

REPORT OF THE ENVIRONMENTAL REGULATION COMMITTEE

The following is the Report of the Environmental Regulation Committee. In this report, the Committee summarizes key developments in federal and state environmental regulation affecting the natural gas and electric industry from July 1, 2018 to July 31, 2019.*

I.	Clean Air Act	1
	A. Affordable Clean Energy Rule.....	1
	B. New Source Review Reform.....	3
	C. Mercury and Air Toxics Standards	4
	D. Ozone Transport Region	5
	E. New Source Review Enforcement	5
	F. Significant Climate Change Litigation.....	6
II.	Clean Water Act.....	6
	A. Effluent Limitations Guidelines	6
	B. Discharges to Groundwater.....	8
	C. Water Quality Certification.....	10
	D. Waters of the United States.....	12
III.	National Environmental Policy Act	13
	A. Litigation.....	14
	1. FERC Administrative Orders	14
	2. FERC Case Law	15
	3. Other Agencies' Case Law.....	16
	B. Council on Environmental Quality Guidance	18
IV.	Endangered Species and Migratory Bird Treaty Acts.....	19

I. CLEAN AIR ACT

A. *Affordable Clean Energy Rule*

In July 2019, the Environmental Protection Agency (EPA) issued a final rule repealing the Clean Power Plan (CPP) and adopting the Affordable Clean Energy Rule (ACE).¹ The CPP never went into effect, having been delayed by

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1. Final Rulemaking, *Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating units; Revisions to Emissions Guidelines Implementing Regulations*, 84 Fed. Reg. 32,520 (2019) (to be codified 40 C.F.R. pt. 60); ENV'T. PROT. AGENCY, FACT SHEET – THE AFFORDABLE CLEAN ENERGY RULE (ACE) (June 2019), https://www.epa.gov/sites/production/files/2019-06/documents/bser_and_eg_fact_sheet_6.18.19_final.pdf.

challenges which were then held in abeyance while the EPA developed a new rule.² The CPP was promulgated pursuant to the Clean Air Act (CAA) section 111, including establishing “standards of performance” for existing sources under CAA section 111(d).³ The CPP allowed states flexibility to develop strategies including improving heat rates at affected coal-fired steam generating units but also “beyond the fence line” strategies, such as substitution of generation from lower-emitting and zero-emitting renewable energy generation for existing fossil-fired generation.⁴ The ACE removes the “beyond the fence line” compliance options.⁵ The EPA contends that the CPP’s allowance for “beyond the fence” compliance strategies was in excess of EPA’s regulatory authority under section 111(d) of the CAA.⁶ In the ACE notice, the EPA states that it is precluded by CAA section 111 from strategies like shifting generation to lower emitting sources “because these types of systems cannot be put into use at the regulated building, structure, facility, or installation.”⁷

Under the ACE, the EPA determined that improving the heat rate of existing generation units represents the “best system of emissions reductions” (BSER) for reducing greenhouse gas emissions, and improving the heat rate is the only compliance strategy available under the ACE.⁸ The ACE identifies six candidate technologies as BSER: neural network/intelligent sootblowers, boiler feed pumps, air heater and duct leakage control, variable frequency drives, blade path upgrade, redesign/replace economizer, as well additional operating and maintenance practices.⁹ The Rule gives states three years to submit implementation plans that specify technologies and operating procedures as the BSER for individual units.¹⁰ The EPA will have 12 months to approve or disapprove those plans.¹¹ Specifically, the EPA identified and took comment on candidate technologies and operational practices that could be used to improve the regulated units’ heat rates and concluded that each unit must be addressed individually, considering such factors as the unit’s past and projected utilization, maintenance history, and remaining useful life.¹² Under the ACE, states are directed to evalu-

2. The legal challenges to the CPP are described in the *Report of the Environmental Regulation Committee*, 38 ENERGY L.J. no. 2, 2017, at 13-16 [hereinafter 2017 Committee Report] and *Report of the Environmental Regulation Committee*, 39 ENERGY L.J. no. 2, 2018, at 2 [hereinafter 2018 Committee Report].

3. Final Rulemaking, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60). The CPP is summarized in the *Report of the Environmental Regulation Committee*, 37 ENERGY L.J. no. 2, 2016, at 14-17 [hereinafter 2016 Committee Report].

4. 2016 Committee Report, *supra* note 3, at 16.

5. See 84 Fed. Reg. 64, 662 at n.463. ENVT. PROT. AGENCY, WHAT THEY ARE SAYING, EPA FINALIZES AFFORDABLE CLEAN ENERGY RULE (June 20, 2019), <https://www.epa.gov/newsreleases/what-they-are-saying-epa-finalizes-affordable-clean-energy-rule>.

6. 84 Fed. Reg. 32,520, at 32,523.

7. *Id.* at 32,524.

8. *Id.* at 35, 550.

9. *Id.* at 32,537.

10. *Id.* at 32,536.

11. 84 Fed. Reg. 32,520, at 32,578.

12. *Id.* at 32,538-43.

ate, determine, and establish the performance standard for existing units considering such unit-specific factors.¹³

Some of the proposed candidate technologies would also potentially trigger New Source Review (NSR).¹⁴ For example, it was noted that redesigning or replacing economizers, heat exchange devices used to capture boiler flue gas waste heat to heat boiler feedwater, may trigger NSR, with its attendant permitting restrictions and costs thereby rendering such replacement not cost-effective as a standard of performance for a facility.¹⁵ As proposed, the ACE would have also revised NSR by changing the emissions test for whether an emission increase triggered NSR to hourly from annual.¹⁶ Thus, modification of electric generation unit would not trigger NSR if the modification increased the unit's annual emissions so long as its hourly rate of emission did not increase.¹⁷ Opponents to the hourly rate test asserted that it would effectively eliminate NSR for coal-fired power plants.¹⁸ In the final rule, the EPA stated that it would pursue NSR reforms separately from the ACE.¹⁹

B. *New Source Review Reform*

The EPA has taken several steps that suggest it intends to reform NSR through a combination of guidance documents and rule makings.²⁰ For example, in a draft guidance released for public comment, the EPA states that when considering whether sources are adjacent for purposes of determining if they are a single source for NSR and Title V permitting, the permitting authority should focus exclusively on proximity, as opposed to considering when operations may be physically separated yet functionally interrelated.²¹ On another interpretative issue, defining the “project” for purposes of conducting NSR applicability, the

13. *Id.* at 32,576.

14. New Source Review is the permitting process required under the Clean Air Act that applies to new a major stationary sources of air pollution and major modifications to major stationary sources to a obtain an air pollution permit before commencing construction. *See* 42 U.S.C. §§ 7474, 7503 (2019); EPA, NEW SOURCE REVIEW (NSR) PERMITTING, <https://www.epa.gov/nsr/nsr-regulatory-actions#nsrreform> (last visited August 16, 2019).

15. 84 Fed. Reg. 32,520, at 32,537.

16. *Id.* at 32,521; *see also* ENVT. PROT. AGENCY, FACT SHEET-PROPOSED AFFORDABLE CLEAN ENERGY RULE- OVERVIEW (Aug. 21, 2018), https://www.epa.gov/sites/production/files/2018-08/documents/ace_overview_0.pdf

17. *Id.*

18. *See, e.g.*, Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program, *Sierra Club*, Docket No. EPA-HQ-OAR-2017-0355, (Nov. 27, 2018).

19. 84 Fed. Reg. 32,520, at 32,521.

20. EPA maintains a list of ongoing NSR reform initiatives on its website. *See* ENVT. PROT. AGENCY, NEW SOURCE REVIEW (NSR) PERMITTING, <https://www.epa.gov/nsr/nsr-regulatory-actions#nsrreform> (last visited Aug. 16, 2019).

21. William L. Wehrum, *Memorandum Re Interpreting “Adjacent” for New Source Review and Title V Source Determinations in All Industries Other Than Oil and Gas*, ENVT. PROT. AGENCY (2018), https://www.epa.gov/sites/production/files/2018/09/documents/draft_adjacent_policy_memo_9_04_2018.pdf.

EPA took final action removing a decade-long administrative stay of a clarification of how projects should be aggregated for purposes of NSR, with the clarification effective November 15, 2018.²² Other topics expected to be addressed include the exception for routine maintenance repair and replacement, plantwide applicability limits, and the test of actual to projected actual emissions, indicating substantial efforts at NSR reform is on the horizon.²³ As the EPA moves to reform NSR through interpretative guidance and rulemakings, a recent Supreme Court ruling unrelated to environmental laws, *Kisor v. Wilkie*, may affect this process.²⁴ In that case, the Court emphasized that there are prerequisites and limitations on courts in deferring to an agency's interpretation of its own regulation.²⁵

C. Mercury and Air Toxics Standards

The EPA proposes to rescind its prior finding that the cost of compliance with Mercury and Air Toxics Standards (MATS) to electric generation units is reasonable.²⁶ Since the Supreme Court's 2015 ruling in *Michigan v. EPA*, requiring the EPA to consider costs of compliance to electric generation units before formulating MATS, there have been a series of EPA findings and court challenges to those findings.²⁷ The latest iteration was a 2016 supplemental finding that concluded that cost considerations did not alter the EPA's finding that it is necessary and appropriate to regulate hazardous air pollutants from coal and oil fired power plants under section 112 of the CAA.²⁸ Under the Trump Administration, the EPA has reanalyzed the costs and proposes to rescind that finding—concluding instead that the “costs of such regulation grossly outweigh the HAP benefits.”²⁹ However, the EPA has not proposed rescinding the MATS, citing as its reason case law precedent ruling that reversing the appropriate and necessary

22. Final Rulemaking, *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Aggregation; Reconsideration*, 83 Fed. Reg. 57,324 (2018).

23. Anna Marie Wood, *NAAQS and Other Implementation Updates*, AIR QUALITY POLICY DIVISION, OFFICE OF AIR QUALITY PLANNING AND STANDARDS (Mar. 2019), https://www.cleanairact.org/events/documents/AnnaWood-April5-AAPCASpring2018_AWood_FINAL.pdf.

24. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2424 (2019).

25. The majority lists significant conditions: “[T]he possibility of deference can arise only if a regulation is genuinely ambiguous . . . even after a court has resorted to all the standard tools of interpretation.” The agency's reading must: (1) “fall ‘within the bounds of reasonable interpretation;’”(2) “in some way implicate its substantive expertise;” and, (3) reflect “‘fair and considered judgment,’” not “‘merely ‘convenient litigating position’ or ‘post hoc rationalizatio[n] advanced’ to ‘defend past agency action against attack.’” *Id.* at 2414-18 (citations omitted).

26. Proposed Rule, *National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units – Reconsideration of Supplemental Finding and Residual Risk and Technology Review*, 84 Fed. Reg. 2670 (2019).

27. *Michigan v. EPA*, 135 S. Ct. 2699 (2015); see also *Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir. 2017); *ARIPPA v. EPA*, No. 15-1180 (D.C. Cir. 2017). The 2016 Report of the Environmental Committee provides a summary of the MATS litigation. 2016 Committee Report, *supra* note 3, at 22-23.

28. 84 Fed. Reg. 2,673-74.

29. *Id.* at 2,676.

finding alone is an insufficient basis to remove power plants from the list of regulated sources under section 112 of the CAA.³⁰

D. Ozone Transport Region

The United States Court of Appeals for the District of Columbia Circuit rejected the efforts of a group of eastern states to require the EPA to expand the membership of the Northeast Ozone Transport Region to include certain upwind states.³¹ States in the Northeast Ozone Transport Regions are subject to mandatory controls under the CAA, 42 U.S.C. § 7511c(b). Under the CAA, Region member states can petition the EPA Administrator to expand the Region to other states or parts of other states.³² The EPA refused such a petition.³³ The D.C. Circuit accepted EPA's argument that it was within EPA's discretion to reject expansion of the Region in reliance on other provisions of the CAA, such as the good neighbor provision, 42 U.S.C. § 7410(a)(2)(D)(i)(I).³⁴ The court noted that EPA's other obligations, such as enforcing the good neighbor provision, are mandatory and the states have remedies under those provisions.³⁵ As the court noted, New York and Connecticut were successful in obtaining a judgment arising from EPA's failure to promulgate a federal implementation plan under the good neighbor provision requirements when several states failed to develop plans to meet the 2008 National Ambient Air Quality Standards for ozone.³⁶

E. New Source Review Enforcement

On October 1, 2018, the United States Court of Appeals for the Fifth Circuit ruled in a split decision that the general five-year statute of limitations bars civil penalties for past NSR violations.³⁷ The court ruled that "any claim asserted under § 7475(a) [prevention of significant deterioration NSR] accrues at the moment unpermitted construction commences."³⁸ The Third, Seventh, Eighth, Tenth, and Eleventh Circuit Courts of Appeal have all held that the preconstruction permitting violation does not constitute an on-going violation during the subsequent operation of the modified facility.³⁹ However, the court also ruled

30. *Id.* at 2,678-79.

31. *New York v. EPA*, 921 F.3d 257 (DC Cir 2019).

32. 42 U.S.C. § 7506a(a) (1990).

33. Notice of Final Action on Petition, *Response to December 9, 2013, Clean Air Act Section 176A Petition From Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island and Vermont*, 82 Fed. Reg. 51,238, 51,242 (Nov. 3, 2017).

34. *New York*, 921 F.3d at 262.

35. *Id.*

36. *Id.* (citing *New York v. Pruitt*, 18-CV-406 (JGK), 2018 WL 2976018, at *3 (SDNY June 12, 2018)).

37. *United States v. Luminant Generation Co., L.L.C.*, 905 F.3d 874 (5th Cir. 2018), *reh en banc granted*, 929 F.3d 316 (5th Cir. 2019).

38. *Id.* at 884.

39. *Sierra Club v. Oklahoma Gas & Elec. Co.*, 816 F.3d 666, 674 (10th Cir. 2016); *United States v. EME Homer City Generation, L.P.*, 727 F.3d 274, 284 (3d Cir. 2013); *United States v. Midwest Generation, LLC*, 720 F.3d 644, 647 (7th Cir. 2013); *Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008, 1018 (8th Cir. 2010); *Nat'l Parks & Conservation Ass'n, Inc. v. Tennessee Valley Auth.*, 502 F.3d 1316, 1322 (11th Cir. 2007).

that the five-year statute of limitations barring penalties did not bar the government from seeking injunctive relief.⁴⁰

F. Significant Climate Change Litigation

On July 19, 2018, the United States District Court for the Southern District of New York dismissed an action brought by the City of New York against multinational oil and gas companies to recover damages sustained by the City resulting from the effects of climate changes caused by greenhouse gas emissions.⁴¹ In *City of New York v. BP P.L.C.*, the court ruled that the City's state law causes of action were preempted by federal common law, which it ruled were displaced by the CAA.⁴² In other similar actions filed in state courts, defendants have sought to remove the action to federal court and move for dismissal on the basis of CAA preemption.⁴³ The courts have reached divergent rulings on the removal to federal court of these state filed claims.⁴⁴

II. CLEAN WATER ACT

A. Effluent Limitations Guidelines

The EPA finalized a rule on November 3, 2015, establishing new limits on the levels of toxic material in wastewater discharges from power plants.⁴⁵ The 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.⁴⁶ The rule did not change the requirements for "legacy wastewater" or "leachate." Legacy wastewater is the wastewater generated by the other waste streams, *e.g.*, fly ash and bottom ash, that is generated prior to a date to be determined by the permitting authority (*i.e.*, the EPA or delegated state authority) "as soon as possible beginning November 1, 2020, but no later than December 31, 2023."⁴⁷ Thus, for those waste streams generated by the date to be determined the old technology standard of unlined impoundment would continue to apply.⁴⁸ Similarly, for leachate, described as liquid and suspended or dissolved constituents percolating or draining from a landfill or surface impoundment, no new standard applies.⁴⁹

40. *United States v. Luminant Generation Co.*, 905 F.3d 874, 887 (5th Cir. 2018).

41. *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018).

42. *Id.* at 474.

43. *See, e.g.*, *Mayor and City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2019) (summarizing strategy and cases).

44. *See id.*

45. 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).

46. *Id.* at 67,481.

47. *Id.* at 67,854.

48. *Id.*

49. *Id.*

Multiple actions were filed challenging the rule in different circuits and they were eventually consolidated in the United States Court of Appeals for the Fifth Circuit.⁵⁰ In addition to delaying aspects of the rule, the EPA undertook to reconsider the standards for flue gas desulfurization and bottom ash transport water.⁵¹ In *Southwestern Electric Power Co. v. EPA*, the court ruled on the challenges to the rule's reliance on impoundments for legacy wastewater and leachate.⁵² The court ruled that in both instances the record and the Act required vacating and remanding the rule.⁵³ Noting the rule itself concluded that surface impoundments were ineffective at removing pollutants while other demonstrated techniques were available, the court held that establishing surface impoundments as BAT for legacy wastewater was arbitrary and capricious.⁵⁴ The court rejected EPA arguments that it could rely on the relatively small amount of the legacy and leachate waste streams compared to the waste stream being regulated under the rule as a basis for setting BAT under the Clean Water Act (CWA).⁵⁵ Citing the EPA's acknowledgement of the ineffectiveness of impoundments and that demonstrated technology for treatment is available, the court held that selection of impoundments as BAT violated the CWA.⁵⁶

A separate challenge is pending before the United States Court of Appeals for the Fifth Circuit on the EPA's delay of the compliance dates for the rule.⁵⁷ Specifically, the EPA delayed compliance dates for all but the legacy and leachate waste streams.⁵⁸ The EPA argues that the revised compliance dates constitute a revision of effluent limitations to prevent needless expenditure while it considers revising the limitations for bottom ash transport water and FGD wastewater.⁵⁹ Petitioners argue that the EPA does not have authority under the CWA to postpone compliance with existing effluent limitations and point to the absence of a provision analogous to express authority under the CAA stay a rule during reconsideration.⁶⁰ Petitioners also argue that the delay is not a revision but a prelude to revising them, and that the EPA did not apply the factors required to determine BAT as a basis for the delay.⁶¹

50. 2018 Committee Report, *supra* note 2, at 7.

51. *Id.*; Final Rulemaking, *Postponement of Certain Compliance Dates for the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category*, 82 Fed. Reg. 43,494 (Sept. 18, 2017) [hereinafter Postponement Rule].

52. *Southwestern Elec. Power Co. v. EPA*, 920 F.3d 999 (5th Cir. 2019).

53. *Id.* at 1033.

54. *Id.* at 1022.

55. *Id.* at 1032.

56. *Id.* at 1033.

57. Petition for Review of an Order of the Environmental Protection Agency, *Clean Water Action v. EPA*, No. 18-60079 (5th Cir. Aug. 28, 2019).

58. Postponement Rule, *supra* note 51, at 43,494.

59. Respondents Brief, *Clean Water Action v. EPA*, No. 18-60079 (5th Cir. Sept. 17, 2018).

60. Reply Brief of Petitioners, *Clean Water Action v. EPA*, No. 18-60079 (5th Cir. Nov. 16, 2018).

61. *Id.*

B. Discharges to Groundwater

In August of 2018, in *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, the United States Court of Appeals for the Sixth Circuit rejected CWA claims brought against a coal-burning power plant alleging that contamination of groundwater from coal combustion residuals stored in settling ponds could constitute discharge from a point source under the CWA.⁶² The two settling ponds were constructed on karst terrain, a highly-soluble subsurface rock, that plaintiffs argued allowed for groundwater to flow through it quickly and abundantly, resulting in increased selenium levels in a nearby lake.⁶³ Rejecting Fourth Circuit and Ninth Circuit Courts of Appeal precedent, the court held that that CWA does not extend liability to pollution that reaches surface waters via groundwater.⁶⁴ The Fourth and Ninth Circuit Courts of Appeal ruled earlier in 2018 that the jurisdiction of the CWA extends to discharges to groundwater “hydrologically connected” to regulated surface waters.⁶⁵

Noting that a CWA claim requires that “(1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source,” the court rejected two theories advanced by plaintiffs as to the point source for purposes of the claim.⁶⁶ The plaintiffs argued that groundwater is a point source by virtue of acting as a conduit.⁶⁷ Second, the plaintiffs asserted that if the ponds are considered the point source the hydrological connection between ground waters in the pond and the navigable waters is sufficient to impose liability.⁶⁸ Expressly disagreeing with the Fourth and Ninth Circuits, the court ruled that the definition of a “point source,” as “discernable, confined and discrete conveyance” in the CWA foreclosed these theories.⁶⁹ The court ruled that groundwater, even if through a karst-subsurface, is not discernable nor discrete.⁷⁰ Second, the court pointed to the CWA’s regulatory mechanism of effluent limitations.⁷¹ The court noted that effluent limitations govern discharges into navigable waters from point sources and, in the case at hand, the allegation was that the selenium was coming from the groundwater and not a point source.⁷² Disagreeing with United States Court of Appeals for the Fourth Circuit, the court rejected reliance on Justice Scalia’s

62. *Kentucky Waterways All. v. Kentucky Util. Co.*, 905 F.3d 925, 928 (6th Cir. 2018).

63. *Id.* at 931.

64. *Id.* at 933.

65. *Hawaii Wildlife Fund v. County of Maui*, 886 F.3d 737, 746 (9th Cir. 2018) (citing *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1152–53 (9th Cir. 2010)); *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 649 (4th Cir. 2018). These rulings are discussed in the 2018 Committee Report, *supra* note 2, at 10–12.

66. *Kentucky Waterways*, 905 F.3d at 932–33.

67. *Id.* at 932.

68. *Id.* at 932–33.

69. *Id.* at 933.

70. *Id.*

71. *Kentucky Waterways*, 905 F.3d at 934.

72. *Id.*

plurality opinion in *Rapanos v. United States*,⁷³ writing that it is not binding and that the cited discussion in *Rapanos* was taken out of context.⁷⁴ Justice Scalia's concern in *Rapanos*, the court reasoned, was with avoidance of liability by virtue of water traveling through multiple point sources, *e.g.* drains and ditches, not, as where there is not a point source in the first instance.⁷⁵

The Sixth Circuit Court of Appeals issued a companion decision, *Tennessee Clean Water Network v Tennessee Valley Authority*,⁷⁶ on the same day as the *Kentucky Waterways* decision.⁷⁷ The court reversed the lower court's imposition of CWA liability on the Tennessee Valley Authority for pollutants allegedly discharging from coal ash ponds hydrologically connected to navigable waters.⁷⁸ Quoting extensively of its decision in *Kentucky Waterways*, the court ruled that that the "hydrological connection theory is not a valid theory of liability" under the CWA.⁷⁹ The court also ruled that, with respect to coal combustion residuals, imposing liability under the CWA was contrary to the "existing regulatory framework" because coal combustion residuals are regulated by the Resource Conservation and Recovery Act.⁸⁰

In *Sierra Club v. Virginia Electric & Power Co.*, the United States Court of Appeals for the Fourth Circuit reviewed a lower court ruling involving arsenic seepage from coal ash ponds and landfills "directly into the groundwater and, from there, directly into the surface water."⁸¹ The court, citing its prior decision in *Upstate Forever*, affirmed the lower court ruling that a direct hydrological connection can give rise to a violation of the CWA.⁸² However, the court ruled there were no point sources, rejecting the claim that the coal combustion residual settling ponds and landfill were point sources by virtue of leaching of arsenic.⁸³ As in the Sixth Circuit Court of Appeals decisions in *Kentucky Waterways*, the court cited to the definition of a point source in the CWA in holding that precipitation falling on the ponds and landfills resulting in leachate did not constitute point sources within the meaning of the CWA.⁸⁴

73. The United States Court of Appeals for the Fourth Circuit reasoned that the plain language of the CWA supports the construction allowing for liability when a pollutant is not discharged "directly" to a navigable water from a point source by finding "likely" CWA violations where a pollutant "naturally washes downstream." *Upstate Forever*, 887 F.3d at 650 (citing *Rapanos v. United States*, 547 U.S. 715, 743 (2006)).

74. *Kentucky Waterways*, 905 F.3d at 936.

75. *Id.*

76. *Tennessee Clean Water Network*, 905 F.3d 436, 445 (6th Cir. 2018).

77. *Kentucky Waterways*, 905 F.3d at 934.

78. *Tennessee Clean Water Network*, 905 F.3d at 445.

79. *Id.* at 443-44.

80. *Id.* at 445.

81. *Sierra Club v. Va. Elec. & Power Co.*, 247 F. Supp. 3d 753 (E.D. Va. 2017) *aff'd in part, rev'd in part* 903 F.3d 403, 409 (4th Cir. 2018).

82. *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403, 409 (4th Cir. 2018).

83. *Id.* at 410.

84. *Id.*

With the circuit courts' disagreement, the United States Supreme Court has granted certiorari in *Hawaii Wildlife Fund*.⁸⁵ Specifically, the Court has granted certiorari on the question of “[w]hether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.”⁸⁶

C. Water Quality Certification

The United States Court of Appeals for the Second Circuit vacated and remanded the New York State Department of Conservation's (NYSDEC) denial of water quality certification under CWA section 401 for National Fuel's Northern Access 2016 Project.⁸⁷ In 2017, the Federal Energy Regulatory Commission (FERC) granted National Fuel “a certificate of public convenience and necessity to construct and operate approximately 99 miles of pipeline, new and modified compression facilities, and ancillary facilities” in Pennsylvania and New York.⁸⁸ Under the CWA section 401, National Fuel required certification from NYSDEC that the project is consistent with certain CWA provisions, *e.g.*, water quality standards.⁸⁹ NYSDEC denied the National Fuel's application for the CWA section 401 certification it required.⁹⁰ The Court held that NYSDEC's denial letter “insufficiently explain[ed] any rational connection between facts found and choices made,” without citations to the records considered, specific projects, or other studies NYSDEC considered in making its decision.⁹¹ The court found that the NYSDEC relied on factors that it was not intended to consider which could indicate a misunderstanding of the record; and NYSDEC failed to consider evidence in the record supporting FERC's water quality findings.⁹² Finding that it was a “close call,” the court remanded to NYSDEC to give it “an opportunity to explain more clearly—should it choose to do so—the basis for its decision.”⁹³

85. *Hawai'i Wildlife Fund*, 886 F.3d at 749, *cert. granted*, 139 S. Ct. 1164 (2019).

86. *Petition, County of Maui v. Hawai'i Wildlife Fund*, No. 18-260, 2018 WL 4205010 (U.S.).

87. *National Fuel Gas Supply Corp. v. New York State Dept. of Env'tl. Conservation*, 761 Fed. Appx. 68, 70 (2d Cir. 2019) (Summary Order) (“Denial Letter here insufficiently explains any rational connection between facts found and choices made”).

88. *National Fuel Gas Supply Corporation Empire Pipeline, Inc.*, 158 F.E.R.C. ¶ 61,145 at P 1 (2017).

89. Under CWA Section 401, an “applicant for a Federal license or permit to conduct” an activity that “may result in any discharge into the navigable waters” must obtain a water quality certification, certifying that “there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards,” Clean Water Act § 401, 40 C.F.R. § 121.2(a)(3), including EPA-approved state water-quality standards under 33 U.S.C. § 1313.

90. The proceedings on NYSDEC's denial of CWA section 401 certification of Northern Access 2016 Project are set forth in: Steven A. Weiler, Marcia A. Stanford, *New York's Denial of Water Quality Certification for Three FERC-Authorized Pipelines: Flagrant Fiat or Valid Veto?*, 39 Energy L.J. 503, 514 (2018).

91. *National Fuel Gas Supply Corp.*, 761 Fed. Appx. at 70; *see also* 33 USCA § 1341 (“If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.”).

92. *National Fuel Gas Supply*, 761 Fed Appx at 70-71.

93. *Id.* at 72.

National Fuel argued that NYSDEC had waived its opportunity to review the project by virtue of having failed to render its decision within its allotted time.⁹⁴ The court ruled that an argument of waiver must be presented to the FERC.⁹⁵ National Fuel had already successfully pursued an order from the FERC that NYSDEC had waived its opportunity to review the project under CWA section 401,⁹⁶ however, a request for rehearing and stay of that order was still pending at the time the court ruled.⁹⁷ Subsequently, the FERC denied the request for rehearing and stay of its order that NYSDEC had waived its CWA section 401 authority.⁹⁸ NYSDEC and the Sierra Club have filed petitions with the United States Court of Appeals for the Second Circuit challenging the FERC's order finding that NYSDEC waived its CWA section 401 authority.⁹⁹

The issue of waiver of 401 certification was recently examined in *Hoopa Valley Tribe v. FERC*.¹⁰⁰ This case involved the ongoing FERC relicensing of the Klamath Hydroelectric Project.¹⁰¹ As part of a stakeholder settlement agreement (including California and Oregon) a withdraw and resubmit practice for the section 401 certification application was implemented in order to avoid waiver of 401 certification authority to the FERC by resetting the statutory deadlines in which states had to act on an application.¹⁰² In 2012, the Hoopa Valley Tribe petitioned the FERC seeking a declaratory order that California and Oregon had waived their section 401 authority and that the applicant, PacifiCorp, failed to diligently prosecute its licensing application.¹⁰³ The court invalidated this practice and held that a waiver had occurred.¹⁰⁴ In its reasoning the court found that the resubmissions of the same application did not amount to the submission of a new request and that this practice was contrary to Congress' intent to prevent undue delay by States to act on a request.¹⁰⁵ On March 11, 2019, several environmental organizations filed a request for rehearing of the U.S. Court of Appeals for the D.C. Circuit's decision, which was subsequently denied on April 26, 2019.¹⁰⁶

94. *Id.*

95. *Id.* (citing *Millennium Pipeline Co., L.L.C. v Seggos*, 860 F.3d 696, 700 (D.C. Cir. 2017) (“Once the Clean Water Act’s requirements have been waived, the Act falls out of the equation. As a result, if the Department has delayed for more than a year—as Millennium alleges—the delay cannot injure Millennium. Instead, the delay triggers the Act’s waiver provision, and Millennium then can present evidence of waiver directly to FERC to obtain the agency’s go-ahead to begin construction.”).

96. *National Fuel Gas Supply Corporation*, 164 F.E.R.C. ¶ 61,084 at P 42 (2018).

97. *Id.*

98. *National Fuel Gas Supply Corporation*, 167 F.E.R.C. ¶ 61,007 at P 1 (2019).

99. Petition for Review of Agency Order, *NY Dep’t Environ Conserv. v. Fed Energy Reg. Comm*, No. 19-610 (filed May 28, 2019).

100. *Hoopa Valley Tribe v. Fed. Energy Regulatory Comm’n*, 913 F.3d 1099 (D.C. Cir. 2019).

101. *Id.* at 1101.

102. *Id.*

103. *Id.* at 1102.

104. *Id.* at 1106.

105. *Hoopa Valley Tribe*, 913 F.3d at 1104-05.

106. Denial of Petition for Rehearing, *Hoopa Valley Tribe*, 913 F.3d 1099.

On April 10, 2019, President Trump issued Executive Order No. 13868, *Promoting Energy Infrastructure and Economic Growth*, which called for updated guidance that clarifies and provides recommendations to states and tribes concerning their implementation of Section 401.¹⁰⁷ The updated CWA Section 401 Certification Guidance for Federal Agencies, States, and Authorized Tribes, supersedes the interim guidance, and aims to limit states' abilities to deny or impose conditions on section 401 certifications and clarify the timeframe for the certification review process.¹⁰⁸ Consistent with the *Hoopa Valley Tribe* Case, the guidance clarifies that the timeframe for the review process should be a "reasonable amount of time" and should not exceed 1 year from the receipt of the certification.¹⁰⁹ The guidance also specifies that the scope of review and conditions should be limited to conditions related to compliance with water quality requirements.¹¹⁰ This clarification could be in response to New York State's rejection of a fourth pipeline's section 401 certification.¹¹¹ Transcontinental Gas Pipeline Co. LLC's section 401 certification was denied on the basis of climate impacts of greenhouse gas emissions and indirect impacts to water and coastal resources.

D. Waters of the United States

The Waters of the United States (WOTUS) Rule, published on June 29, 2015, has resulted in multi-year litigation in various federal district courts across the country.¹¹² Furthermore, additional WOTUS cases were filed in 2018, after the EPA and the U.S. Army Corps of Engineers (the "federal agencies") issued a rule that delayed the effective date of the 2015 WOTUS Rule by two years (the "Applicability Date Rule").¹¹³

On August 16, 2018, the U.S. District Court for the District of South Carolina ruled that the federal agencies failed to comply with the Administrative Procedures Act (APA) when issuing the Applicability Date Rule, and enjoined the rule nationwide.¹¹⁴ The Western District of Washington also issued an order in-

107. *Promoting Energy Infrastructure and Economic Growth*, 84 Fed. Reg. 15,495 (2019).

108. See ENVT. PROT. AGENCY, *CLEAN Water Act Section 401 Guidance for Federal Agencies, States, and Authorized Tribes* (June 7, 2019), https://www.epa.gov/sites/production/files/2019-06/documents/cwa_section_401_guidance.pdf.

109. *Id.* at 3.

110. *Id.* at 4.

111. Letter from Daniel Whitehead, Director, Div. of Env'tl. Permits of the New York St. Dep't of Env'tl. Conservation, to Joseph Dean, Manager, Env'tl. Health and Safety Dep't of Transcontinental Gas Pipe Line Co., LLC (May 15, 2019).

112. Final Rule, *Clean Water Rule: Definition of "Waters of the United States*, 80 Fed. Reg. 37,054 (2015). Although there were originally challenges filed to the 2015 WOTUS Rule in federal appellate courts, the Supreme Court ruled on January 22, 2018 that the federal appellate courts did not have original exclusive jurisdiction over challenges to the rule. See *National Ass'n of Mfrs v. Dept. of Def.*, 138 S. Ct. 617 (2018).

113. *Definitions of "Waters of the United States" – Addition of an Applicability Date to 2015 Clean Water Rule*, 83 Fed. Reg. 5,200 (Feb. 6, 2018).

114. *South Carolina Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959 (D.S.C. Aug. 16, 2018).

validating the Applicability Date Rule on November 27, 2018.¹¹⁵ Because several courts had already stayed the 2015 WOTUS Rule in multiple states, the ruling from South Carolina resulted in the 2015 WOTUS Rule being reinstated in only 26 states.¹¹⁶ On September 12, 2018, the U.S. District Court for the Southern District of Texas granted a preliminary injunction of the 2015 WOTUS Rule to Louisiana, Mississippi, and Texas.¹¹⁷ On September 18, 2018, the U.S. District Court for North Dakota followed by issuing a ruling stating that the injunction against the 2015 WOTUS Rule also applied to Iowa.¹¹⁸ Although the federal government originally appealed the decisions on the Applicability Date Rule, they withdrew their appeals in March 2019.¹¹⁹

Litigation also continued to proceed on the merits of the 2015 WOTUS Rule. On May 28, 2019, the Southern District of Texas held that the 2015 WOTUS Rule violated the APA and remanded the rule back to the agencies.¹²⁰ Briefing is proceeding in the Western District of Washington, where parties have challenged a specific provision in the 2015 WOTUS Rule that addresses the exclusion of waste treatment systems.¹²¹ Additionally, there are still active cases in several other courts, including the Southern District of Georgia, the Northern District of Oklahoma, and the Northern District of California.¹²²

The EPA and the Army Corps of Engineers are also continuing to work on a rewrite of the 2015 WOTUS Rule. On July 12, 2018, the agencies issued a supplemental notice clarifying the repeal of the 2015 WOTUS Rule and recodification of the pre-2015 regulations.¹²³ On February 14, 2019, the EPA and USACE published a proposed rule to revise the definition of “waters of the United States.”¹²⁴ Comments on the proposed rule were accepted from the public until April 15, 2019.

III. NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act (NEPA) requires that federal agencies identify and consider impacts to the human environment arising from proposed major agency actions under their consideration, which typically include federal permits, licenses, and approvals.¹²⁵ NEPA and the Council on Environ-

115. Puget Soundkeeper Alliance v. Wheeler, C15-1342-JCC (W.D. Wash. Nov. 26, 2018).

116. *South Carolina Coastal Conservation League*, 318 F. Supp. 3d at 960.

117. *American Farm Bureau Fed. v. EPA*, 3:15-cv-00165 (S.D. Tex. Sept. 12, 2018).

118. *North Dakota v. EPA*, 3:15-cv-00059-DLH-ARS (D. N.D. Sept. 18, 2018).

119. See *New York v. Wheeler*, 1:18-cv-01048-JPO (S.D. N.Y. Mar. 8, 2019); *South Carolina Coastal Conservation League v. Wheeler*, No. 1801988 (4th Cir. Mar. 8, 2019); *Puget Soundkeeper Alliance v. Wheeler*, No. 19-35074 (9th Cir. Mar. 12, 2019).

120. *Texas v. EPA*, 3:15-cv-00162 (S.D. Tex. May 28, 2019).

121. *Puget Soundkeeper Alliance v. Pruitt*, 2:15-cv-01342-JCC (W.D. Wash. Apr. 4, 2019).

122. *Georgia v. Pruitt*, 2:15-cv-79 (S.D. Ga. Aug. 2, 2018); *Oklahoma v. EPA*, 4:15-cv-00381-CVE-FHM (N.D. Okla. Dec. 7, 2018); *Waterkeeper Alliance Inc. v. Pruitt*, 18-cv-03521-JSC (N.D. Cal. May 29, 2019).

123. *Definitions of “Waters of the United States” – Recodification of Preexisting Rule*, 83 Fed. Reg. 32,227 (2018).

124. *Revised Definition of “Waters of the United States,”* 84 Fed. Reg. 4,154 (2019).

125. 42 U.S.C. § 4321 (1970).

mental Quality's (CEQ's) regulations implementing NEPA impose procedural requirements that inform a federal agency's review obligations.¹²⁶ Pursuant to NEPA and CEQ regulations, federal agencies prepare an environmental assessment (EA) where there will be no significant impact on the environment or an environmental impact statement (EIS) where a major federal action may result in significant impacts.¹²⁷

Federal agencies must take a "hard look" at the environmental consequences of a proposed action, including its direct, indirect, and cumulative environmental effects.¹²⁸ Several key cases and regulatory developments further address the types of impacts federal agencies must consider under NEPA, whether potential effects need to be considered both downstream and upstream, the gathering and review of such information, and whether federal agencies should consider the "Social Cost of Carbon" (SCC) in their calculations.

A. *Litigation*

1. FERC Administrative Orders

In *Sierra Club v. FERC*, 867 F.3d 1357, (D.C. Cir. 2017), the court held that downstream greenhouse gas (GHG) emissions from burning natural gas received via the Sabal Trail pipeline were reasonably foreseeable indirect impacts of the pipeline project.¹²⁹ Pursuant to that decision, FERC adopted a practice of including in its NEPA reviews information regarding the potential impacts associated with natural gas production and downstream combustion of natural gas even where that use was not reasonably foreseeable or casually related to the proposals at issue.¹³⁰ That practice changed on May 18, 2018, when FERC articulated a new GHG analysis, according to which the Commission will only analyze impacts from upstream production and downstream combustion of natural gas in instances in which there is a causal connection to a specific end-use consumer.¹³¹ FERC's decision was appealed on the grounds that FERC acted in an arbitrary and capricious manner, ignoring its NEPA obligations.¹³² On May 9, 2019, the Court of Appeals for the D.C. Circuit dismissed the lawsuit, titled *Otsego 2000 v. FERC*, on procedural grounds for lack of standing and did not reach the merits of the appeal.¹³³ Subsequently, the court refused to rehear the case en banc on July 22, 2019.¹³⁴ The court, however, did provide some guid-

126. *Id.*

127. An EIS is required for any action that may significantly affect the environment. 42 U.S.C. § 4332(C). The regulations implementing NEPA include a set of "significance factors" to guide the decision whether to prepare an EIS. *See* 40 C.F.R. § 1508.27(b).

128. 40 C.F.R. §§ 1501.3, 1501.4, 1508.13.

129. *Sierra Club v. FERC*, 867 F.3d 1357, 1371 (D.C. Cir. 2017).

130. *Id.*

131. Order Denying Rehearing, *Dominion Transmission, Inc.*, 163 F.E.R.C. ¶ 61,128 (May 18, 2018).

132. Petition, *Otsego 2000 v. FERC*, Docket No. 18-1188 (filed July 16, 2018).

133. *Otsego 2000 v. FERC*, 767 Fed. App'x 19 (D.C. Cir. 2019).

134. *Otsego 2000 v. FERC*, 2019 U.S. App. LEXIS 21831 (July 22, 2019 D.C. Cir.) (*en banc*).

ance to FERC regarding the merits, in the companion case, *Birckhead v. FERC*, argued on the same day as *Otsego 2000 v. FERC* and discussed in detail below.

As to liquefied natural gas (LNG) projects, on February 19, 2019, FERC issued an order approving the Calcasieu Pass LNG project and outlined its analysis associated with LNG projects.¹³⁵ This analysis included estimating the GHG emissions from the project with reference to the national GHG inventory and estimating the qualitative effects of climate change.

2. FERC Case Law

In June 2019, the D.C. Circuit expounded on its *Sierra Club* decision in *Birckhead v. FERC*, suggesting that FERC should attempt to obtain information regarding upstream and downstream impacts of a pipeline project to determine if quantification is possible.¹³⁶ *Birckhead* involved a challenge to FERC's approval of the Tennessee Gas Pipeline Co.'s compressor station, part of the Broad Run Expansion project.¹³⁷ Petitioners argued that FERC violated NEPA by failing to address reasonably foreseeable indirect environmental impacts resulting from increased gas production upstream from the compressor station and increased gas combustion downstream from the facility.¹³⁸ FERC had concluded that the impacts did not qualify as indirect and it did not consider them during the project review.¹³⁹ FERC indicated it lacked the required information to assess those impacts, but the court did not find FERC's argument that asking for such information "would be an exercise in futility" to be persuasive.¹⁴⁰

In *Birckhead*, Petitioners claimed that *Sierra Club* explicitly mandated FERC to consider and quantify those indirect impacts.¹⁴¹ The court rejected that argument, noting that its holding in *Sierra Club* was specific to the facts of that case and did not establish a general rule that downstream gas consumption impacts are *always* reasonably foreseeable indirect impacts.¹⁴² The court likewise rejected other arguments put forward by FERC, including FERC's inability to quantify the impacts based on the unknown identity of gas consumers.¹⁴³ Yet the court explained "[w]e are troubled . . . by the Commission's attempt to justify its decision to discount downstream impacts based on its lack of information about the destination and end use of the gas in question."¹⁴⁴ Although the court did not find FERC's failure to consider upstream and downstream emissions arbitrary

135. Order Granting Authorizations Under Sections 3 and 7 of the Natural Gas Act, *Venture Global Calcasieu Pass, LLC & TransCameron Pipeline, LLC*, 166 F.E.R.C. ¶ 61,144 (2019).

136. *Birckhead v. FERC*, 925 F.3d 510 (D.C. Cir. 2019).

137. *Id.* at 514.

138. Petitioners also asserted other challenges, not relevant here. *Id.*

139. *Id.* at 514.

140. *Id.* at 516-17 ("[W]e are dubious of the Commission's assertion that asking Tennessee Gas to provide additional information . . . would be futile.").

141. *Birckhead*, 925 F.3d at 518.

142. *Id.* at 518-19.

143. *Id.* at 519-20.

144. *Id.*

based on procedural grounds,¹⁴⁵ it indicated that NEPA required FERC to “at least *attempt* to obtain the information necessary to fulfill its statutory responsibilities.”¹⁴⁶ The court added that “an agency must use its best efforts to find out all that it reasonably can.”¹⁴⁷ On July 19, 2019, the Petitioners asked the D.C. Court of Appeals to reconsider the case *en banc*; the court’s decision whether it will accept the petition is forthcoming.¹⁴⁸

In *Township of Bordentown v. FERC*, decided on September 5, 2018, local governments and an environmental organization argued that FERC acted arbitrarily and capriciously in approving a proposed interstate project, the Garden State Expansion.¹⁴⁹ The Third Circuit, however, rejected their challenge that FERC, as part of NEPA’s cumulative effects analysis, improperly considered the project’s impacts separately from impacts from two other pipeline projects, PennEast and Southern Reliability Link Project.¹⁵⁰ Petitioners in that case argued that the review should include the environmental impacts across the entire span of pipelines other than the project under review, because those pipelines will be ultimately part of the same network served by the project.¹⁵¹ The Third Circuit disagreed and found that FERC only needed to review impacts that are likely to occur in the area affected by the project under FERC review.¹⁵² The court explained its rationale by stating that “such an expansive reading of the cumulative impacts requirement ‘draws the NEPA circle too wide for the Commission.’”¹⁵³

3. Other Agencies’ Case Law

In *National Parks Conservation Ass’n v. Semonite*, a U.S. Army Corps of Engineers (Corps) permit allowing construction of electric transmission towers crossing the James River in Virginia was challenged.¹⁵⁴ On March 1, 2019, the Third Circuit Court of Appeals found that the Corps violated NEPA by not preparing an EIS because of the potentially significant impacts caused by the project,¹⁵⁵ focusing on the project’s context (region and locality) and intensity (severity of impact) as outlined in CEQ’s regulations.¹⁵⁶ Under the contextual analysis, the court found that the project’s location in an area of important cultural resources was of central importance.¹⁵⁷ As to intensity, the court focused

145. Because the Petitioners did not argue that FERC’s failure to request this information from the pipeline applicant violated NEPA. *Id.*

146. *Birckhead*, 925 F.3d at 520 (emphasis in original).

147. *Id.* (citing *Barnes v. U.S. DOT*, 655 F.3d 1124, 1136 (9th Cir. 2011)).

148. Petitioners’ Petition for Rehearing and Rehearing *En Banc*, July 19, 2019, in *Birckhead v. FERC*, USCA Case No. 18-1218 (D.C. Cir. 2019).

149. *Township of Bordentown v. FERC*, 903 F.3d 234, 242-43 (3d Cir. 2018).

150. *Id.*

151. *Id.* at 254.

152. *Id.*

153. *Id.*

154. *National Parks Conservation Ass’n v. Semonite*, 916 F.3d 1075 (D.C. Cir. 2019).

155. *Id.*

156. 40 C.F.R. § 1508.27.

157. *National Parks Conservation Ass’n*, 916 F.3d at 1083.

on several factors (based on the list of ten factors in CEQ's regulations), including (1) the level of controversy; (2) "unique characteristics" of the area; and (3) the nature of the potential effect on sites listed or eligible for listing in the National Register of Historic Place.¹⁵⁸ The court ordered the Corps to prepare an EIS.

On March 19, 2019, the District Court of the District of Columbia issued an opinion in *Wildearth Guardians v. Zinke*, finding that the NEPA analysis performed in conjunction with the approval of hundreds of oil and gas leases by the Bureau of Land Management (BLM) was deficient.¹⁵⁹ The court considered arguments regarding whether BLM appropriately analyzed the direct effects, indirect effects, and cumulative effects of the leases in its EAs.¹⁶⁰ As to direct effects, because BLM could have reasonably estimated potential GHG emissions from oil and gas drilling in the aggregate, it could not rely solely on generalized, qualitative discussions of the potential environmental impacts of those emissions.¹⁶¹ Regarding indirect effects, the Court found that the lease sales are a "legally relevant cause" of downstream GHG emissions and it is important for BLM to understand the scope of downstream GHG emissions because BLM is authorized by law to decline to sell the oil and gas leases "if the environmental impact of those leases - including use of the oil and gas produced - would not be in the public's long-term interest."¹⁶²

The court also discussed the requisite level of detail for the analysis of indirect climate impacts.¹⁶³ The court directed BLM to strengthen its discussion of the environmental effects of downstream oil and gas use and to consider whether quantifying downstream GHG emissions is reasonably possible or helpful.¹⁶⁴ Any decision by BLM to forego emissions quantification or to ignore or discount estimates provided by a third party must be "thoroughly explain[ed]."¹⁶⁵ With respect to cumulative impacts of the proposed leases in the EAs, the Court explained that "although BLM may determine that each lease sale individually has a de minimus impact on climate change, the agency must also consider the cumulative impact of GHG emissions generated by past, present, or reasonably foreseeable BLM lease sales in the region and nation."¹⁶⁶ The Court stopped short, however, of requiring BLM to use particular protocols or methodologies such as the SCC model or global carbon budget to determine the impact of the

158. *Id.* at 1083-87.

159. *Wildearth Guardians v. Zinke*, 368 F. Supp. 3d 41, 69 (D.D.C. 2019).

160. *Id.* at 71.

161. *Id.* at 67-71. The court explained that "BLM had at its disposal estimates of (1) the number of wells to be developed; (2) the GHG emissions produced by each well; (3) the GHG emissions produced by all wells overseen by certain field offices; and (4) the GHG emissions produced by all wells in the state. With this data, BLM could have reasonably forecasted, by multiple methods, the GHG emissions to be produced by wells on the leased parcels." *Id.* at 69.

162. *Id.* at 73.

163. *Wildearth Guardians*, 368 F. Supp. 3d at 74.

164. *Id.* at 75.

165. *Id.*

166. *Id.* at 77.

lease sales on climate change.¹⁶⁷ According to the court, the choice of methodology is left to the discretion of the agency and will not be disturbed as long as the decision is well-reasoned.¹⁶⁸

B. Council on Environmental Quality Guidance

As a follow-up to a June 20, 2018 Advance Notice of Proposed Rulemaking¹⁶⁹ to update CEQ's NEPA implementing regulations, on June 26, 2019, the CEQ issued new draft guidance for public comment to further permit streamlining and clarify GHG analysis specifically.¹⁷⁰ The new guidance replaces previous CEQ guidance issued by the Obama Administration¹⁷¹ on how GHG effects should be estimated for projects during NEPA review.

The new proposed guidance encourages federal agencies to use a "rule of reason" in considering impacts of GHG emissions during NEPA review, noting that "agencies preparing NEPA analyses need not give greater consideration to potential effects from GHG emissions than to other potential effects on the human environment." The proposed guidance goes on to state that agencies do not need to prepare cumulative effect analysis under NEPA for GHG impacts of projects, "because the potential effects of GHG emissions are inherently a global cumulative effect." Finally, the new proposed guidance notes that neither NEPA nor CEQ require cost-benefit review, suggesting that therefore federal agencies "need not weigh" costs and benefits using the SCC model "or similar cost metrics."

The new guidance is expected to be challenged in court and, as noted in the draft guidelines, CEQ guidance "is not a rule or regulation" and is not binding on courts or federal agencies such as FERC.

Consistent with the current administration's focus on permit streamlining and energy infrastructure, other federal agencies have established or proposed new exceptions and categorical exclusions for certain facilities.¹⁷²

167. *Id.* at 78.

168. *Wildearth Guardians*, 368 F. Supp 3d at 79.

169. Advance Notice of Proposed Rulemaking, *Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act*, 83 Fed. Reg. 28,591 (2018).

170. Draft Guidance; *Request for Comment, Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions*, 84 Fed. Reg. 30,097 (2019).

171. Notice of Availability, *Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews*, 81 Fed. Reg. 51,866 (2016). The current Administration withdrew the prior (2016) CEQ guidance by an Executive Order (E.O.) signed on April 5, 2017 as part of its efforts to streamline permitting processes for energy projects. Another E.O. signed in 2017 directed federal agencies to improve coordination during NEPA review and, was also intended to streamline permitting. E.O. 13807, 82 Fed. Reg. 40,463 (2017). This E.O. resulted in the Department of Transportation and ten other federal agencies entering into a Memorandum of Understanding on April 10, 2018 that requires a uniform schedule for review and input by federal agencies during the NEPA process. MOU, April 10, 2018.

172. Final Rule, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, 83 Fed. Reg. 19,440 (2018) (exempting small wireless facilities from NEPA review); Notice of Proposed Rule, *National Environmental Policy Act (NEPA) Compliance*, 84 Fed. Reg. 27,544 (2019) (the U.S. Forest Service proposing to establish new categorical exemptions for projects in National Forests).

IV. ENDANGERED SPECIES AND MIGRATORY BIRD TREATY ACTS

On July 25, 2018, the United States Fish & Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) (collectively, Services) jointly proposed revisions to regulations implementing portions of the Endangered Species Act (ESA).¹⁷³ The proposed rules, aimed primarily at streamlining and clarifying the application of the ESA to projects, amend three sets of regulations: (1) the interagency cooperation rules, which relates to agency consultation under ESA Section 7; (2) the regulations governing threatened species; and (3) the regulations for listing species and designating critical habitat.¹⁷⁴ The public comment period closed on September 24, 2018.¹⁷⁵ As expected, a significant number of public comments were received by the Services, with over 65,000 comments.¹⁷⁶ In December 2018, the Services sent final versions of the rules to the White House Office of Management and Budget (OMB) for review before their publication in the Federal Register; however, as of July 31, 2019, OMB has not yet concluded its review despite several indications by the Services that their issuance was imminent in recent months.

Meanwhile, in *Weyerhaeuser Co. v. Fish and Wildlife Service*, 139 S. Ct. 361 (2018), the Supreme Court considered the USFWS' ESA designation of unoccupied habitat for the dusky gopher frog as "critical habitat", which may not be destroyed or adversely modified by any action authorized, funded, or carried out by the federal government.¹⁷⁷ In 2012, the USFWS had designated timberland in Louisiana as critical habitat for the dusky gopher frog—depriving the timber interests owning the property up to \$34 million—despite the area's unoccupied status and lack of biological factors necessary to support the frog.¹⁷⁸

On November 27, 2018, the Supreme Court held that, to be considered critical habitat, an area must first be habitat for a listed species.¹⁷⁹ "Habitat" is not defined by the ESA; therefore, the Court remanded the case to the Fifth Circuit so that the lower court could interpret the meaning of "habitat."¹⁸⁰ The parties

173. Ankur Tohan & Christina Elles, *Trump Administration Finalizes New Endangered Species Act Regulations*, K & L GATES (Oct. 11, 2019), <https://www.jdsupra.com/legalnews/trump-administration-finalizes-new-78324/>.

174. Proposed Rule, *Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation*, 83 Fed. Reg. 35,178 (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 (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 (2018) (to be codified at 50 C.F.R. pt. 17).

175. 83 Fed. Reg. 35,178, at 35,178.

176. Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants, <https://www.regulations.gov/docket?D=FWS-HQ-ES-2018-0007>.

177. 16 U.S.C. § 1536(a)(2).

178. Final Rule, *Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog)*, 77 Fed. Reg. 35,118 (2012).

179. *Weyerhaeuser Co. v. United States Fish and Wildlife Serv.*, 139 S. Ct. 361, 368–69 (2018).

180. *Id.* at 369.

recently settled the case and, as a condition in the settlement, the USFWS agreed to vacate the disputed designation.¹⁸¹

Subsequently, the Services have indicated they plan to publish a proposed rule by the end of the year that would revise the regulations for designating critical habitat.¹⁸² Among other things, these changes will “clarify [the Services’] consideration of the benefits of both including and excluding specific habitat segments in such designations.”¹⁸³ The agencies also plan to publish a proposed rule by the end of the year amending the regulations for issuing incidental taking permits under ESA § 10.¹⁸⁴

The Department of Interior (DOI) also continues to face legal challenges for its December 22, 2017 Migratory Bird Treaty Act (MBTA) M-Opinion¹⁸⁵ (Opinion) re-interpreting the statute’s taking prohibition as not applying to incidental takings, which are those “takings that result from, but are not the purpose of, carrying out an otherwise lawful activity.”¹⁸⁶ Three recently consolidated proceedings brought by environmental groups and several States¹⁸⁷ against the Opinion are pending before the Federal District Court for the Southern District of New York.¹⁸⁸ These challenges dispute the Opinion’s interpretation of the MBTA and its departure from an Obama-era opinion, which interpreted the MBTA as including incidental takings.¹⁸⁹ These lawsuits allege the Trump Administration’s Opinion violates the APA and NEPA, and request the court accordingly vacate it.¹⁹⁰ On July 31, 2019, the court concluded that these challenges could withstand the defendants’ challenge to the plaintiffs’ standing.¹⁹¹ The USFWS has expressed its intention to codify the Opinion in a proposed rule,

181. Consent Decree, *Markle Interests, LLC v. U.S. Fish and Wildlife Serv.*, No. 2:13-cv-00234 (E.D. La. filed July 3, 2019).

182. OFFICE OF INFO. AND REGULATORY AFFAIRS, OFFICE OF MGMT. AND BUDGET, ENDANGERED AND THREATENED WILDLIFE AND PLANTS; REVISION OF THE REGULATIONS FOR DESIGNATING CRITICAL HABITAT (2019), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=1018-BD84>.

183. *Id.*

184. OFFICE OF INFO. AND REGULATORY AFFAIRS, OFFICE OF MGMT. AND BUDGET, ENDANGERED SPECIES ACT SECTION 10 REGULATIONS; EXCEPTIONS REGARDING THE CONSERVATION OF ENDANGERED AND THREATENED SPECIES OF WILDLIFE AND PLANTS (2019), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=1018-BD81>; see 16 U.S.C. § 1539(a)(1)(B).

185. Memorandum from the U.S. Dep’t of Interior, Solicitor’s Opinion M-37050: The Migratory Bird Treaty Act Does Not Prohibit Incidental Take (Dec. 22, 2017), <https://www.doi.gov/sites/doi.gov/files/uploads/m-37050.pdf>.

186. 50 C.F.R. § 402.02 (2019).

187. The State challengers are California, Illinois, Maryland Massachusetts, New Jersey, New Mexico, New York, and Oregon.

188. Opinion and Order, *N. Res. Def. Council, Inc., v. U.S. Dep’t of Interior*, No. 1:18-CV-04596-VEC (S.D.N.Y. filed July 31, 2019).

189. Memorandum from the U.S. Dep’t of Interior, Solicitor’s Opinion M-37041: Incidental Take Prohibited Under the Migratory Bird Treaty Act (Jan. 10, 2017), https://www.eenews.net/assets/2017/02/21/document_ew_01.pdf.

190. *Id.*

191. Opinion and Order, *N. Res. Def. Council, Inc., v. U.S. Dep’t of Interior*, No. 1:18-CV-04596-VEC (S.D.N.Y. filed July 31, 2019).

which it indicated would be published in June 2019, though it has not yet been issued.¹⁹²

192. OFFICE OF INFO. AND REGULATORY AFFAIRS, OFFICE OF MGMT. AND BUDGET, MIGRATORY BIRD PERMITS; REGULATIONS GOVERNING TAKE OF MIGRATORY BIRDS (2019), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=1018-BD76>.

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