost all states that has adopted some form of ABA Model Rule 5.5(c), which addresses practicing law "temporarily" while in a state other than the lawyer's licensed state.

Despite the ease of practicing law from remote locations and the rise of second homes, very little guidance is available and state bar organizations seem reluctant to remove any of the uncertainty. The commentators who have addressed this issue seem to agree that certainty is generally unavailable.

## **Conclusion and Suggestions**

The Texas rules require the Texas lawyer to know the applicable law of the state of the lawyer's second home. The comment suggests that if a lawyer has a "substantial and continuous" presence in another state, that lawyer should certainly investigate the law of that state to ensure the lawyer's actions do not violate the other state's law.

The overwhelming number of states have some provision to allow for providing legal services on a "temporary" basis on matters reasonably related to the lawyer's practice in the state where the lawyer is licensed. Very few states have given much guidance as to what is "temporary." To the lawyer practicing for several weeks out of the year for several years, I suggest:

- Do not include a land line in the second home on business cards, letterhead, or your firm's web page;
- Do not list the second home as an alternative address;
- Do not participate in business development activities from your second home in your second home state;
- Keep it at home, do not rent a small office in the second home state;
- If the second home state allows for admission by motion (no exam), get admitted;
- Do not practice for a significant time from the second home and then decide to seek admission to the bar of the second home state;
- Do not take office space in your second home as a tax deduction;
- Generally, do not give the bar of the state of your second home a reason to care about what goes on in your second home.

## **TECHNOLOGY RELATED TIPS FOR NON-LAWYERS**

### **Avoid Committing Crimes/Consequences for Deleting Emails and Text Messages**

It is a crime to destroy evidence when the destruction is done with criminal intent to impede a government's civil or criminal investigation. Criminal intent generally requires the person have notice of the existence or reasonable expectation of the investigation.

Courts are not clear as to what constitutes "notice" that an investigation is pending and what can constitute evidence of the required mental state for criminal liability. However, some cases provide some guidance. For example, one federal court of appeals stated that a defendant who issued a directive to colleagues to "clean up" emails and other electronic files could be convicted of obstruction of justice. The court said that the defendant did not need to know the scope and subject matter of the investigation, only that the defendant knew of outstanding subpoenas or other government document requests that were in support of an investigation, and that the subpoenas or document requests called for "the types of documents he generally knew were in the possession of" the recipients of the defendant's directive. *U.S. v. Quattrone*, 441 F.3d 153, 179 (2nd Cir. 2006).

In another case, a Court instructed the jury a defendant could be convicted for deleting text messages if an investigation was reasonably foreseeable at the time of the destruction. The government did not have to prove the deleted text messages would have been material to the investigation, only that the defendant had the desire to impede the investigation when he deleted them. The judge also allowed the jury to learn the defendant's employer had issued a "litigation hold order" in assessing if the defendant reasonably expected an investigation and had criminal intent.

### **When Does a Duty to Preserve Evidence Begin and What Must Be Preserved?**

A few examples of when a duty to preserve has arisen:

- Upon receipt of a text message saying a lawsuit has been filed or an agency investigation has been initiated
- Upon receipt of a litigation hold order from an employer or employer's lawyer
- When an incident occurs that is reasonably expected to trigger a governmental investigation:
  - Death in a workplace
  - Major oil spill
  - Major air event that leads to evacuation, closing of streets, or non-employees seeking medical attention
- When credible evidence indicates a serious crime has been committed

Everything that might be considered “evidence” must be preserved, including

- Text messages
- Photographs and videos, including on a mobile phone
- Voice messages, including on mobile phones, or embedded in email on computers
- Email
- Drafts of documents
- Handwritten notes
- Samples, debris, clothing, broken tools or equipment
- Metadata