

REPORT OF THE ENVIRONMENTAL REGULATION COMMITTEE

This report summarizes key developments in federal and state environmental regulations affecting the natural gas and electric industry from July 1, 2017, through June 30, 2018.*

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I. CLEAN AIR ACT

A. *Methane Emission Regulations*

On April 5, 2018, fourteen states, the District of Columbia, and the city of Chicago filed suit against the Environmental Protection Agency (EPA) for failing to issue regulations to curb methane emissions.¹ As noted in last year's Committee Report, the Trump administration issued Executive Order No. 13,783, *Promoting Energy Independence and Economic Growth*, on March 28, 2017.² Section 7 of the order directs EPA to review the rule called "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources," and to suspend, revise, or rescind the rule pursuant to the order.³ In reviewing the rule, EPA stopped collecting data that would support the establishment of emission limitations for existing oil and gas facilities.⁴ The plaintiffs filed suit claiming an unreasonable delay in developing methane-control measures for existing wells, pipelines, storage tanks, pumping stations, and other facilities.⁵

B. *Clean Power Plan (CPP)*

On June 26, 2018, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) held that the legal challenges to the Clean Power Plan (CPP) were to remain in abeyance for sixty days.⁶ However, three judges indicated a strong preference to not approve future extensions.⁷ Judge Robert Wilkins, joined by Judge Patricia Millett, stated that if the EPA or petitioners wish to further delay operation of the CPP, "then they should avail themselves of whatever authority Congress gave them to do so, rather than availing themselves of the Court's authority under the guise of preserving jurisdiction over moribund petitions."⁸ Judge David Tatel stated that the parties were required to advise the Supreme Court of the "circumstances as they stand today" so that the Court may "decide for itself whether the temporary stay it granted pending *judicial* assessment of the [CPP] ought to continue now that it is being used to maintain the status quo pending *agency* action."⁹ Further information regarding the CPP can be found in last year's Committee Report.¹⁰

1. The fourteen states are: California, Connecticut, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington. *State of New York et al. v. Pruitt et al.*, No. 1:18-CV-00773 (D.C. Cir., 2017); *see also* *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017).

2. Executive Order, *Promoting Energy Independence and Economic Growth*, 82 Fed. Reg. 16,093 (Mar. 28, 2017); Report of the Environmental Regulation Committee, 38 ENERGY L. J. 2, at 6-7 (2017) [hereinafter 2017 Committee Report].

3. 82 Fed. Reg. 16,093 at 16,096.

4. Press Release, *EPA Withdraws Information Request for the Oil and Gas Industry*, EPA (Mar. 2, 2017).

5. *Clean Air Council*, 862 F.3d at 10-11, 13.

6. *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. 2018).

7. *Id.* at 1-2.

8. *Id.* at 3.

9. *Id.* at 2.

10. 2017 Committee Report, *supra* note 2, at 15.

C. Hydrofluorocarbons (HFCs)

On June 26, 2018, the Natural Resources Defense Council (NRDC), eleven states, and the District of Columbia filed suit in the D.C. Circuit challenging EPA's decision to halt enforcement of the 2015 final rule prohibiting or restricting certain uses of HFCs under the Clean Air Act's (CAA) significant new alternatives policy.¹¹ EPA stated that it would not apply the 2015 rule listings of HFCs as "unacceptable" or as "acceptable subject to narrowed use limits" until the agency finished a rulemaking, thereby addressing the D.C. Circuit's opinion in *Mexichem Fluor v. EPA*, which vacated the portion of the final rule that requires manufacturers to replace HFCs with low-global warming potential substitutes.¹²

D. Ozone and the "Good Neighbor" Provision

On June 29, 2018, EPA stated that it would not write a new regulation to comply with the CAA's "good neighbor provision"—a legal requirement to address air pollution from across state lines.¹³ In 2016, EPA promulgated federal implementation plans to address obligations of twenty-two states under the good neighbor provision and the 2008 ozone National Ambient Air Quality Standards (NAAQS).¹⁴ EPA stated that it was initially unable to determine whether those plans fully addressed CAA and NAAQS requirements.¹⁵ After further review, EPA determined that its 2016 update would meet all applicable legal requirements once implemented.¹⁶ In the same notice, EPA stated it would make "minor" changes to the 2016 update to reflect that the update fully addressed CAA and NAAQS requirements.¹⁷

E. Reclassification of Major Sources as Area Sources under Section 112

On March 26, 2018, environmental organizations sued EPA to challenge the agency's decision to allow certain major industrial plants to turn off particular pollution controls.¹⁸ On January 15, 2018, EPA repealed the "once in, always in" policy, which required that once a power plant or factory was considered a "major"

11. The eleven states are: California, Delaware, Illinois, Massachusetts, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Vermont, and Washington. *NRDC v. Pruitt*, No. 18-1172 (D.C. Cir., filed June 26, 2018); *Id.*

12. *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 456 (D.C. Cir. 2017); Proposed Rule, *Protection of Stratospheric Ozone: Notification of Guidance and a Stakeholder Meeting Concerning the Significant New Alternatives Policy (SNAP) Program*, 83 Fed. Reg. 18,431 (Apr. 27, 2018).

13. 42 U.S.C. § 7410(a)(2)(D)(i)(I) (2018); Proposed Rule, *Determination Regarding Good Neighbor Obligations for 2008 Ozone National Ambient Air Quality Standard*, 83 Fed. Reg. 31,915 (July 10, 2018). While EPA gave public notice of the decision not to write a new regulation on June 29, 2018, the notice was not published in the Federal Register until July 10, 2018.

14. 83 Fed. Reg. 31,915 at 31,916-17.

15. *Id.*

16. *Id.* at 31,916.

17. *Id.*

18. *California Communities Against Toxics v. EPA*, No. 18-1085 (D.C. Cir. filed Mar. 26, 2018).

source of hazardous air pollutants, it remained regulated as such, even if the facility took measures to reduce emissions.¹⁹ The EPA memorandum was released without notice or a public comment period.²⁰

F. Regional Haze

On March 20, 2018, the D.C. Circuit upheld EPA's decision to incorporate its Cross-State Air Pollution Rule (CSAPR) into regional haze regulations.²¹ EPA amended the 2005 regional haze rule in 2012 to state that CSAPR requirements are stringent enough so that states do not have to comply with the Best Available Retrofit Technology (BART)—a separate emissions standard.²² The D.C. Circuit held that challenges by environmental groups were either moot or barred by the CAA's 60-day limit on challenges to the permissibility of regulations, and that challenges by states and industry groups were foreclosed as there was no obvious remedy.²³ Additional information on the regional haze rule, CSAPR, and BART can be found in last year's Committee Report.²⁴

G. Mercury and Air Toxics Standards (MATS)

The Trump administration is still considering 2011 standards that limit mercury and other air toxics from power plants.²⁵ After the Supreme Court's 2015 ruling in *Michigan v. EPA*, which required EPA to consider costs before formulating and applying Mercury and Air Toxics Standards (MATS) to power plants, the D.C. Circuit remanded MATS while leaving the compliance obligations in place.²⁶ On remand, EPA again determined that the cost of compliance with MATS was reasonable.²⁷ Multiple states and industry groups challenged the finding on several grounds, including reliance upon "co-benefits," an issue not reached by the Supreme Court.²⁸ On EPA's motion, the D.C. Circuit Court stayed litigation of the MATS.²⁹ EPA requested the stay because "EPA officials appointed by

19. See generally Memorandum from William L. Wehrum (EPA) on Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act to Regional Air Division Directors (Jan. 25, 2018).

20. *Id.* at 4.

21. *Utility Air Reg. Grp. v. EPA*, No. 12-1342 (D.C. Cir. Mar. 20, 2018).

22. Final Rule, *Regional Haze: Revisions to Provisions Governing Alternatives to Source-Specific Best Available Retrofit Technology (BART) Determinations, Limited SIP Disapprovals, and Federal Implementation Plans*, 77 Fed. Reg. 33,642 (June 7, 2012) (to be codified at 40 C.F.R. pts. 51-52); see generally 40 C.F.R. §§ 51.300-309 (2016); see also 40 C.F.R. pt. 51, app. Y.

23. *Utility Air Reg. Grp. v. EPA*, No. 12-1342 (D.C. Cir. Mar. 20, 2018).

24. 2017 Committee Report, *supra* note 2, at 22-23.

25. Amanda Reilly, *EPA 'Still Thinking About' Obama Mercury Standards – Wehrum*, E&E DAILY (Apr. 19, 2018), <https://www.eenews.net/stories/1060079569>.

26. *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

27. Proposed Rule, *Supplemental Finding That It Is Appropriate and Necessary to Regulate Hazardous Air Pollutants From Coal and Oil-Fired Electric Utility Steam Generating Units*, 81 Fed. Reg. 24,419 (Apr. 25, 2016) (to be codified at 40 C.F.R. pt. 63).

28. *Texas v. EPA*, 829 F.3d 405, 427-32 (5th Cir. 2016).

29. *Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir. 2017); *ARIPPA v. EPA*, No. 15-1180 (D.C. Cir. 2017).

the new Administration are closely reviewing the Supplemental Finding to determine whether the Agency should reconsider the rule or some part of it.”³⁰ As noted, the stay remains in place while the Trump administration considers the rule.³¹

H. EPA Risk Management Program

On May 17, 2018, EPA released the Risk Management Program (RMP) Reconsideration proposed rule.³² The RMP rule aims to prevent chemical accident prevention facilities that use certain hazardous substances, requiring facilities that use extremely hazardous substances to develop a plan that identifies the potential effects of a chemical accident and the steps the facility is taking to prevent an accident, and spells out emergency response procedures should an accident occur.³³ EPA is proposing to rescind amendments related to safer technology and alternatives analysis, third-party audits, incident investigations, information availability, and other minor regulatory changes.³⁴

I. Hazardous Air Pollutants (HAPS)

On March 16, 2018, the D.C. Circuit held that an EPA decision governing the emission of pollutants from industrial boilers was not supported by a proper analysis.³⁵ To decrease the danger from air toxics released by industrial boilers, EPA issued rules under the CAA in 2013 to govern emissions from these sources, prompting a number of legal challenges.³⁶ The legal challenges resulted in a 2015 revised rule; that rule also was challenged.³⁷ In March 2018’s *Sierra Club v. EPA*, the D.C. Circuit held that EPA’s conclusion that a 130 ppm carbon monoxide (CO) level was sufficient to eliminate organic hazardous air pollutants (HAPS) was not properly supported by data and analysis by the agency, among other administrative holdings.³⁸ The court remanded to EPA, highlighting for review the CO limits established by the agency.³⁹

30. Respondent’s Motion to Continue Oral Argument at 5, *Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir. 2017).

31. *Id.* at 17.

32. Proposed Rule, *Accidental Prevention Requirements: Risk Management Programs Under the Clean Air Act*, 83 Fed. Reg. 24,850 (May 30, 2018) (to be codified at 40 C.F.R. pt. 63).

33. EPA, RISK MANAGEMENT PLAN (RMP) RULE OVERVIEW, <https://www.epa.gov/rmp/risk-management-plan-rmp-rule-overview> (last visited Aug. 2, 2018).

34. *Id.*

35. *Sierra Club v. EPA*, 884 F.3d 1185 (D.C. Cir. 2018).

36. Final Rule, *National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters*, 78 Fed. Reg. 7,138, 7,144 (Jan. 31, 2013); *United States Sugar Corp. v. EPA*, 830 F.3d 579 (D.C. Cir. 2016).

37. Final Rule, *National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters*, 80 Fed. Reg. 72,790 (Nov. 20, 2015).

38. *Sierra Club*, 884 F.3d at 1205.

39. *Id.* at 1198, 1205.

J. Title V Permitting

On July 20, 2017, the New York Supreme Court, Appellate Division, affirmed the lower court's dismissal of a petition for review of a decision by the New York State Department of Environmental Conservation (NYSDEC) to grant a State Pollutant Discharge Elimination System permit and Title V permit to a natural gas electric generating station.⁴⁰ The appeals court rejected the argument that the NYSDEC was required to hold a public adjudicatory hearing prior to issuing the permits, specifically finding that the petitioner failed to show that its issues were "substantive and significant" enough to warrant a public hearing.⁴¹

K. Significant Climate Change Litigation

1. Oakland and San Francisco's Climate Change Nuisance Lawsuits

On June 25, 2018, the U.S. District Court for the Northern District of California dismissed two public nuisance lawsuits, brought by the cities of Oakland and San Francisco, which asked to hold five fossil fuel companies liable for climate change harms.⁴² The court had ruled previously that any nuisance claim would arise under federal, rather than state, common law.⁴³ In *City of Oakland v. BP p.l.c.*, the court rejected the cities' attempt to separate their federal nuisance claims from claims based on greenhouse gas (GHG) emissions, which both the Supreme Court and the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) had found to be unrecoverable under the CAA.⁴⁴

2. Ongoing Climate Change Investigations by State AGs

On March 29, 2018, a New York federal district court judge dismissed a lawsuit brought by ExxonMobil, which alleged that the attorneys general of New York and Massachusetts conspired to violate the company's free speech rights on climate change issues by conducting investigations of the company.⁴⁵ Beginning in 2016, the attorneys general began an investigation into ExxonMobil, including issuing subpoenas requiring that the company turn over documents regarding climate change and risks.⁴⁶ The investigation of ExxonMobil by the attorneys general remains ongoing.

40. *Riverkeeper, Inc. v. N.Y. State Dep't of Env'tl. Conservation*, 59 N.Y.S.3d 806 (N.Y. App. Div. 2017).

41. *Id.* at 808.

42. *City of Oakland v. BP p.l.c.*, No. 3:17-CV-06011 (N.D. Cal. June 25, 2018).

43. *Id.*

44. *Id.*; *American Elec. Power Co. v. Connecticut (AEP)*, 564 U.S. 410 (2011); *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012).

45. *ExxonMobil Corp. v. Healey*, No. 1:17-CV-02301 (S.D.N.Y. Mar. 29, 2018).

46. Keith Goldberg, *Exxon's Attack on AG Climate Probes Thrown Out*, LAW360 (Mar. 29, 2018), <https://www.law360.com/articles/1028052/exxon-s-attack-on-ag-climate-probes-thrown-out>.

II. CLEAN WATER

A. *Effluent Limitations Guidelines (ELG)*

There are several updates regarding EPA's decision to delay compliance deadlines for ELG standards. As background, on November 3, 2015, EPA finalized a rule that established new limits on the levels of toxic material in wastewater discharges from power plants (ELG Rule).⁴⁷ The ELG Rule also created requirements for wastewater streams based on Best Available Technology Economically Achievable (BAT) for flue gas desulfurization, fly ash, bottom ash, flue gas mercury control, and fuel gasification.⁴⁸

On July 31, 2017, EPA held a public hearing on its proposal to postpone compliance dates for the ELG Rule; it issued a final rule delaying implementation on September 18, 2017.⁴⁹

In October 2017, Chesapeake Climate Action Network, Sierra Club, and others filed challenges to the delay in both the U.S. District Court for the District of Columbia and the D.C. Circuit.⁵⁰ The D.C. Circuit agreed to transfer the case filed therein to the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit), where a facial challenge to the 2015 ELG Rule is already being heard.⁵¹ Meanwhile, on April 18, 2018, Judge Dabney Friedrich dismissed the district court complaint for lack of jurisdiction.⁵² Judge Friedrich agreed with EPA and industry groups that challenges to the delay must be brought in a federal appeals court pursuant to 28 U.S.C. § 2112 and 33 U.S.C. § 1369(b)(1), because the delay is effectively a change in effluent standards for the period of time in which the 2015 standards would have gone into effect.⁵³ The petitioners' appeal of Judge Friedrich's order is pending.

Additionally, on January 30, 2018, the Center for Biological Diversity (CBD) filed suit in the U.S. District Court for the District of Arizona regarding the delay in implementing the ELG Rule.⁵⁴ CBD alleged that the delay violates both the Endangered Species Act (ESA) and National Environmental Policy Act (NEPA) consultation and review mandates.⁵⁵ Proposed intervenor-defendant Utility Water Act Group moved to dismiss or transfer the case to the Fifth Circuit on June 6,

47. Final Rulemaking, *Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category*, 80 Fed. Reg. 67,838 (Nov. 3, 2015) (to be codified at 40 C.F.R. pt. 423).

48. 80 Fed. Reg. 67,838, at 67,481.

49. Proposed Rule, *Postponement of Certain Compliance Dates for the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category*, 82 Fed. Reg. 26,017 (Jun. 6, 2017) (to be codified at 40 C.F.R. pt. 423); Final Rule, *Postponement of Certain Compliance Dates for ELGs for Steam Electric Power Generating Point Source Category*, 82 Fed. Reg. 43,494 (Sept. 18, 2017) (to be codified at 40 C.F.R. pt. 423).

50. *Clean Water Action v. Pruitt*, No. 1:17-CV-00817-DLF (D.D.C. 2017); *Clean Water Action v. Pruitt*, No. 17-1216 (D.C. Cir. filed Oct. 11, 2017).

51. *Clean Water Action*, No. 17-1216, Doc. No. 1716063 (D.C. Cir. Feb. 1, 2018); *Southwestern Elec. Power Co. v. EPA*, No. 15-60821 (5th Cir. 2015).

52. *Clean Water Action*, No. 1:17-CV-00817-DLF (D.D.C. filed Apr. 18, 2018).

53. *Id.*

54. *Center for Biological Diversity v. Pruitt*, No. 4:18-CV-00050-JAS (D. Ariz. filed Jan. 30, 2018).

55. *Id.*

2018.⁵⁶ CBD responded by arguing that the delay “does not approve or promulgate any effluent limitation” and, therefore, does not fall within the mandatory circuit court jurisdiction of 33 U.S.C. § 1369(b)(1).⁵⁷ The motion to dismiss or transfer for lack of subject matter jurisdiction remains pending.

B. WOTUS

On January 22, 2018, the Supreme Court unanimously reversed a decision by the U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) regarding jurisdictional rules for challenges to the Obama-era Clean Water Rule, also known as the Waters of the United States (WOTUS) Rule.⁵⁸ The WOTUS Rule, published on June 29, 2015, has been challenged in multiple jurisdictions; the actions filed in the federal appellate courts were consolidated in the Sixth Circuit.⁵⁹

Under federal law, judicial review of seven enumerated categories of EPA decisions, including those “approving or promulgating any effluent limitation or other limitation,” must be brought in the federal appellate courts within 120 days of the date of the challenged action.⁶⁰ Accordingly, in 2016, the Sixth Circuit ruled that district courts did not have jurisdiction to hear challenges to the WOTUS rule.⁶¹ In a unanimous opinion, the Supreme Court reversed, holding that challenges to the WOTUS Rule under the Administrative Procedures Act (APA) must first be heard in the district courts; as such, the Court directed the Sixth Circuit to dismiss the petitions for review filed in that court for lack of jurisdiction.⁶² The high court reasoned that the WOTUS Rule “falls outside the ambit of § 1369(b)(1)” because it is not an “effluent limitation or other limitation,” but rather a definitional provision that imposes no enforceable duty or restriction on the private sector.⁶³ Therefore, the federal courts of appeals do not have exclusive, original jurisdiction over challenges to the WOTUS rule.⁶⁴

In the wake of the Supreme Court decision, multiple district courts proceeded with determining the legality of the WOTUS Rule. A federal district judge in Georgia granted a preliminary injunction on June 8, 2018, blocking enforcement of the 2015 WOTUS Rule in ten states.⁶⁵ Meanwhile, the thirteen state plaintiffs in *North Dakota v. EPA*, which had already been granted a preliminary injunction

56. Center for Biological Diversity, No. 4:18-CV-00050-JAS (D. Ariz. PACER No. 27).

57. *Id.*

58. *National Ass'n of Mfrs. v. Dep't of Def.*, 138 S.Ct. 617 (2018).

59. Final Rule, *Clean Water Rule: Definition of “Waters of the United States”*, 80 Fed. Reg. 37,054 (June 29, 2015) (to be codified at 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, 401); *see also* Consolidation Order in *In re EPA and Dept. of Def. Final Rule*, MCP No. 135, Doc. 3 (July 28, 2015).

60. 33 U.S.C. § 1369(b)(1) (2010).

61. *In re United States Dep't of Defense, United States E.P.A. Final Rule: Clean Water Rule: Definition of Waters of the United States*, 817 F.3d 261, 274 (6th Cir. 2016).

62. *National Ass'n of Mfrs.*, 138 S. Ct. at 634.

63. *Id.* at 624.

64. *Id.* at 624-34.

65. *Georgia v. Pruitt*, 2018 WL 2766877 at 9* (S.D. Ga. 2018). The ten states are: Alabama, Florida, Georgia, Kansas, Kentucky, North Carolina, South Carolina, Utah, West Virginia, and Wisconsin.

preventing enforcement of the WOTUS Rule in 2015, moved for summary judgment on June 1, 2018, arguing that the WOTUS Rule violates the CWA, APA, NEPA, and the U.S. Constitution.⁶⁶

Additionally, shortly after the Supreme Court's ruling, EPA and the U.S. Army Corps of Engineers (Corps) jointly promulgated a rule delaying the implementation of the 2015 WOTUS Rule until February 6, 2020.⁶⁷ Several states and environmental groups challenged this decision in the U.S. District Court for the Southern District of New York and the U.S. District Court for the District of South Carolina.⁶⁸ The government moved to transfer both cases to the U.S. District Court for the Southern District of Texas, where a suit challenging the merits of the original WOTUS Rule is pending.⁶⁹ Both district court judges denied the motions.⁷⁰

C. Water Quality Certification and Federal Energy Regulatory Commission (FERC) Proceedings

New York federal courts rendered several important decisions related to states' permitting authority of federal energy projects.

First, on August 18, 2017, the U.S. Court of Appeals for the Second Circuit (Second Circuit) upheld NYSDEC's denial of CWA section 401 certification for the Constitution Pipeline, holding that the denial was not arbitrary or capricious given the applicant's refusal to provide relevant information.⁷¹ As background, under CWA section 401, states affected by projects that may discharge into navigable waters must certify that such discharge will not conflict with the CWA.⁷² Section 401 certification is a requirement to obtain a federal permit for projects such as pipelines, but affected states automatically waive the requirement if they do not act on a request for certification within one year.⁷³ Constitution Pipeline wished to use a "trenched method" for constructing a pipeline across streams, in contravention to NYSDEC's preference, and failed to provide a waterbody analysis using the trenchless method; the Second Circuit upheld NYSDEC's denial based on these grounds.⁷⁴ Constitution Pipeline petitioned the Supreme Court for a writ of certiorari on January 16, 2018, but the high court denied the petition on April 30, 2018.⁷⁵

66. *North Dakota v. EPA*, 3:15-cv-00059-DLH-ARS 5-6, 9 (D.N.D. PACER No. 212).

67. Definition of "Waters of the United States" – Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200-001 (Feb. 6, 2018) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401).

68. *New York v. Pruitt*, 1:18-CV-01030-JPO (S.D.N.Y. filed Feb. 6, 2018); *Natural Resources Def. Council v. EPA*, 1:18-CV-1048-JPO (S.D.N.Y. filed Feb. 6, 2018); *South Carolina Coastal Conservation League v. Pruitt*, 2:18-CV-330-DCN (D.S.C.).

69. *New York v. Pruitt*, 2018 WL 2411595 at *2 (S.D.N.Y. 2018); *South Carolina Coastal Conservation League*, 2:18-CV-330-DCN at *2.

70. *New York*, 1:18-CV-01030-JPO, 2018 WL 2411595 at *7 (S.D.N.Y. May 29, 2018); *South Carolina Coastal Conservation League*, 2:18-CV-330-DCN, 2018 WL 2184395 at *9 (D.S.C. May 11, 2018).

71. *Constitution Pipeline Co.*, 868 F.3d at 103.

72. *Id.* at 99.

73. 33 U.S.C. § 1341(a)(1).

74. *Constitution Pipeline Co.*, 868 F.3d at 103.

75. *Constitution Pipeline Co. v. New York State Dep't of Env'tl. Conservation*, 138 S. Ct. 1697 (2018).

Second, on July 21, 2017, the Millennium Pipeline Company (Millennium) requested that the FERC grant it a notice to proceed with construction of a pipeline, arguing that NYSDEC waived its right to deny CWA section 401 approval by failing to act within the statutory one-year timeframe.⁷⁶ On September 15, 2017, FERC granted Millennium's request, finding that NYSDEC "waived its authority to issue or deny a water quality certification" for failing to act within one year of receiving Millennium's application.⁷⁷ In a separate order, the FERC also authorized construction of the pipeline, denying NYSDEC's request for rehearing, stay, and rescission.⁷⁸ The Second Circuit denied NYSDEC's petition to vacate the FERC's orders and upheld the FERC's determination that NYSDEC had waived its CWA section 401 review authority.⁷⁹

Last, Millennium was also denied state-level permits for stream disturbance and freshwater wetlands; these denials prompted Millennium to file an action for declaratory judgment against NYSDEC Commissioner Basil Seggos in the U.S. District Court for the Northern District of New York.⁸⁰ The district court granted Millennium's motion for a preliminary injunction, enjoining the NYSDEC from enforcing either permit requirement against Millennium so as to prevent it from beginning construction on its pipeline.⁸¹ The Court rejected NYSDEC's argument that litigation over the permits was within the exclusive jurisdiction of the Second Circuit pursuant to the Natural Gas Act, 15 U.S.C. § 717r(d)(1), because the denial of state permits is not "an action pursuant to federal law."⁸²

D. CWA and Discharges to Groundwater

Both the Ninth Circuit and the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) issued decisions broadly interpreting the CWA's applicability to discharges to groundwater "hydrologically connected" to regulated surface waters.⁸³ The Ninth Circuit case, *Hawai'i Wildlife Fund v. County of Maui*, arose as a citizen-suit enforcement action seeking to compel the County of Maui to apply for and adhere to the terms of a National Pollutant Discharge Eliminate System (NPDES) permit for injection wells at its wastewater reclamation facility.⁸⁴ On February 1, 2018, the Ninth Circuit affirmed the district court's grant of summary judgment against the County of Maui for discharging pollutants from its wells.⁸⁵ In so doing, the court reasoned that the wells constituted point sources requiring

76. Declaratory Order Finding Waiver Under Section 401 Of The Clean Water Act, *Millennium Pipeline Co.*, 160 F.E.R.C. ¶ 61,065 at P 6-7 (2017).

77. *Id.* at P 1-2.

78. 161 F.E.R.C. ¶ 61,186 at P 2-3.

79. *New York State Dep't of Env'tl. Conservation v. FERC*, 884 F.3d 450, 456-57 (2d Cir. 2018).

80. *Millennium Pipeline Co. v. Seggos*, 288 F. Supp. 3d 530, 534-37 (N.D.N.Y. 2017).

81. *Id.* at 546.

82. *Id.* at 539.

83. *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018); *Hawai'i Wildlife Fund v. County of Maui*, 2012 WL 3263093, at *1 (D. Haw. Aug. 8, 2012); *Upstate Forever v. Kinder Morgan Energy Partners L.P.*, 887 F.3d 637 (4th Cir. 2018).

84. *Hawai'i Wildlife Fund*, 886 F.3d at 743.

85. *Id.* at 742.

NPDES permits because they are confined and contain effluent before discharging into the ground, “and, eventually, surface water.”⁸⁶

The Fourth Circuit also ruled that a discharge to groundwater may be within the scope of the CWA’s prohibition on unpermitted discharges of pollutants.⁸⁷ *Upstate Forever v. Kinder Morgan Energy Partners, L.P.* presented an issue of first impression to the Fourth Circuit, “whether a discharge of a pollutant that moves through ground water before reaching navigable waters may constitute a discharge of a pollutant within the meaning of the CWA.”⁸⁸ A 3,100-mile long pipeline owned by a subsidiary of the defendant Kinder Morgan leaked an estimated 369,000 gallons of petroleum product near Belton, South Carolina.⁸⁹ Within a few days of the leak, the pipeline was repaired and remediation efforts commenced, resulting in the recovery of approximately 209,000 gallons of gasoline and petroleum products from the spill site.⁹⁰ The citizen-suit plaintiffs filed suit in the U.S. District Court for the District of South Carolina, alleging that the leak contaminated nearby creeks and wetlands.⁹¹

Citing Justice Scalia’s plurality opinion in *Rapanos v. United States*, the Fourth Circuit reasoned that the plain language of the CWA allows for liability when a pollutant is not discharged “directly” to a navigable water from a point source.⁹² The Court found its holding in accord with federal court decisions finding “likely” CWA violations where a pollutant “naturally washes downstream.”⁹³ The court outlined a standard under which a “plaintiff must allege a direct hydrological connection between ground waters and navigable waters” to state a CWA claim for discharge of a pollutant that passes through ground water.⁹⁴ The court found no difference between its test and the Ninth Circuit’s “fairly traceable” requirement.⁹⁵ Applying its rule to the case, the Fourth Circuit found that the “extremely short distance” of 1,000 feet between the defendant’s pipeline and navigable waters, and the traceability of the discharge, supported the plaintiffs’ CWA claim.⁹⁶

The Fourth Circuit ruled against Kinder Morgan even though the spill had been repaired and supervised remediation was ongoing.⁹⁷ In dissent, Judge Henry Floyd noted that an important jurisdictional limit on CWA citizen-suits is that they may only be brought against someone alleged to be in present violation—not for

86. *Id.* at 746-47 (citing *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1152–53 (9th Cir. 2010)).

87. *Upstate Forever*, 887 F.3d at 652.

88. *Id.* at 649 (4th Cir. 2018).

89. *Upstate Forever v. Kinder Morgan Energy Partners*, 252 F. Supp. 3d 488, 490 (D.S.C. 2017).

90. *Id.*

91. *Id.*

92. *Upstate Forever*, 887 F.3d at 649-50 (citing *Rapanos v. United States*, 547 U.S. 715, 732-38, 743 (2006)).

93. *Id.* at 650 (citing *Rapanos*, 547 U.S. at 743).

94. *Id.* at 651.

95. *Id.* at 651 n.12.

96. *Id.* at 651-52.

97. *Upstate Forever*, 887 F.3d. at 644.

a violation that is “wholly past.”⁹⁸ Because the pipeline at issue was “not currently leaking or releasing any pollutants,” the judge reasoned, there could be no ongoing CWA violation upon which a citizen suit could stand.⁹⁹ The Fourth Circuit denied Kinder Morgan’s motion for rehearing, but the district court judge agreed to stay proceedings while it petitions the Supreme Court for review.¹⁰⁰

The Fourth Circuit’s decision in *Upstate Forever* may have a dispositive effect on another case pending before it. In *Sierra Club v. Virginia Electric & Power Co.*, the plaintiffs seek to hold the defendant, Dominion Energy Virginia (Dominion), liable for alleged discharges of coal ash from its disposal sites.¹⁰¹ The U.S. District Court for the Eastern District of Virginia found Dominion liable under the CWA and issued a preliminary injunction requiring extensive sampling and monitoring of the site; however, the court stopped short of requiring the disposal of all coal ash.¹⁰² Dominion appealed the district court’s preliminary injunction and finding of liability, arguing that the groundwater liability theory upon which the court based its ruling would expand CWA liability to “the entire land area of the United States.”¹⁰³ Oral argument was heard on March 21, 2018. Whether the Fourth Circuit applies *Upstate Forever* and affirms the district court’s ruling or distinguishes the cases remains to be seen. Two similar appeals are pending in the Sixth Circuit.¹⁰⁴ The potential for a circuit split suggests that the Supreme Court may, eventually, need to resolve the issue of CWA liability when a pollutant is discharged to groundwater that is “hydrologically connected” or “fairly traceable” to a surface water.

In response to the Ninth Circuit’s decision in *County of Maui*, and recognizing the “mixed case law” on the issues therein, the EPA published notice on February 20, 2018, seeking comment on whether it should review its position on groundwater discharges and their consistency with CWA jurisdiction.¹⁰⁵

E. Cooling Water Intake Structures

On July 23, 2018, the Second Circuit upheld another Obama-era regulation that has been challenged by environmental groups and industry associations.¹⁰⁶

98. *Upstate Forever*, 887 F.3d at 658-59 (Floyd, J., dissenting) (citing 33 U.S.C. § 1365(a)(1); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987)).

99. *Id.* at 659-60.

100. Meera Gajjar, ‘Indirect discharge’ suit delayed as *Kinder Morgan* seeks SCOTUS review, WESTLAW Energy and Environment Daily Briefing, 2018 WL 3521576 (July 23, 2018), [https://1.next.westlaw.com/Document/I2c354a418eb311e8a5b3e3d9e23d7429/View/FullText.html?transitionType=UniqueDocItem&context-Data=\(sc.UserEnteredCitation\)&userEnteredCitation=2018+WL+3521576](https://1.next.westlaw.com/Document/I2c354a418eb311e8a5b3e3d9e23d7429/View/FullText.html?transitionType=UniqueDocItem&context-Data=(sc.UserEnteredCitation)&userEnteredCitation=2018+WL+3521576).

101. *Sierra Club v. Virginia Elec. & Power Co.*, 247 F. Supp. 3d 753, 755-56 (E.D. Va. 2017).

102. *Sierra Club v. Virginia Elec. & Power Co.*, 2017 WL 4476832 (E.D. Va. July 31, 2017).

103. Appellant’s Opening Brief, *Sierra Club v. Virginia Elec. & Power Co.*, No. 17-1895, at 42 (4th Cir. PACER Doc. 23) (citing *Rapanos*, 547 U.S. at 722).

104. See generally Appellees’ Brief, *Tennessee Clean Water Network v. Tennessee Valley Authority*, No. 17-6144 (6th Cir. PACER Doc. 62); Appellants’ Brief, *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, No. 18-5115 (6th Cir. PACER Doc. 30).

105. Request for Comment, *Clean Water Act Coverage of “Discharges of Pollutants” via a Direct Hydrologic Connection to Surface Water*, 83 Fed. Reg. 7126-01 (Feb. 20, 2018) (to be codified at 40 C.F.R. pt. 122).

106. *Cooling Water Intake Structure Coal v. EPA*, 898 F.3d 173, 181-82 (2d Cir. July 23, 2018).

Specifically, on August 15, 2014, the Obama administration promulgated requirements for cooling water intake structures (CWISs) at existing regulated facilities.¹⁰⁷ The rule established standards for impingement and entrainment of aquatic wildlife caused by CWISs, and implements processes to ensure compliance with the ESA.¹⁰⁸

Rule opponents filed petitions to review the rule in six federal appellate circuits; these cases were consolidated and transferred to the Second Circuit.¹⁰⁹ On July 23, 2018, the Second Circuit upheld the 2014 CWIS regulations, finding that “the EPA acted reasonably and within its statutory” purview when it established “standards to minimize aquatic mortality from entrainment and impingement.”¹¹⁰ The court also affirmed the EPA’s use of a site-specific standard of best available technology, rejecting environmentalist groups’ argument that a single, nationwide standard should apply.¹¹¹ The court deferred to the EPA’s determination that a “one-size-fits-all” approach to entrainment standards was infeasible and that closed-cycle cooling is not available nationwide.¹¹²

Industry petitioners claimed that the U.S. Fish and Wildlife Service and National Marine Fisheries Service (collectively, the “Services”) “biological opinion was unlawful because the Services should have concurred in the EPA’s initial determination that the proposed rule was unlikely to adversely affect listed species.”¹¹³ The Second Circuit rejected this argument, finding that “the agencies acted appropriately in conducting formal consultation,” and that the EPA did not impermissibly delegate its authority to establish permit requirements.¹¹⁴ Moreover, it found that the Services’ biological opinion was supported by the administrative record and consistent with the ESA and its regulations.¹¹⁵

III. NEPA

Under NEPA, a federal agency must prepare a detailed statement discussing and disclosing the environmental impacts of a proposed agency action.¹¹⁶ To comply with NEPA, agencies issue an Environmental Assessment (EA) to determine if an Environmental Impact Statement (EIS) is required in the recommendation or report on major projects that affect the human environment.¹¹⁷ Several landmark cases issued this year address first, what types of impacts federal agencies must

107. Final Rule, *National Pollutant Discharge Elimination System—Final Regulations to Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities*, 79 Fed. Reg. 48,300 (Aug. 15, 2014) (codified at 40 C.F.R. pts. 122, 125).

108. 79 Fed. Reg. 48,300 at 48,321-23, 48,380-83.

109. *Cooling Water*, 898 F.3d at 181-82.

110. *Id.* at 207.

111. *Id.* at 189.

112. *Id.* at 190.

113. *Id.* at 204.

114. *Cooling Water*, 898 F.3d at 203-04.

115. *Id.* at 207.

116. Pub. L. No. 91-190, 83 Stat. 852 (1970).

117. *Sierra Club v. FERC*, 827 F.3d 59, 63 (D.C. Cir. 2016).

consider in NEPA reviews, and second, whether projects can remain under construction or in operation while an agency addresses a deficient environmental statement.¹¹⁸

For example, in *Sierra Club v. Federal Energy Regulatory Commission*, the D.C. Circuit vacated FERC orders permitting construction and operation of three new southeastern interstate natural gas pipelines known as the Southeast Market Pipelines Project (SMP Project).¹¹⁹ The court determined that the FERC's EIS was legally deficient because the FERC did not estimate and consider the downstream GHG emissions that would "be made possible" from the operation of power plants using the natural gas delivered through the approved pipelines.¹²⁰ Accordingly, the court remanded to the FERC to prepare a supplemental EIS (SEIS).¹²¹ On remand, the FERC issued an SEIS and reinstated its authorizations.¹²²

The court distinguished this case from recent NEPA decisions concerning liquid natural gas (LNG) terminals (discussed below), where no remand was required, because it concluded that, in those cases, the FERC had no control over the environmental impacts related to the effects of the exportation of natural gas.¹²³ In contrast, in this case, because the FERC possesses authority to deny a pipeline based on "direct and indirect environmental effects on the pipelines it approves," the FERC's balancing of public benefits against adverse effects must encompass an assessment of the GHG emissions of the downstream power plants fueled by the proposed pipelines.¹²⁴

The FERC argued that it was practically impossible to calculate properly the amount of adverse effects, e.g., the amount of GHGs emitted by power plants served by the new pipelines.¹²⁵ The court rejected this argument, stating that while the calculation "depends on several uncertain variables, including the operating decisions of individual plants and the demand for electricity in the region," "NEPA analysis necessarily involves some 'reasonable forecasting,' and that agencies may

118. *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017); *Sierra Club v. FERC*, 827 F.3d 36 (D.C. Cir. 2016); *Sierra Club v. FERC*, 827 F.3d 59 (D.C. Cir. 2016); *EarthReports, Inc. v. FERC*, 828 F.3d 949 (D.C. Cir. 2016); *Sierra Club v. Dep't of Energy*, 867 F.3d 189 (D.C. Cir. 2017).

119. See generally *Sierra Club*, 867 F.3d 1357. On motion by FERC, the court granted a stay of the mandate to prevent the operator of the SMP Project from having to cease operation due to the court vacating the SMP Project's FERC authorization to operate. *Sierra Club v. FERC*, No. 16-1329, Order (D.C. Cir. Mar. 7, 2018).

120. *Id.* at 1371-72.

121. *Id.* at 1363.

122. *Florida Southeast Connection, LLC Transcontinental Gas Pipe Line Co., LLC Sabal Trail Transmission, LLC*, 162 FERC ¶ 61233 (Mar. 14, 2018) The FERC stated that the final SEIS estimates the GHGs generated by the SMP Project's customers' downstream facilities, describes the methodology used, discusses context for understanding the magnitude of these emissions, describes FERC's past policy on use of the Social Cost of Carbon tool, and as appropriate, addresses comments on the draft SEIS.

123. *Sierra Club*, 867 F.3d at 1372-73 (citing *Sierra Club*, 827 F.3d 36; *Sierra Club*, 827 F.3d 59; *EarthReports*, 828 F.3d 949).

124. In Docket No. PL18-1-000, the FERC has issued a Notice of Inquiry regarding the *Certification of New Interstate Pipeline Facilities*, 163 F.E.R.C. ¶ 61,042 (2018). The FERC sought input on whether and, if so how, it should adjust the methodology it follows for review and authorization of proposed pipeline projects under the guidance in the 1999 Certificate Policy Statement across four categories, including environmental impact. Comments were due on July 25, 2018 and more than 2,900 documents were submitted in the proceeding. The FERC is currently reviewing the submissions and follow up action is pending. *Sierra Club*, 867 F.3d at 1373.

125. *Sierra Club*, 867 F.3d at 1373-74.

sometimes need to make educated assumptions about an uncertain future.”¹²⁶ The court did not hold that “quantification of greenhouse-gas emissions is required every time those emissions are an indirect effect of an agency action,” as there may be cases where quantification is not feasible.¹²⁷ But, in this case, because the end-users were known, the FERC had to either quantify and consider the project’s downstream GHG emissions or explain in more detail why it could not do so.¹²⁸ In the SEIS, the FERC quantified the GHG downstream emissions.¹²⁹

Additionally, as noted above, following its previous decision challenging the FERC’s approval of the same LNG terminal, the D.C. Circuit upheld the Department of Energy’s (DOE) authorization of the Freeport Terminal in *Sierra Club v. Department of Energy*.¹³⁰ In approving an LNG terminal for the export of natural gas to non-free trade agreement countries, the DOE considers the environmental impacts of the export decision under NEPA and performs a “public interest” test under section 3 of the Natural Gas Act.¹³¹ When multiple federal agencies have oversight of different aspects of the same project, agency coordination is permitted.¹³² One agency may adopt the NEPA environmental analysis of a “cooperating agency” so long as the adopting agency satisfies concerns it raised in its review.¹³³ With regard to the Freeport Terminal, the DOE appended the FERC’s EIS with (1) an analysis of the export-induced domestic natural gas production, and (2) a commissioned study of potential indirect effects of LNG exports on GHG emissions.¹³⁴ The Court determined that these materials were part of DOE’s environmental review under NEPA.¹³⁵

Sierra Club asserted several challenges against the adequacy of the DOE’s environmental review of the Freemont Terminal.¹³⁶ Specifically, Sierra Club alleged that the review was defective in that it did not quantify the “indirect effects” of export-induced natural gas production and did not tailor the indirect effects to specific levels of exports.¹³⁷ The court accepted the DOE’s explanation that the indirect effects were not reasonably foreseeable because fluctuations in the amount of natural gas produced as a result of the terminal would be related to the price of gas, which depends on numerous factors.¹³⁸ DOE also concluded that “without knowing where the production would occur, the corresponding environmental impacts were ‘not “reasonably foreseeable”’ under NEPA.”¹³⁹ The court affirmed this reasoning, stating, “[b]ecause the Department could not estimate the locale of

126. *Id.* at 1374.

127. *Id.*

128. *Id.*

129. Florida Southeast Connection, *supra* note 122.

130. *Sierra Club v. Dep’t of Energy*, 867 F.3d 189 (D.C. Cir. 2017).

131. *Id.* at 192-93.

132. *Id.* at 193.

133. 40 C.F.R. § 1501.6(b) (2010); *Sierra Club*, 867 F.3d at 193 (citing *Sierra Club*, 827 F.3d at 41-42).

134. *Sierra Club*, 867 F.3d at 195.

135. *Id.* at 197.

136. *Id.* at 201-02.

137. *Id.* at 196-97.

138. *Id.* at 198-99.

139. *Sierra Club*, 867 F.3d at 199.

production, it was in no position to conduct an environmental analysis of corresponding local-level impacts, which inevitably would be ‘more misleading than informative.’”¹⁴⁰ Accordingly, the court, i concluded that the DOE did not fail to fulfill its NEPA obligations by failing to predict specific levels of export induced gas production and the potential for increased power sector reliance on coal in response to increased gas prices.¹⁴¹

Another key case is *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, in which the United States District Court for the District of Columbia upheld a challenge to the Corps’ decision to conduct an EA—and not an EIS—for the Dakota Access Pipeline (DAPL).¹⁴² The court found three flaws with the Corps’ environmental analysis: 1) whether the pipeline’s impact would be “highly controversial;” 2) the impact of a spill on fish and wildlife; and 3) the environmental justice impacts of a spill on wildlife.¹⁴³ The court remanded and ordered a briefing on the issue of vacating the Corps’ EA and easement granted for the pipeline to operate.¹⁴⁴

In determining whether to vacate, thereby forcing DAPL to cease operations, the court based its determination on the legal test developed by the D.C. Circuit in *Allied-Signal v. NRC*.¹⁴⁵ “The decision whether to vacate depends on ‘the seriousness of the order’s deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.’”¹⁴⁶ In performing the first part of the analysis, the court assessed the likelihood that, on remand, the Corps would be able to justify its prior decision on the NEPA review and looked at each of the three identified defects in the EA.¹⁴⁷ With regard to the Corps’ failure to fully consider whether impacts of the pipeline are likely to be “highly controversial,” “the Opinion stated that ‘it may well be the case that the Corps reasonably concluded that these expert reports were flawed or unreliable and thus did not actually create any substantial evidence of controversial effects,’” and that what was missing was that the Corps’ assessment “never said as much.”¹⁴⁸ Additionally, the court’s opinion reasoned, remedying this flaw would not require the Corps to start over, but instead “better articulate their reasoning below.”¹⁴⁹ Following this and similar reasoning, the court con-

140. *Id.*

141. *Id.* at 201.

142. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 255 F.Supp.3d 101 (D.D.C. 2017) (Initial decision issued two weeks after the pipeline began operations delayed the question of whether the environmental assessment deficiencies warranted the pipeline to cease operations. That issue is the subject for the later decision discussed here in *Standing Rock Sioux Tribe v. United States Army Corps of Eng’rs*, 282 F.Supp.3d 91 (D.D.C. 2017)).

143. *Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 112.

144. *Id.* at 147-48, 153.

145. *Standing Rock Sioux Tribe v. United States Army Corps of Eng’rs*, 282 F. Supp. 3d 91, 97, 108 (D.D.C. 2017) (relying on *Allied-Signal v. United States Nuclear Regulatory Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)).

146. *Allied-Signal*, 988 F.2d at 150-51.

147. *Standing Rock Sioux Tribe*, 282 F. Supp. 3d at 98.

148. *Id.*

149. *Id.*

cluded that the deficiencies were “potentially lawful but insufficiently or inappropriately explained.”¹⁵⁰ On the second prong, the court concluded that the disruption or lack thereof that would occur as a result of a shutdown that would result from vacatur “weights only slightly in favor of remand without vacatur.”¹⁵¹ While confirming that if one prong of the *Allied-Signal* test is met, a determination under the second prong is “only barely relevant,” the court reasoned with regard to the second prong, vacatur would be “an invitation to substantial inconvenience.”¹⁵² As such, the court denied the request to vacate the EA and easement grant based on the “‘serious possibility’ that the Corps will be able to substantiate” prior conclusions.¹⁵³ The court later granted the Standing Rock Sioux’s petition for interim conditions during the pendency of time the Corps was provided to justify its decision on the points at issue.¹⁵⁴

Additionally, in July 2018, the Fifth Circuit overturned an injunction issued by the United States District Court for the Middle District of Louisiana.¹⁵⁵ The district court had issued an injunction in part because the Corps had improperly applied the NEPA cumulative effects test because past incidents of noncompliance had been overlooked.¹⁵⁶ The district court also found that the Corps failed to sufficiently explain its mitigation plan that provided for the substitution for one type of wetlands for another.¹⁵⁷ The Fifth Circuit, in evaluating these issues came to different conclusions and vacated the injunction.¹⁵⁸

The Fifth Circuit asserted that the Corps were under no obligation to consider the past incidents of noncompliance, since the cumulative impact analysis only requires the review of the impacts of permitted actions that are found to have an incremental impact when added to other past, present, and reasonably foreseeable future actions.¹⁵⁹ The Corps’ environmental assessments made a finding that because of appropriate mitigation measures, there would be no incremental impact. Therefore, there could be no cumulative effects with regard to pre-existing conditions and past non-compliance.¹⁶⁰ The Fifth Circuit’s reasoning follows the 9th Circuit’s holding that “a finding of no incremental impact relieves an agency of the necessity of extensive and ultimately uninformative discussion of cumulative effects pursuant to this regulation.”¹⁶¹

150. *Id.* at 103 (citing *Radio-Television News Directors Ass’n v. FCC*, 184 F.3d 872, 888 (D.C. Cir. 1999)).

151. *Id.*

152. *Standing Rock Sioux Tribe*, 282 F. Supp. 3d at 108 (citing *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1049 (D.C. Cir.), *opinion modified on reh’g*, 293 F.3d 537 (D.C. Cir. 2002); *Standing Rock Sioux Tribe*, 282 F. Supp. 3d at 108).

153. *Id.* at 109.

154. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 280 F. Supp. 3d 187, 192 (D.D.C. 2017).

155. *Atchafalaya Basinkeeper v. U.S. Army Corps of Eng’rs*, 894 F.3d 692, 695 (5th Cir. 2018); *Atchafalaya Basinkeeper v. United States Army Corps of Eng’rs*, 310 F. Supp. 3d 707 (M.D. La. 2018).

156. *Atchafalaya Basinkeeper*, 894 F.3d at 696.

157. *Atchafalaya Basinkeeper*, 310 F. Supp. 3d at 735.

158. *Atchafalaya Basinkeeper*, 894 F.3d at 704.

159. *Id.* at 703; *See also* 40 C.F.R. § 1508.7.

160. *Id.*

161. *Id.* at 704; *see also* *Nw. Envtl. Advocates v. Nat’l Marine Fisheries Serv.*, 460 F.3d 1125, 1140–41 (9th Cir. 2006); *Northern Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1082 (9th Cir. 2011); *cf. Louisiana Crawfish Producers Ass’n–West v. Rowan*, 463 F.3d 352, 359 (5th Cir. 2006).

IV. ENDANGERED SPECIES AND MIGRATORY BIRD TREATY ACTS

The U.S. Fish & Wildlife Service (USFWS) proposed three revisions to regulations on July 25, 2018, to address critical habitat designation, ESA section 7 consultation, and protection of threatened species.¹⁶² The proposals address concerns by industry and landowners that critical habitat designations regulate “broad areas of land and water that have little or no current demonstrated value to the species”, as well as questions regarding the proper scope of ESA section 7 consultations.¹⁶³

Additionally, in a reversal of policy, on December 22, 2017, the Department of Interior (DOI) Solicitor’s Office issued an opinion expressing the view that the Migratory Bird Treaty Act (MBTA) prohibition on “taking” protected migratory birds only applies to “direct and affirmative purposeful actions that reduce migratory birds, their eggs, or their nests, by killing or capturing, to human control” and does not apply where the “taking” is incidental to an otherwise lawful action”, even when the death of a protected bird is directly foreseeable.¹⁶⁴ Based on this opinion, USFWS announced that it would not take further action on an Obama-era notice of intent to evaluate a proposed rule authorizing incidental takes of migratory birds.¹⁶⁵ On the same day, two separate lawsuits were filed in the U.S. District Court for the Southern District of New York alleging that the December 2017 DOI opinion was contrary to the plain language, purpose, and longstanding practice under the MBTA, and asked the court to vacate that opinion and force the government to revert to the policy expressed in a January 2017 opinion issued during the Obama administration.¹⁶⁶

162. Proposed Rule, *Endangered and Threatened Wildlife and Plants; Revision of Regulations for Inter-agency Cooperation*, 83 Fed. Reg. 35,178-01 (July 25, 2018) (to be codified at 50 C.F.R. pt. 402); Proposed Rule, *Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Listing Species and Designating Critical Habitat*, 83 Fed. Reg. 35,193-01 (July 25, 2018) (to be codified at 50 C.F.R. pt. 424); Proposed Rule, *Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants*, 83 Fed. Reg. 35,174-01 (July 25, 2018) (to be codified at 50 C.F.R. pt. 17).

163. Andrew J. Turner & Karma B. Brown, *Services Propose Highly Anticipated Revisions to ESA Regulations on Critical Habitat Designation, Section 7 Consultation, and Protections for Threatened Species*, THE NICKEL REPORT: TRENDS AND DEVELOPMENTS IN ENERGY AND ENV’T L. (July 20, 2018), <https://www.huntonnickelreportblog.com/2018/07/services-propose-highly-anticipated-revisions-to-esa-regulations-on-critical-habitat-designation-section-7-consultation-and-protections-for-threatened-species/>.

164. E. Carter Clements, Eric J. Murdock & Andrew J. Turner, *US Fish & Wildlife Service To Seek Dismissal of Suits Challenging MBTA Legal Opinion*, THE NICKEL REPORT: TRENDS AND DEVELOPMENTS IN ENERGY AND ENV’T L. (July 23, 2018), <https://www.huntonnickelreportblog.com/2018/07/us-fish-wildlife-service-to-seek-dismissal-of-suits-challenging-mbta-legal-opinion/>.

165. Announcement, *Migratory Bird Permits; Programmatic Environmental Impact Statement*, 83 Fed. Reg. 24,080 (May 24, 2018) (to be codified at 50 C.F.R. pt. 21).

166. E. Carter Clements et al., *US Fish & Wildlife Service to Seek Dismissal of Suits Challenging MBTA Legal Opinion*, THE NICKEL REPORT: TRENDS AND DEVELOPMENTS IN ENERGY AND ENV’T L. (July 23, 2018), <https://www.huntonnickelreportblog.com/2018/07/us-fish-wildlife-service-to-seek-dismissal-of-suits-challenging-mbta-legal-opinion/>.

In another case concerning protected species, the U.S. Court of Appeals for the Tenth Circuit (Tenth Circuit) upheld the regulation of takings of a purely intrastate species, the Utah prairie dog, on non-federal land.¹⁶⁷ The court found that the ESA is a comprehensive scheme with a substantial relation to interstate commerce.¹⁶⁸ The Tenth Circuit also found that Congress had a rational basis to include the regulation of purely intrastate species because it is an “essential part of the ESA’s regulatory scheme.”¹⁶⁹ The court noted that sixty-eight percent of protected species under the ESA exist purely intrastate.¹⁷⁰ Thus, excluding those species from ESA’s protection would “severely undercut the ESA’s conservation purpose.”¹⁷¹ The Supreme Court denied plaintiffs’ petition for a writ of certiorari.¹⁷²

V. TOXIC SUBSTANCES CONTROL ACT (TSCA)

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

The Trump administration EPA took numerous actions to implement the 2016 Frank R. Lautenberg Chemical Safety for the 21st Century Act (Lautenberg Act), which significantly updated the TSCA for the first time in forty years.¹⁷³ EPA completed three “framework” rules that implement the Lautenberg Act’s most significant changes to TSCA: 1) the Inventory Reset Rule—which requires manufacturers to notify EPA of active chemicals on the TSCA Inventory; 2) the Prioritization Rule—new procedures for EPA’s screening and prioritization of chemicals for risk evaluation; and 3) the Risk Evaluation Rule—new procedures governing how EPA will conduct chemical risk evaluations.¹⁷⁴

Several environmental organizations challenged all three rules.¹⁷⁵ The challenge to the Inventory Reset Rule is being heard in the D.C. Circuit, and the challenges to the Prioritization and Risk Evaluation Rules were consolidated for resolution in the Ninth Circuit.¹⁷⁶ To date, petitioners and EPA have filed their briefs in both cases; intervenors have yet to file in the Ninth Circuit proceeding.

167. *People for Ethical Treatment of Property Owners v. United States Fish & Wildlife Serv.*, 852 F.3d 990, 994 (10th Cir. 2017).

168. *People for Ethical Treatment of Property Owners*, 852 F.3d at 1005-1006.

169. *Id.* at 1006-1007.

170. *Id.* at 1007.

171. *Id.*

172. *People for the Ethical Treatment of Property Owners v. U.S. Fish & Wildlife Serv.*, 138 S. Ct. 649 (2018).

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

174. Final Rulemaking, *TSCA Inventory Notification (Active-Inactive) Requirements*, 82 Fed. Reg. 37,520 (Aug. 11, 2017) (to be codified at 40 C.F.R. pt. 710); Final Rulemaking, *Procedures for Prioritization of Chemicals for Risk Evaluation Under the Toxic Substances Control Act*, 82 Fed. Reg. 33,753 (July 20, 2017) (to be codified at 40 C.F.R. pt. 702); Final Review, *Procedures for Chemical Risk Evaluation Under the Amended Toxic Substances Control Act*, 82 Fed. Reg. 33,726 (July 20, 2017) (to be codified at 40 C.F.R. pt. 702).

175. See generally *Safety Chems. Healthy Families v. EPA*, NO. 17072260 (9th Cir.).

176. *Environmental Def. Fund v. EPA*, No. 17-1201 (D.C. Cir.); Challenges to the prioritization rule were consolidated under lead case, *Safety Chems. Healthy Families v. EPA*, No. 17-72260 (9th Cir.). Challenges to the risk evaluation rule were consolidated under lead case, *Alliance of Nurses v. EPA*, No. 17-73290 (9th Cir.).

B. *New Chemicals Program and Significant New Uses*

Aside from mandating a new structure for the evaluation of existing chemicals, the Lautenberg Act also amended the provisions governing the review of new chemicals and new uses, known as pre-manufacture notices (PMN) and significant new use notices (SNUN).¹⁷⁷ EPA now needs to make affirmative determinations about the risk posed by new chemicals or uses prior to concluding a review, and such review now must include consideration of reasonably foreseeable uses of the substances.¹⁷⁸ In late 2017, EPA issued a draft guidance document outlining a proposed decision-making process.¹⁷⁹ Environmental groups challenged this as well.¹⁸⁰ To date, petitioners, EPA and intervenors have filed their briefs in the case.

C. *Mercury*

Under the Lautenberg Act, EPA was required to develop an inventory of mercury supply, use, and trade in the United States, and update such inventory every three years.¹⁸¹ EPA finalized a rule containing reporting requirements for persons to provide information to assist in the preparation of that inventory.¹⁸² The requirements apply to any person who manufactures or imports mercury or mercury-added products, or otherwise intentionally uses mercury in a manufacturing process.¹⁸³ Based on the inventory of information collected, EPA may identify any manufacturing processes or products that intentionally add mercury and recommend actions to achieve further reductions in mercury use.¹⁸⁴ EPA did not do such in their initial mercury inventory rule.¹⁸⁵

D. *Risk Evaluations of Existing Chemicals*

In December of 2016, EPA published a list of the first ten chemicals it selected for risk evaluations under the Lautenberg Act: asbestos, 1-bromopropane (1-BP), carbon tetrachloride, 1,4-dioxane, cyclic aliphatic bromide cluster (HBCD), methylene chloride, n-methylpyrrolidone (NMP), perchloroethylene, C.I. Pigment Violet 29, and trichloroethylene (TCE).¹⁸⁶ In July 2017, EPA published the proposed scope of the risk evaluations for these substances, which in-

177. NEW CHEMICALS DECISION-MAKING FRAMEWORK: WORKING APPROACH TO MAKING DETERMINATIONS UNDER SECTION 5 OF TSCA (2017), https://www.epa.gov/sites/production/files/2017-11/documents/new_chemicals_decision_framework_7_november_2017.pdf

178. *Id.*

179. *Id.*

180. *Natural Resources Def. Council v. EPA*, No. 18-25 (2nd Cir.).

181. Final Rulemaking, *Mercury Reporting Requirements for the TSCA Mercury Inventory*, 83 Fed. Reg. 30,054 (June 27, 2018) (to be codified at 40 CFR Pt. 713).

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. Notice, *Designation of Ten Chemical Substances for Initial Risk Evaluations Under the Toxic Substances Control Act*, 81 Fed. Reg. 91,927 (Dec. 19, 2016).

cludes the “hazards, exposures, conditions of use, and potentially exposed or susceptible subpopulations that EPA expects to consider.”¹⁸⁷ In May of 2018, EPA published a response to comments.¹⁸⁸ In June 2018, EPA released “problem formulation” documents that clarify the chemical uses that EPA expects to evaluate and describe how EPA expects to conduct the evaluations.¹⁸⁹ Comments received on the problem formulation documents will inform EPA’s development of the draft risk evaluation.¹⁹⁰

E. Program Fees

On February 8, 2018, EPA published a proposed rule regarding user fees for the administration of the TSCA.¹⁹¹ The Lautenberg Act gave EPA the authority to levy fees on certain chemical manufacturers, including importers and processors, to “provide a sustainable source of funding to defray resources that are available for implementation of new responsibilities under the amended law.”¹⁹² The proposed fees “would go toward developing risk evaluations for existing chemicals; collecting and reviewing toxicity and exposure data and other information; reviewing Confidential Business Information (CBI); and, making determinations . . . with respect to the safety of new chemicals before they enter the marketplace.”¹⁹³ The comment period closed on May 24, 2018.¹⁹⁴

VI. RESOURCE CONSERVATION AND RECOVERY ACT (RCRA)

EPA solicited public comments concerning its intention to submit an information collection request (ICR) to the Office of Management and Budget concerning its Revisions to the RCRA Definition of Solid Waste.¹⁹⁵ The ICR related to final revisions to the definition of solid waste that were published in 2015, and which exclude certain hazardous secondary materials from regulation.¹⁹⁶ Specifically, the ICR related to documents that entities engaged in certain management

187. Notice, *Scopes of the Risk Evaluations to be Conducted for the First Ten Chemical Substances Under the Toxic Substances Control Act; Notice of Availability*, 82 Fed. Reg. 31,592 (July 7, 2017).

188. EPA’s Responses to Public Comments received on the Scope Documents for the First Ten Chemicals for Risk Evaluation Under TSCA (2018), https://www.epa.gov/sites/production/files/2018-06/documents/rtc_10_pf_53118.pdf.

189. Notice, *Problem Formulations for the Risk Evaluations To Be Conducted Under the Toxic Substances Control Act, and General Guiding Principles To Apply Systematic Review in TSCA Risk Evaluations; Notice of Availability*, 83 Fed. Reg. 26,998 (June 11, 2018).

190. *Id.*

191. Proposed Rule, *User Fees for the Administration of the Toxic Substances Control Act*, 83 Fed. Reg. 8,212 (Feb. 26, 2018).

192. EPA Meets another TSCA Milestone, Releases Draft Strategy to Reduce Animal Testing (2018), <https://www.epa.gov/newsreleases/epa-meets-another-tsca-milestone-releases-draft-strategy-reduce-animal-testing>.

193. EPA Meets Important Milestones: Proposes Fees Rule, the Final of Four Framework Rules for EPA Chemical Safety Evaluations Under TSCA (2018), <http://www.epa.gov/newsreleases/epa-meets-important-milestone-proposes-fees-rule-final-four-framework-rules-epa-0>.

194. 83 Fed. Reg. 8,212.

195. Notice, *Agency Information Collection Activities: Proposed Collection: Comment Request; Revisions to the RCRA Definition of Solid Waste*, 83 Fed. Reg. 8,259 (Feb. 26, 2018).

196. Final Rule, *Definition of Solid Waste*, 80 Fed. Reg. 1,694 at 1,703 (Jan. 13, 2015).

activities for secondary materials are required to maintain in order to demonstrate their compliance with certain regulatory exclusions.¹⁹⁷ The specific exclusions referenced in the notice include the generator-controlled exclusion, the verified recycler exclusion, the remanufacturing exclusion, and the revised speculative accumulation requirements.¹⁹⁸ EPA's comment period on the ICR closed on April 27, 2018.¹⁹⁹

Additionally, EPA promulgated revisions to the RCRA regulations associated with the definition of solid waste to implement vacatur orders by the D.C. Circuit on July 17, 2017, as modified on March 6, 2018.²⁰⁰ The court's orders upheld the containment and emergency preparedness provisions of the 2015 rule; largely vacated the 2015 verified recycler exclusion for hazardous waste that is recycled off-site and reinstated the 2008 version as a replacement; and vacated Factor 4 (discussed below) of the 2015 definition of legitimate recycling and likewise reinstated the 2008 version as a replacement.²⁰¹

EPA took the somewhat unusual step of issuing the final rule without providing for notice and comment, relying on Section 553 of the APA.²⁰² EPA also made the rule effective immediately, relying both on Section 553(d) of the APA and Section 3010(b) of RCRA.²⁰³ EPA based its actions on its belief that it was merely implementing the court's orders; as such, affected parties had notice of the court's action, meaning that a delay in the effective date was not needed to allow parties to come into compliance.²⁰⁴

The preamble of the final rule contains a discussion of EPA's attempts to distinguish between legitimate recycling activities and "sham recycling."²⁰⁵ Noted above, Factor 4 addresses the concept that the product of the recycling process is comparable to a legitimate product or intermediate in terms of hazardous constituents or characteristics.²⁰⁶ Under the 2008 rule, Factor 4 was a factor to be considered, but was not mandatory for all recycling activities.²⁰⁷ Under the 2015 rule, Factor 4 became mandatory.²⁰⁸ Under the 2018 final rule, Factor 4 again is a non-mandatory factor to be considered in evaluating recycling activities.²⁰⁹ The final rule contains revisions to the regulatory texts of the following regulations: 40 CFR 260.30, 260.31, 260.42, 260.43, and 261.4.²¹⁰

197. *Id.* at 1,720-66

198. 40 C.F.R. 261.4(a)(23), (24), (27); 40 C.F.R. 261.1(c)(8).

199. 83 Fed. Reg. 8,259.

200. Final Rule, *Response to Vacatur of Certain Provisions of the Definition of Solid Waste Rule*, 83 Fed. Reg. 24,664 (May 30, 2018).

201. *Id.*

202. 5 U.S.C. § 553(b)(3)(B) (1946).

203. *Id.* § 553(d); 42 U.S.C. 6930(b) (1984).

204. 83 Fed. Reg. 24,664 at 24,665.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. 83 Fed. Reg. 24,664 at 24,665.

210. *Id.* at 24 667-24671.

EPA also promulgated a final rule amending the regulations governing disposal of Coal Combustion Residuals from Electric Utilities.²¹¹ EPA originally adopted national minimum criteria for existing and new Coal Combustion Residual (CCR) landfills and new CCR surface impoundments in April 2015.²¹² The 2018 amendments provide for two alternative performance standards that can be applied to CCR units, either by Participating State Directors (in states with approved CCR permit programs) or EPA (in states where EPA is the permitting authority for CCR units).²¹³ Specifically, 1) the Participating State Director or EPA may suspend groundwater monitoring requirements for CCR units if there is no potential for migration of hazardous constituents into the uppermost aquifer during the active life of the unit and the post-closure care period, and 2) the Participating State Director or EPA may decide to certify that certain regulatory criteria have been met in lieu of exclusive reliance on a qualified Professional Engineer.²¹⁴

The 2018 final rule also extended the deadline by which facilities must cease placement of waste in CCR units that are required to close (“closure for cause”).²¹⁵ The 2015 CCR regulations contained provisions that required the owner/operator of a CCR unit to cease placing waste into the unit and initiate closure within six months of determining that existing unlined surface impoundments had experienced a statistically significant exceedance of a Ground Water Protection Standard, or surface impoundments did not comply with location standards.²¹⁶ These provisions also applied to existing CCR landfills that did not comply with location criteria for unstable areas.²¹⁷ The July 2018 final rule extended the deadline to October 31, 2020.²¹⁸ The “closure for cause” provisions for landfills was left unchanged.²¹⁹

The 2018 final rule also adopted health-based groundwater protection standards for four constituents (cobalt, lithium, molybdenum, and lead) for which there is not designated Maximum Contaminant Level.²²⁰

The July 2018 final rule became effective on August 29, 2018.²²¹

211. Final Rule, *Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Amendments to the National Minimum Criteria (Phase One, Part One)*, 83 Fed. Reg. 36,435 (July 30, 2018).

212. Final Rule, *Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities*, 80 Fed. Reg. 21,302 at 21,302-501 (April 17, 2015).

213. 83 Fed. Reg. 36,435.

214. *Id.* at 36,439.

215. *Id.* at 36,441.

216. *Id.* at 36,440.

217. *Id.*

218. 83 Fed. Reg. 36,435 at 36,441.

219. *Id.* at 36,440.

220. *Id.* at 36,453.

221. *Id.* at 36,456.

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