2023-2024 Environmental Case Law Update: Trial and Appellate Courts [1]

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Introduction

The following summarizes noteworthy judicial developments in environmental law over the last year. It includes only trial and appellate court decisions, with United States Supreme Court rulings covered in a separate paper. While this compilation is not comprehensive, it is intended to reflect some key developments in environmental cases that have been or are expected to be impactful to the field of environmental law. This update is current as of July 17, 2024.

Water

In Camp Lejeune Water Litigation v. U.S.,[3] a North Carolina federal district court held that former residents of Marine Corps Base Camp Lejeune must prove that their illnesses were "caused by exposure to the water at Camp Lejeune," denying their request for a more lenient standard of causation. The Camp Lejeune Justice Act ("CLJA"), passed in 2022, allows former residents who lived on the base between 1953 and 1987 to file claims against the government arising from contaminated water, which has been linked to various diseases and illnesses. Over 229,000 claims have been filed with the U.S. Department of the Navy and in North Carolina federal court. Given the decades that have passed since exposure, the residents argued that they should only be required to establish general, not specific, causation, asserting that Congress intended the CLJA to establish a unique causation framework that does not require plaintiffs to show that the specific diseases they suffered from were directly caused by the water. They also claimed the government delayed producing evidence linking the diseases to the water exposure, complicating their ability to prove causation. The court disagreed, finding that if Congress had intended to allow claimants to prove only general causation, it would have explicitly written the CLJA to reflect that.

Following the U.S. Supreme Court's landmark decision in *Sackett*, in which the Court rejected the significant-nexus test for determinations concerning the Clean Water Act (CWA) and clarified that "waters of the United States" ("WOTUS") do not include non-adjoining wetlands, the EPA and

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[1] Decisions by the United States Supreme Court are the subject of a separate update.

[2] With many thanks to associate Lindsey Mitchell for her invaluable assistance.

[3] No. 7:23-cv-00897, 2024 WL 457770 (E.D.C.N Feb. 6, 2024), motion to certify appeal denied, No.7:23-CV-897 (E.D.N.C May 13, 2024).

the Army Corps of Engineers issued a revised WOTUS rule in August. The new rule defines "waters of the United States" to include wetlands having a continuous surface connection to traditional navigable waters, the territorial seas, or interstate waters (Jurisdictional Water); impoundments of Jurisdictional Waters (Jurisdictional Impoundments); or relatively permanent, standing or continuously flowing tributaries to either Jurisdictional Waters or Jurisdictional Impoundments. Some argue that the revised WOTUS rule does not conform to the *Sackett* decision.

In one such post-*Sackett* challenge to the revised WOTUS rule, White v. EPA,[4] a federal judge in North Carolina denied a property owner's motion for a temporary injunction blocking implementation of the rule nationwide. The court found that the definition of "adjacent" wetlands "faithfully conforms" to *Sackett*. The landowner contended that the rule prevented him from developing or maintaining his land with erosion control measures and that the rule's definition of "adjacent" wetlands does not align with *Sackett*'s holding that a wetland must have "a continuous surface connection" with another jurisdictional water such that it is "difficult to determine where the water ends and the wetland begins." The court disagreed, ruling that the landowner failed to demonstrate a likelihood of success on the merits of his claim. The court explained, "[a] wetland with a continuous surface connection is a 'water of the United States' because that continuous surface connection renders the wetland practically indistinguishable from the jurisdictional water to which it is connected. . . . The continuous surface connection powers the test."

Ones to Watch: Three other lawsuits filed by states and industry groups are currently challenging the revised WOTUS rule as vague and overly broad, with the plaintiffs asking the courts to vacate the rule and remand it to the agencies for revision. These cases are *State of Texas v. EPA*[5], *State of West Virginia v. EPA*[6], and *Commonwealth of Kentucky v. EPA*.[7]

Air

In Ohio v. EPA,[8] a three-judge panel for the D.C. Circuit upheld a Clean Air Act ("CAA") waiver issued by the EPA to California which permitted the state to run a zero-emission vehicle program and set its own greenhouse gas emissions standards. A group of states and various fuel industry groups had challenged the waiver, arguing that the waiver violated the preemption of state fuel economy standards provided in the Energy Policy and Conservation Act. The fuel groups contended that the zero-emission vehicle program would have a negative effect on the demand for their products. The Court held that the plaintiffs lacked standing, finding that "both groups of petitioners fall far short of meeting their burden of demonstrating a 'substantial probability' that their alleged injuries would be redressed by a favorable decision by this court." In July, the industry groups and states filed a petition for a writ of certiorari with the U.S.

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[4] No. 24-00013, 2024 WL 3049581 (E.D.N.C. June 18, 2024).

[5] Nos. 23-17, 23-20, in the U.S. District Court for the Southern District of Texas.

[6] No. 23-00032, in the U.S. District Court for the District of North Dakota.

[7] No. 23-00007, in the U.S. District Court for the Eastern District of Kentucky.

[8] No. 22-1081, in the U.S. Court of Appeals for the D.C. Circuit.

Supreme Court.[9] California has been the only state with the authority to request and obtain EPA waivers since the 1960s due to the high number of vehicles in the state and air quality issues. The waivers allow it the ability to set air quality standards more stringent than the federal standards.

Ones to Watch: In Ohio v. EPA,[10] several states are challenging the EPA's "Good Neighbor" Plan ("GNP") under the CAA and the Administrative Procedure Act. They allege that the interstate ozone rule usurps states' authority to develop their own procedures for controlling emissions, imposes impossible standards on companies operating in the affected states, and violates the CAA's mandate that individual states are responsible for controlling their emissions and air pollution. Additionally, several states have filed challenges to the EPA's disapprovals of their "Good Neighbor" interstate ozone state implementation plans.[11] Federal appeals courts stayed the interstate plan disapprovals in 12 of the 23 covered states, effectively halting implementation of the GNP in the 12 states, and prompting the EPA to administratively stay the GNP in those states. In June, the United States Supreme Court blocked implementation of the GNP pending resolution of the lawsuits, finding the plaintiffs likely to prevail on the merits.[12]

Ones to Watch: Numerous lawsuits have been filed against the EPA since it finalized a rule in March requiring significant reductions in tailpipe emissions for certain vehicles. Set to take effect in 2027, the rule imposes stricter emissions standards on manufacturers of heavy-duty and medium-duty vehicles, such as buses, tractors, public utility trucks, and delivery trucks. In State of Nebraska v. EPA,[13] 25 states have petitioned the D.C. Circuit Court to challenge the rule, arguing that it "exceeds the agency's statutory authority and otherwise is arbitrary, capricious, an abuse of discretion, and not in accordance with law." This petition has been consolidated with other challenges by trucking and trade associations.[14] A coalition of 22 other states and four cities has filed a motion to intervene in defense of the EPA's rule, arguing that if the petitioners succeed,

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[9] Diamond Alternative Energy LLC et al. v. Environmental Protection Agency et al., No. 24-7, in the U.S. Supreme Court.

[10] No. 23A349, Kinder Morgan Inc. et al. v. EPA et al., No. 23A350, American Forest & Paper Association et al. v. EPA et al., No. 23A351, and U.S. Steel Corp. v. EPA et al., No. 23A384, in the Supreme Court of the United States.

[11] The lead case is State of Utah et al. v. EPA et al., No. 23-1157, in the U.S. Court of Appeals for the D.C. Circuit.

[12] Ohio et al. v. EPA et al., No. 23A349 (U.S. June 27, 2024).

[13] No. 24-1129, in the U.S. Court of Appeals for the D.C. Circuit.

[14] Western Trucking Association Inc. et al. v. EPA et al., No. 24-1157, in the U.S. Court of Appeals for the D.C. Circuit; Warren Petersen et al. v. EPA et al., No. 24-1133, in the U.S. Court of Appeals for the D.C. Circuit.

"harmful emissions that threaten public health and the environment will increase." Other challenges to the rule have been filed by industry groups in the D.C. Circuit.[15]

Ones to Watch: The EPA is also facing challenges to its rule regulating greenhouse gas emissions from power plants. Twenty-five states have challenged this rule in West Virginia v. EPA,[16] arguing that the rule exceeds the agency's statutory authority and sets "impossible to meet" standards. In May, a three-judge panel for the D.C. Circuit denied the states' request for an administrative stay of the rule until litigation was resolved, which would have halted the rule's implementation. Since then, several other petitions have been filed by states and industry groups to block the rule.[17]

Ones to Watch: The EPA's expanded methane emissions control requirements for oil and gas infrastructure are also being challenged. On the day the final methane emissions rule was published in March, the State of Texas filed suit against the EPA in Texas v. EPA,[18] arguing that the rule "violates fundamental principles of federalism by forcing the states to adopt federal standards as their own." Twenty-four other states later filed petitions challenging the rule, all of which were consolidated with the Texas case. Various oil and gas industry groups have also filed petitions, arguing that the EPA did perform the required cost-benefit analysis before implementing the rule.[19] In July, a three-judge panel of the D.C. Circuit denied the requests to stay the methane rule, finding "the stringent requirements for a stay pending court review" had not been satisfied.

Ones to Watch: The EPA is also facing challenges to several of its air toxics rules regulating commercial sterilizers using ethylene oxide, chemical manufacturing, iron and steel manufacturing, oil refineries, and ethylene production, among others. In Cleveland-Cliffs, Inc. v. EPA,[20] two industry groups are suing the EPA over its national emissions standards for hazardous air pollutants ("NESHAP") as applied to the integrated iron and steel sector, arguing the rule

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[15] American Petroleum Institute et al. v. EPA et al., No. 24-1196, in the U.S. Court of Appeals for the D.C. Circuit; American Fuel & Petrochemical Manufacturers et al. v EPA, No. 24-1207, in the U.S. Court of Appeals for the D.C. Circuit.

[16] No. 24-1120, in the U.S. Court of Appeals for the D.C. Circuit.

[17] Idaho Power Co. v. EPA et al., No. 24-1155, NACCO Natural Resources Corp. v. EPA et al., No. 24-1153; Edison Electric Institute v. EPA, No. 24-1152; Midwest Ozone Group v. EPA et al., No. 24-1146; International Brotherhood of Boilermakers v. EPA, No. 24-1144; International Brotherhood of Electrical Workers v. EPA, No. 24-1143; United Mine Workers of America v. EPA, No. 24-1142; all in the U.S. Court of Appeals for the D.C. Circuit.

[18] Nos. 24-1054, 24-1118, in the U.S. Court of Appeals for the D.C. Circuit.

[19] American Petroleum Institute v. EPA et al., No. 24-1116; American Exploration & Production Council v. EPA et al., No. 24-1117; Texas Oil and Gas Association v. EPA et al., No. 24-1114; Interstate Natural Gas Association of America v. EPA, No. 24-1115; GPA Midstream Association v. EPA et al., No. 24-1111; Michigan Oil and Gas Association et al. v. EPA et al., No. 24-1101; State of Oklahoma et al. v. EPA et al., No. 24-1059; Independent Petroleum Association of America et al. v. EPA et al., No. 24-1103; all in the U.S. Court of Appeals for the D.C. Circuit.

[20] No. 24-1110, in the U.S. Court of Appeals for the D.C. Circuit.

requires changes that are too expensive and difficult to implement. In the same consolidated case, environmental groups like the Sierra Club and Clean Air Council are challenging the rule for not being stringent enough. In another consolidated case, ACC v. EPA,[21] the American Chemistry Council, the American Fuel and Petrochemical Manufacturers, and environmental groups have filed competing challenges to an EPA rule which has clarified and reconsidered other aspects of the NESHAP rules.

One to Watch: Twenty-five states and eight industry groups have challenged the EPA's rule creating more stringent standards for fine particulate matter pollution, asking the D.C. Circuit to vacate it.[22] The states argue that by considering environmental justice and climate change in establishing the new standard for fine particulate matter, the agency considered goals that "are not within the EPA's portfolio." The industry groups allege that the EPA revised the standards without going through the required two-step revision process provided by the CAA, which mandates that agencies consider various factors when deciding whether revisions are necessary.

One to Watch: In Wynnewood Refining Company, LLC v. Regan,[23] a small Texas refinery filed a suit against the EPA, arguing the agency failed to rule on its request to be exempt from CAA regulations within the 90-day statutory deadline. Pursuant to the CAA, fuel sold within the United States must contain a certain amount of renewable fuel, but small refineries may apply for an economic hardship exemption. The refinery is arguing that the EPA violated the CAA by not deciding its exemption status by the statutory deadline, and claims the agency regularly fails to meet the deadline, citing to a report finding the EPA ruled on such requests on average, over 700 days after receipt.

Climate Change & Greenhouse Gases

In Held v. State,[24] the Montana District Court found that state laws governing agency approval of fossil fuel projects violated the Montana Constitution because they required the agencies to ignore the climate impacts of those projects. In 2011, the state legislature revised the Montana Environmental Protection Act ("MEPA") to prohibit its Department of Environmental Quality and Department of Natural Resources & Conservation from considering fossil fuel effects in their compliance and climate change reports. In 2020, sixteen youth plaintiffs filed a case against the State, alleging that its legislative support of the fossil fuel industry had exacerbated climate change, depriving them of their state constitutional rights to a "clean and healthful environment." The trial court agreed, finding that the Montana Constitution does provide a right to a clean and healthful environment, "which includes climate as part of the environmental life-support system." The

[21] No. 24-1174, in the U.S. Court of Appeals for the D.C. Circuit.

[22] Kentucky et al. v EPA et al., No. 24-1050; Chamber of Commerce of the USA et al. v. EPA et al., No. 24-1051, Texas et al. v. EPA et al., No. 24-1052; Warren Petersen et al. v. EPA et al., No. 24-1073, all in the U.S. Court of Appeals for the D.C. Circuit.

[23] No. 4:24-cv-02554, in the U.S. District Court for the Southern District of Texas.

[24] 2023 Mont. Dist. LEXIS 2, No. 2020-307.

State's motion to stay the trial court's decision was denied, and the Montana Supreme Court upheld this denial, finding no abuse of discretion by the trial court. The Court is now considering the State's argument that the plaintiff's lacked standing to pursue their claims under MEPA because it is a procedural statute, the invalidation of which would not provide a remedy for the plaintiffs' alleged injuries.

A similar case, Navahine v. Hawai'i Department of Transportation,[25] settled in June with an agreement recognizing children's constitutional rights to a life-sustaining climate. The settlement commits the Hawaii Department of Transportation to achieve zero emissions in state grounds, sea, and air transportation by 2045. In another case, United States v. U.S. District Court for the District of Oregon Eugene,[26] a three-judge Ninth Circuit panel ordered the U.S. District Court for Oregon to immediately dismiss Juliana v. United States.[27] The youth plaintiffs in *Juliana* alleged that federal policies which have the effect of worsening climate change violated their constitutional rights. In its second decision dismissing the case, the Ninth Circuit found that the plaintiffs lacked standing. This decision reiterated a 2020 ruling in which the Ninth Circuit had remanded the case with instructions, but the district court allowed the plaintiffs to amend their complaint. This time, the Ninth Circuit granted the federal government's petition for a writ of mandamus, emphasizing that such a remedy is appropriate when the district court fails to follow the appellate court's mandate. The plaintiffs requested en banc review of the decision, which the Ninth Circuit rejected in July.

In Sunoco LP v. City and County of Honolulu,[28] several fossil fuel companies and their subsidiaries have petitioned for writ of certiorari before the Supreme Court after their motions to dismiss tort law claims related to GHG emissions were rejected by lower courts. Honolulu's claims seek to hold the companies liable for failing to warn consumers about the climate impact of their products and for deceptive marketing practices allegedly occurring over several decades. The companies argued that federal common law and the Clean Air Act preempted the case because Honolulu was seeking to regulate global fossil fuel emissions. Both the trial court and the Hawaii Supreme Court rejected these arguments. The companies have now asked the U.S. Supreme Court to decide whether state-law claims seeking damages for global climate impacts caused by interstate and international GHG emissions and climate change are precluded by federal law.

In a similar case, Baltimore v. BP PLC,[29] the City of Baltimore sued several oil companies including BP, Chevron, and Exxon, alleging the companies have for decades deceived the public and consumers about the dangers associated with fossil fuels. The Baltimore Circuit Court dismissed the suit, finding that the Constitution's federal structure does not allow for state laws to be applied to claims arising from "global climate change." The court found the city's claims stem

[25] No. 22-0000631, in the Circuit Court of the First Circuit, State of Hawaii.

[26] No. 24-684, in the U.S. Court of Appeals for the Ninth Circuit.

[27] No. 15-01517, 2023 U.S. Dist. LEXIS 231191 (D. Or. 2023).

[28] No. 23-947, 2024 WL 2883747 (U.S. June 10, 2024).

[29] No. 24-18-004219, in the Circuit Court for Baltimore City.

from a global phenomenon caused by emissions from sources "in literally every state and nation in the world" and thus are "beyond the limits of Maryland state law."

The Commonwealth of Puerto Rico filed a climate suit against ExxonMobil, BP, Chevron, and other petrochemical companies in July. The complaint filed in Estado Libre Asociado De Puerto Rico v. Exxon Mobil Corp.[30] accuses the companies of deceiving the public about the effects associated with the use and burning of fossil fuels, which have allegedly resulted in severe damage to Puerto Rico's natural resources.

In ExxonMobil Corp. v. Arjuna,[31] a federal district court in Texas dismissed ExxonMobil's suit against an investor group based on a proposed shareholder resolution urging Exxon to adopt more climate-based policies. Arjuna Capital, LLC submitted a shareholder proposal for inclusion in Exxon's 2024 proxy statement, calling for accelerated emissions reductions. Exxon filed suit against the investor group, bypassing the typical SEC challenge process, arguing that the SEC favored investor activists. Arjuna later withdrew its proposal, but Exxon did not drop the case, citing concerns that the investors would not cease pressuring the company towards more climate-friendly policies. The U.S. District Court for the Northern District of Texas found the case was moot due to the withdrawal of the proposal and deemed Exxon's argument about future investor actions too speculative.

In Healthy Gulf v. FERC and Sierra Club v. U.S. Department of Energy,[32] two D.C. Circuit panels ruled in July that the Federal Energy Regulatory Commission (FERC) inadequately explained a failure to assess the significance of GHG emissions for proposed natural gas liquefaction and export facilities in Louisiana, dismissing conservation groups' challenge of approvals allowing a Texas project to send more of its LNG exports to non-free trade agreement countries. The panel held that FERC failed to address NEPA and Natural Gas Act requirements, finding the Commission failed to explain its departure from its previous approach to determining the significance of the facilities' GHG emissions, and sent the order back to FERC for more consideration. The panel also found that FERC's analysis of the cumulative effects of nitrogen dioxide emissions from the proposed facilities was arbitrary, but declined to vacate the project's authorization order, finding it "reasonably likely" that FERC would be able to address the defects in its analysis. The panel rejected claims that FERC failed to adequately consider alternatives.

One to Watch: Nineteen attorneys general have sought to file a bill of complaint with the U.S. Supreme Court, aiming to enjoin five states' climate change lawsuits against large energy companies. In Alabama v. California,[33] Alabama, Florida, West Virginia, and other states allege that California, New Jersey, Connecticut, Minnesota, and Rhode Island are improperly attempting

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[30] The case is pending in the San Juan Trial Court. No case number was available at the time this paper was submitted.

[31] No. 24-00069, 2024 U.S. Dist. LEXIS 91609 (N.D. Tex. 2024).

[32] Healthy Gulf et al. v. FERC, No. 23-1069; Sierra Club v. U.S. Department of Energy et al., No. 22-1218, both in the U.S. Court of Appeals for the D.C. Circuit.

[33] No. 220158, in the Supreme Court of the United States.

to regulate global emissions through state tort actions. The state suits allege that the companies have violated state laws in concealing from the public that burning fossil fuels contributes to climate change. One such case is Bonta v. Exxon Mobil Corp.,[34] in which the California Attorney General sued major fossil fuel companies and the American Petroleum Institute, alleging decades of deception regarding fossil fuels and climate change. The Supreme Court previously declined to hear industry appeals in these state cases after the lower courts decided that state court was the appropriate forum.

One to Watch: In State of Iowa v. SEC,[35] several states and companies sued the SEC over its new climate-impact disclosure rules, which require large public companies to report their GHG emissions, climate-related business risks, and financial impacts from extreme weather. The states argue the SEC lacks congressional authority to implement these rules, while other petitioners like the Sierra Club contend the rules are insufficient to protect shareholders from climate-related risks to their investments. These cases have been consolidated in the Eighth Circuit, and the SEC has stayed the rule pending a final decision.

Toxics

In Inhance Technologies v. EPA,[36] the Fifth Circuit found that the EPA had exceeded its statutory authority under the Toxic Substances Control Act (TSCA) when it prohibited Inhance Technologies from manufacturing or processing per-and polyfluoroalkyl substances ("PFAS") during its fluorination process. Inhance, a plastics company, fluorinates plastic containers using a process that produces three PFAS. The company argued that its production of PFAS was not a "significant new use" under Section 5 of TSCA, as it had been using the same fluorination process since 1983. The EPA contended that "new use" should mean uses that were "not previously known to the EPA," arguing that because Inhance did not identify its fluorination process as an "ongoing use" during the rulemaking process, it qualified as a "new use." The court held that the EPA's interpretation distorted the meaning of Section 5 and would grant the agency an overly broad scope of regulation. It further stated that if the EPA wished to regulate Inhance, it should use TSCA's Section 6, which applies to ongoing uses and involves a more extensive procedure.

In Joseph Lurenz v. The Coca-Cola Co.,[37] a federal district court in New York dismissed without prejudice a suit claiming Coca-Cola had falsely marketed some of its products as made with all-natural ingredients when they allegedly contained PFAS. Lurenz, a consumer, filed the suit after commissioning independent testing of Coca-Cola's Simply Tropical fruit juice, claiming the results revealed "material levels of multiple PFAS." He argued that he had paid more for the juice than he would have had he known it contained PFAS. The court dismissed the suit without prejudice, holding that Lurenz lacked standing as he only had tested one sample of juice and had

[34] No. 24-005310, in the Superior Court of the State of California, San Francisco County.

[35] No. 24-1522, in the U.S. Court of Appeals for the Eighth Circuit.

[36] 96 F.4th 888 (5th Cir. 2024).

[37] 2024 U.S. Dist. LEXIS 103894 (S.D.N.Y. 2024).

not properly linked the sample to his own purchases. Lurenz filed an amended complaint on July 10.

One to Watch: In American Water Works Association v. EPA,[38] drinking water utilities and industry groups are challenging the EPA's National Primary Drinking Water Regulation ("NPDWR") that imposes maximum contaminant levels for six PFAS under the Safe Drinking Water Act ("SDWA"). The petitioners allege that the rule is "arbitrary and capricious or otherwise contrary to law, in excess of statutory authority, unreasonable, not feasible, and not supported by the best available health effects and occurrence data and science." Specifically, they claim the EPA underestimated the rule's costs, failed to rely on the best science, and used novel approaches outside the conventional rulemaking process. These cases have been consolidated before the U.S. Court of Appeals for the District of Columbia Circuit.

One to Watch: In the first PFAS cleanup suit against a commercial airport, Michigan EGLE v. GFIAA,[39] the Michigan Attorney General filed suit against the Gerald R. Ford International Airport Authority in state court for knowingly releasing PFAS-containing firefighting material, aqueous film-forming foam ("AFFF"), leading to contamination of the area water supply. The Michigan Department of Environment, Great Lakes, and Energy ("EGLE") had previously sent numerous communications and warnings to the Airport Authority, urging compliance with the Michigan Natural Resources and Environmental Protection Act. The Attorney General filed the suit in state court after the Airport Authority failed to comply, seeking damages for loss and destruction of natural resources, past and future remediation costs, and injunctive and declaratory relief. A federal district court in Michigan remanded the case back to state court after the Airport Authority removed it to federal court. The Airport Authority has since appealed to the Sixth Circuit, arguing it was "acting under" the Federal Aviation Administration ("FAA") as a contractor, thus making federal court the appropriate venue. The Airport Authority has also filed third-party claims against 19 manufacturers of AFFF, with one manufacturer seeking to remove the entire action to federal court, arguing immunity from tort liability due to compliance with U.S. military specifications. EGLE has filed a request to sever its claims from the Airport Authority's third-party claims in an effort to keep the suit in state court.

One to Watch: A federal multidistrict litigation ("MDL") involving over 9,000 cases alleging various causes of action relating to PFAS from AFFF is being overseen by the U.S. District Court for the District of South Carolina.[40] The plaintiffs generally allege contaminated groundwater near various military bases, airports, and other industrial sites where AFFFs were used. Claims fall into five categories: testing and remediation for public water, harm from PFAS exposure, medical monitoring, contamination remediation and cleanup costs, and harm to natural resources. Some claims have been remanded to state court when states specifically disclaimed seeking damages

[38] No. 24-1188, in the U.S. Court of Appeals for the D.C. Circuit.

[39] No. 24-00520, in the U.S. District Court for the Western District of Michigan.

[40] In re: Aqueous Film Forming Foams (AFFF) Products Liability Litigation, MDL No. 18-02873, in the District Court for the District of South Carolina.

from AFFF pollution. Four states[41] involved in the MDL have successfully petitioned for their non-AFFF PFAS claims to be remanded to state courts, with Michigan and Illinois currently seeking remands. 3M has appealed the remands of Maryland's and South Carolina's cases to the Fourth Circuit.[42]

One to Watch: In Chamber of Com. v. EPA,[43] the U.S. Chamber of Commerce filed a petition in the D.C. Circuit to challenge a new EPA rule categorizing two substances, perfluorooctanoic acid ("PFOA") and perfluorooctanesulfonic acid ("PFOS"), as hazardous under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). The rule enables both agencies and states to require companies to bear the cost of cleaning up contaminated properties and pursue litigation against the manufacturers of these chemicals.

One to Watch: In James Farmer v. EPA,[44] a group of Texas farmers has sued the EPA in the District Court for the District of Columbia, alleging that the agency has failed to regulate PFAS in fertilizer. The suit, brought under the citizen enforcement provision of the Clean Water Act, accuses the EPA of failing to identify numerous PFAS present in sewage sludge used as fertilizer. Although sewage must be treated before it becomes fertilizer, the suit alleges that PFAS are not removed, and the EPA does not regulate the amount of PFAS that fertilizer can safely contain.

Waste

In MRP Properties Company, LLC v. U.S.,[45] the Court of Appeals for the Sixth Circuit held that the federal government's regulation of the petroleum industry during World War II did not mean it "operated" certain petroleum-refining facilities for purposes of establishing its liability under CERCLA. The plaintiffs, a group of Valero affiliates operating twelve refineries used to produce fuel for the U.S.'s war efforts, are now facing liability under CERCLA after hazardous waste from these refineries leaked into surrounding environments. Valero argued that the federal government should bear some liability, claiming that it effectively "operated" the refineries through extensive industry oversight during the war. A federal district court in Michigan agreed, but the Sixth Circuit reversed, finding that an "operator" under CERCLA is the entity that makes "day-to-day" decisions and "exercises control over the waste disposal process." The appeals court held that while the government "influenced refineries' business decisions during the war," it did not "operate" the facilities because the refineries themselves made broader decisions about waste

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[41] New Hampshire v. 3M Co., No. 22-145, in the U.S. District Court for the District of New Hampshire; Maryland v. 3M Co., No. 23-1836, in the U.S. District Court for the District of Maryland; Maine v. 3M Co., No. 23-cv-00210, in the U.S. District Court for the District of Maine; South Carolina v. 3M Co., No. 23-05979, in U.S. District Court of South Carolina.

[42] State of Maryland v. 3M Company, No. 24-1218, in the U.S. Court of Appeals for the Fourth Circuit.

[43] No. 24-1193, in the U.S. Court of Appeals for the D.C. Circuit.

[44] No. 24-01654, in the U.S. District Court for the D.C. Circuit.

[45] No. 22-1789, 2023 WL 5498748 (6th Cir. 2023, pet. denied).

disposal, such as how to process the petroleum and how to handle waste. The United States Supreme Court denied Valero's petition for writ of certiorari in June 2024.

In 68th Street Site Work Group v. Alban Tractor Co. Inc.,[46] a three-judge panel of the Fourth Circuit held that companies arranging for the disposal of hazardous waste are liable for cleanup costs under CERCLA, even if they did not know the waste was hazardous at the time of the arrangements. The panel found that to claim arranger liability, a plaintiff need only allege that a defendant intended to dispose of waste and that the waste was hazardous; it need not allege that the defendant knew the waste was hazardous. In dismissing the arranger's "policy concerns" about the harshness of this standard, the panel highlighted that Congress had developed CERCLA as a strict-liability regime. The panel also pointed to other CERCLA provisions explicitly imposing a knowledge requirement and declined to imply such a requirement where Congress was silent. The defendants are seeking rehearing en banc.

In Pakootas v. Teck Cominco Metals Ltd.,[47] the District Court for the Eastern District of Washington held that the cultural resource damages sought by the Confederated Tribes of the Colville Reservation are not recoverable under CERCLA. The Tribe claimed it suffered an altered relationship with the Columbia River due to permitted discharges of slag and effluents into the river in British Columbia. The Tribe considered this a specific cultural resource damage, termed a "tribal service loss." Noting "[t]here is no express or implied reference to cultural resources in the language of CERCLA" and that "there is no reference to 'cultural' or 'tribal service' damages" in CERCLA or the Department of Interior's natural resource damages assessment regulations, and that "[n]either the statute nor the regulations reference a cultural or tribal 'connection' or 'relationship' with a particular resource, let alone possible recovery from loss or damage to that connection or relationship," the court held that "cultural resource damages are simply not recoverable under CERCLA." The court certified the question for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

Endangered Species Act ("ESA")

In Alaska v. Nat'l Marine Fisheries Serv,[48] the United States District Court for the District of Alaska upheld the National Marine Fisheries Service ("NMFS") decision not to delist the Arctic ringed seal as an endangered species. The seal had been listed since 2012 following an NMFS study that found the seal was vulnerable to future loss of its sea ice and snow habitat due to climate change. In 2019, the State of Alaska petitioned NMFS to delist the seal, arguing that the effects of climate change on the ringed seal were speculative, that there is high variability in projected climate conditions, and that post-listing data showed no corresponding reductions in seal populations due to changes in sea ice. Alaska also contended NMFS should follow the United States Fish & Wildlife Service's ("FWS") decision not to list the Pacific walrus due to similar climate change concerns. The court found no reason to vacate NMFS's finding and delist the Arctic

[46] No. 23-1155, 2024 WL 3152077 (4th Cir. June 25, 2024).

[47] No. 04-00256, 2024 WL 1559540 (E.D. Wa. Apr. 10, 2024).

[48] No. 22-00249, 2024 U.S. Dist. LEXIS 49702 (D. Alaska Mar. 20, 2024).

ringed seal. It noted that NMFS had evaluated FWS's walrus decision but found that, unlike Artic ringed seals, Pacific walruses do not require access to sufficient snow cover on top of stable ice and have the behavioral flexibility to persist despite drastic reductions in ice and snow cover. Additionally, the court observed that current trends indicate continued high greenhouse gas emissions and that the State had not presented any evidence to suggest a dramatic worldwide reduction in emissions. Finally, the court dismissed the State's argument based on data showing no decline in seal populations, explaining that NMFS's decision was premised on habitat modification projected decades in the future.

In Migrant Clinicians Network v. U.S. EPA,[49] the Ninth Circuit held that the EPA's amended registration for the use of the pesticide streptomycin sulfate to combat citrus diseases violated the ESA. The court found that the EPA had entirely failed to evaluate the risk that the human antibiotic drug could pose to endangered species. Consequently, the court vacated the EPA's amended registration and remanded it to the agency for it to conduct an ESA effects determination. In denying the EPA's request for a remand without vacatur, the court cited "the seriousness of [EPA's] wholesale failure to comply with the ESA."

In Ctr. for Biological Diversity v. Little,[50] the United States District Court for the District of Idaho held that Idaho Senate Bill 1211, which authorized a year-round wolf trapping and snaring season on private property, including within grizzly bear habitat, violated the ESA. Senate Bill 1211 differed from state laws authorizing trapping on public lands only during times grizzly bears are likely to be hibernating in dens and thus less likely to be trapped. Several environmental and conservation groups challenged the law, highlighting that grizzly bears are considered threatened under the ESA and that Idaho encompasses four of the six ecosystems designated by FWS as grizzly bear recovery zones. Since the ESA makes it a violation to "take" any endangered species, even if trapped unintentionally, the plaintiffs argued that Bill 1211 created "a reasonably certain risk" that a grizzly bear taking would occur during the expanded wolf trapping season on private property. The plaintiffs sought an injunction prohibiting the State from authorizing wolf trapping in the relevant grizzly bear habitats until it could obtain an incidental takings permit from FWS. The court granted a limited injunction enjoining Idaho from authorizing wolf trapping and snaring in grizzly bear habitat on both public and private lands except when "it is reasonably certain that almost all grizzly bears will be in dens."

In Center for Biological Diversity et al. v. U.S. Forest Service,[51] the Ninth Circuit agreed to hear an appeal of a Montana District Court opinion that held the U.S. Forest Service had violated the ESA, NEPA, and the National Forest Management Act in approving a commercial timber harvest project in the Kootenai National Forest. The district court barred the Forest Service from continuing the project until it resolved the violations. Regarding the ESA, the court found that the agency had acted arbitrarily in relying on a biological opinion from FWS, which the court found did not present the best available science in providing an estimate of grizzly bear population size,

[49] No. 21-70719, 88 F.4th 830 (9th Cir. Dec. 13, 2023).

[50] No. 21 -00479, 2024 U.S. Dist. LEXIS 49611 (D. Idaho Mar. 19, 2024).

[51] No. 22-114, in the U.S. District Court for the District of Montana Missoula Division.

and, as such, could not be relied on to determine the project's effect on grizzlies. In its appeal, the United States argued that the Forest Service followed the ESA's "best-available-science" requirement in its reliance on the biological opinion and that such reliance was not arbitrary.

National Environmental Policy Act ("NEPA")

In Citizens for Clean Air v. U.S. Department of Transportation,[52] the Fifth Circuit upheld the Department of Transportation's ("DOT") approval of a license for the construction and operation of the Sea Port Oil Terminal ("SPOT"), a deepwater oil facility off the coast of Texas. Various environmental groups claimed that the DOT had violated NEPA by not taking the requisite "hard look" at the facility's projected environmental impact in its Final Environmental Impact Statement ("FEIS'), arguing that the DOT had grossly underestimated the project's consequences. The plaintiffs argued the FEIS failed to adequately assess the potential for oil spills and the impacts on native species and the area's habitat. They highlighted that the facility could negatively affect the Rice whale, an endangered species with a population of less than 50, by creating environmental stressors like noise, vessel traffic, and potential oil spills. The groups pointed to recent studies showing the whale's range includes Texas coastal waters and argued DOT was required to supplement its FEIS with this new information. They also contended that NEPA required DOT to analyze a range of reasonable alternatives to the project, such as operating a facility with decreased capacity for storing and exporting oil. The Fifth Circuit found that DOT's FEIS was adequate, as it had sufficiently analyzed the facility's environmental impact and addressed the environmental groups' concerns. The court held that while government agencies are required to supplement the FEIS when "significant new circumstances or information" becomes available, the studies on the Rice whale's range were not deemed significant. The court further held that although a FEIS must include an analysis on reasonable alternatives, "NEPA only requires the consideration of alternatives relevant to the applicant's goals." Because operating a decreased capacity facility was not aligned with the facility's goal of moving two million barrels of oil per day, NEPA did not require the agency to analyze this alternative.

In Eagle County v. Surface Transportation Board,[53] various environmental organizations and a Colorado county challenged an order of the Surface Transportation Board authorizing the construction and operation of an 88-mile rail line in Utah for transporting crude oil produced in the Uinta Basin in Utah along the Colorado River to refineries in the Gulf of Mexico. The opponents claimed that the Board's environmental analysis under NEPA was flawed because it did not consider the downstream environmental impacts of the extraction, refinement, and transportation of oil facilitated by the railway's construction and operation. The D.C. Circuit agreed, finding the Board's approval arbitrary and capricious due to numerous NEPA violations, including its failure to consider the "upstream" impacts of increased drilling and the "downstream" impacts on Gulf Coast communities from refining the transported oil. The court vacated parts of the Board's EIS and biological opinion, as well as its order exempting the project from more

[52] 98 F.4th 178 (5th Cir. 2024).

[53] 82 F.4th 1152 (D.C. Cir. 2023), cert granted sub nom. Seven Cnty. Coal. v. Eagle Cnty., No. 23-975, 2024 WL 3089539 (U.S. June 24, 2024).

extensive application requirements. The Supreme Court granted a petition to review one aspect of the D.C. Circuit's ruling: whether NEPA requires a federal agency to consider all environmental effects of a project or only those within the agency's jurisdiction. This will be the first time the Supreme Court has addressed NEPA in 20 years.

In Food & Water Watch v. FERC,[54] the U.S. Court of Appeals for the District of Columbia found that the Federal Energy Regulatory Commission ("FERC") had fulfilled its legal obligations under NEPA in its analysis of the impact of GHG emissions from the Tennessee Gas Pipeline Co.'s East 300 Upgrade Project. In 2022, FERC had approved the project, which has a goal of increasing the gas flow to Consolidate Edison, the utility provider for around 10 million people in the New York City area. An environmental group argued that FERC's review of the project was inadequate, particularly regarding the continued necessity of the project after the passage of New York's Climate Leadership and Community Protection Act, which mandates aggressive GHG reductions. The court held that NEPA does not require FERC to determine whether GHG and climate impacts are significant, but "require[s] only a discussion of the significance of environmental impacts." Regarding the recent GHG reduction law, the court found that "New York State law still requires Con Edison to provide natural-gas service to all who seek it," and the new law did not prohibit the provision of gas to meet demand.

In Dish Network v. FCC and International Dark-Sky Association Inc. v. FCC,[55] a three-judge panel of the D.C. Circuit affirmed a Federal Communications Commission ("FCC") license authorizing SpaceX to deploy up to 7,500 of its Starlink satellites. The authorization had been challenged by DarkSky, a nonprofit organization opposed to light pollution which contended the FCC should have conducted an environmental review pursuant to NEPA. While the panel found DarkSky had standing to pursue the challenge, it dismissed the organization's environmental concerns, finding the FCC reasonably relied on two European Space Agency studies in concluding that the launch and reentry of the satellites would not bring about a "significant environmental impact." Absent that significant impact, an environmental assessment was not required because the FCC has determined that commission actions with no significant effect on the environment "are categorically excluded from environmental processing," according to the panel, a determination which was "reasonable, reasonably explained, and consistent with the commission's legal obligations."

Greenwashing Litigation

In Berrin v. Delta Air Lines,[56] a California district court found that an air passenger's claims that Delta Air Lines had violated various California laws were not preempted by the Airline Deregulation Act ("ADA"). Berrin, a California resident who had purchased tickets from Delta, filed a class action lawsuit in the District Court for the Central District of California, alleging that Delta had "grossly misrepresent[ed] the total environmental impact of its business operation," and

[54] Nos. 22-1214, 22-1315, 2024 U.S. App. LEXIS 14466 (D.C. Cir. 2024).

[55] Nos. 23-1001 and 22-1337, in the U.S. Court of Appeals for the District of Columbia Circuit.

[56] No. 23-04150, 2024 U.S. Dist. LEXIS 58323 (C.D. Cal. 2024).

asserting claims under Unfair Competition Law, False Advertising Law, and California's Consumers Legal Remedies Act. She argued that Delta had marketed itself as a "carbon-neutral" airline based on its participation in a voluntary carbon offsets market. The offsets were allegedly based on "fraudulent projections of carbon reduction." She claimed that she would have either paid less or not purchased tickets from Delta at all had she known the representations were false. Delta filed a motion to dismiss the suit, arguing Berrin's claims were preempted by the ADA. The court held that the ADA did not preempt her claims but dismissed her claims for lack of standing with leave to amend, as she had not alleged any future intent to purchase tickets from Delta. In April, Berrin filed an amended complaint, alleging her future intent to purchase tickets and seeking an order temporarily and permanently enjoining Delta from continuing the unlawful, fraudulent, and unfair practices she alleged in her complaint.

In Ellis v. Nike USA, Inc.,[57] a federal district court in Missouri dismissed a consumer's lawsuit against Nike alleging that the company had made false statements regarding the sustainability and manufacturing process of its products. Nike had produced a Sustainability Collection and marketed it with the phrase "journey toward zero carbon and zero waste." The consumer alleged that she had purchased pieces from the collection at a premium because of these statements. The court dismissed the suit, finding that the consumer had failed to show that the products were not made using any recycled fibers and that her allegations were impermissibly vague, as she had not specified which representations had induced her to purchase the products, as required by Missouri's Merchandising Practices Act.

In Dorris v. Danone Waters of Am.,[58] a federal district court in New York found that the term "carbon neutral" could be easily interpreted by the average consumer to mean "zero carbon emissions," and allowed a proposed class action against Danone, the manufacturer and seller of Evian Spring Water to proceed. Consumers argued that they had purchased Evian bottled water at a higher price than other bottled water options because the "carbon neutral" labeling had led them to believe Evian did not produce any carbon dioxide. Evian responded, saying this interpretation of "carbon neutral" was "manifestly unreasonable" and that no reasonable consumer of their water would believe the product was produced without any carbon dioxide emissions. The court held that because "carbon neutral" does not possess a common, everyday meaning, consumers could easily misunderstand the term in the absence of an explicit definition. The court also held the consumers' fraud claim that Evian had engaged in greenwashing by using "carbon neutral" in their marketing was sufficiently alleged to establish a "strong inference" of fraudulent intent.

Ones to Watch: In People of the State of New York v. PepsiCo Inc. et al.,[59] the New York attorney general brought a lawsuit against PepsiCo, accusing the company of endangering the environment, failing to warn the public about the risks of single-use plastic, and misrepresenting its aims to make all its packaging "recyclable, compostable, biodegradable, or reusable" by 2025. The lawsuit

[57] No. 23-00632, 2024 WL 1344805 (E.D. Mo. Mar. 28, 2024) reconsideration denied, No. 23-00632, 2024 WL 2891459 (E.D. Mo. June 10, 2024).

[58] No. 22 CIV. 8717 (NSR), 2024 WL 112843 (S.D.N.Y. Jan. 10, 2024).

[59] No. 814682, in the Supreme Court of the State of New York County of Erie.

focuses on single-use plastic pollution in the Buffalo River, where plastics manufactured by Pepsi allegedly make up the largest percentage of plastic pollution. The State characterizes this as a public nuisance harming the environment and the people of Buffalo. The complaint also alleges that while Pepsi advertised its goals of making its packaging more environmentally friendly, it has increased its use of virgin plastic over the last four years. The City of Baltimore recently announced that it has sued PepsiCo, Coca-Cola, and Frito-Lay, and others under various state and local laws for alleged deceptive marketing practices, false claims, and failures to warn consumers about risks associated with their products.[60]

Ones to Watch: In July, a proposed greenwashing class action was filed against athleisure company Lululemon. The suit, Gyani v. Lululemon USA Inc.,[61] alleges Lululemon misled consumers into believing its products and business practices were eco-friendly by its "Be Planet" marketing campaign when in reality the company's GHG emissions "have more than doubled since the start of the campaign in 2020."

Other Administrative

In Excelsior Aggregates LLC v. Commissioner of Internal Revenue,[62] the U.S. tax court upheld the IRS' rejection of more than $30 million in charitable contribution deductions taken by three partnerships for nearly 700 acres of conservation easements in Alabama. This was a test case for a larger group of partnerships that took over $187 million in deductions. The court found that certain estimated property values forming the basis of the deductions were inflated based on inflated estimates of the land's potential for commercial sand and gravel mining.

In Public Utility Commission of Texas v. RWE Renewables Americas LLC and TX Hereford Wind LLC and Public Utility Commission of Texas v. Luminant Energy Co. LLC,[63] the Texas Supreme Court held that the Public Utility Commission of Texas acted within its authority when it set a $9,000 per megawatt-hour cap on electricity for several days during 2021 winter storm Uri—nearly a 30,000% increase over normal prices. The Court found that the lower appellate court "strayed from its lane" when it struck down the Commission's pricing order.

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[60] The case was filed in the Circuit Court for Baltimore City. A case number was not available at the time this paper was submitted.

[61] No. 24-22651, in the U.S. District Court for the Southern District of Florida.

[62] Nos. 20608-18, 7079-19 and 7703-19, in the U.S. Tax Court.

[63] Nos. 23-0555 and 23-0231, in the Supreme Court of Texas.