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 industries from July 1, 2016 to June 30, 2017.*

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I. TRUMP ADMINISTRATION EXECUTIVE ORDERS

Developments in environmental regulation over the last twelve months fall into two very different patterns depending upon whether they precede or follow the change in Presidential Administration in January 2017.[1] Prior to the change, developments were a continuation of those reported last year as the Obama Administration sought to complete the crafting and implementation of new rules to achieve its environmental objectives.[2] For example, in November 2016, the Obama EPA issued its final information collection request to existing oil and gas facilities to assist in developing fugitive methane and carbon dioxide emission standards for such facilities; and the Department of the Interior issued final rules on natural gas flaring, venting, and leaks related to oil and gas production on Federal and Indian lands.[3]

Since January 2017, the investiture of the Trump Administration prompted a substantial reversal of direction driven by a changed focus—i.e., stressing improved economic activity less burdened by environmental regulation perceived as interfering with that activity.[4] Whereas through Fall 2016, EPA actively developed and adopted new environmental requirements to lessen global warming and other air or water pollution (these new requirements were challenged in the appellate courts), after January 2017, EPA announced its intent to review and revise the Obama Administration rules, delayed early implementation and compliance deadlines for such rules, and further sought delays in appellate litigation to pursue its revision program.

These actions began with a series of Presidential Executive Orders issued days after President Trump's Inauguration.[5] For example, on January 24, 2017, the President issued Executive Order No. 13,766, *Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects*, which describes its purpose as follows:

1. Mark Hand, Repeal of Obama-era Environmental Rules Dominates Trump's Regulatory Agenda: Environmental Groups, Scientists plan to hold Trump Accountable, THINK PROGRESS (July 20, 2017, 9:10 PM), https://thinkprogress.org/trump-releases-deregulatory-agenda-6ad07b7dd28a; Dan Merica, Trump Dramatically Changes US Approach to Climate Change, CNN POLITICS (Mar. 29, 2017, 5:01 AM), http://www.cnn.com/2017/03/27/politics/trump-climate-change-executive-order/index.html.

2. *Report of the Environmental Regulation Committee*, 37 ENERGY L.J. 2 (2016) [hereinafter 2016 Committee Report].

3. Notice Regarding Withdrawal of Obligation to Submit Information, 82 Fed. Reg. 12,817 (2017); Final Rulemaking, General Revisions and Non-Federal Oil and Gas Rights, 81 Fed. Reg. 77,972 (2016) (to be codified at 36 C.F.R. pts. 1, 9); Final Rulemaking, Management of Non-Federal Oil and Gas Rights, 81 Fed. Reg. 79,948 (2016) (to be codified at 50 C.F.R. pts. 28-29); Final Rulemaking, Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 83,008 (2016) (to be codified at 43 C.F.R. pts. 3100, 3160, 3170).

4. Hand, *supra* note 1, at 2.

5. Rebecca Harrington, *Trump Signed 90 Executive Actions in his First 100 Days — Here's What Each One Does*, BUSINESS INSIDER (May 3, 2017, 11:07 AM), http://www.businessinsider.com/trump-executive-orders-memorandum-proclamations-presidential-action-guide-2017-1.

> Infrastructure investment strengthens our economic platform, makes America more competitive, creates millions of jobs, increases wages for American workers, and reduces the cost of goods and services for American families and consumers. Too often, infrastructure projects in the United States have been routinely and excessively delayed by agency processes and procedures. These delays have increased project costs and blocked the American people from the full benefits of increased infrastructure investments, which are important to allowing Americans to compete and win on the world economic stage. Federal infrastructure decisions should be accomplished with maximum efficiency and effectiveness, while also respecting property rights and protecting public safety and the environment.[6]

The order provides a procedure by which the Chairman of the White House Council on Environmental Quality, at the request of a State Governor or certain others, may designate a particular project as "high priority" based on consideration of its "importance to the general welfare, value to the Nation, environmental benefits, and such other factors as the Chairman deems relevant."[7] Once a project is so designated, "expedited procedures and deadlines for completion of environmental reviews and approvals for such projects" are to be established, and written explanations are to be provided by the Agency Head "explaining the causes for [any] delay."[8] Employing the spirit of these new procedures, the Administration urged the permitting of two oil pipeline projects (Dakota Access & Keystone XL) long denied necessary approvals under the Obama Administration, which permits were subsequently issued despite strong environmentalist opposition.[9]

On January 30, 2017 and again on February 24, 2017, the Trump Administration issued two additional Executive Orders with a similar objective of assuring that federal regulation not burden the American public with unnecessary costs or project delays or interfere with economic activity.[10] In Executive Order No. 13,771, *Reducing Regulation and Controlling Regulatory Costs*, the Administration stated:

> [I]t is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations. Toward that end, it is important that for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.[11]

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6. Exec. Order No. 13,766 § 1, 82 Fed. Reg. 8,657 (Jan. 30, 2017).

7. *Id.*

8. *Id.*

9. Memorandum from President Donald Trump to Secretary of the Army, 82 Fed. Reg. 11,129 (Feb. 17, 2017); Memorandum from President Donald Trump to the Secretaries of State, Army & Interior, 82 Fed. Reg. 8,663 (Jan. 30, 2017).

10. Exec. Order No. 13,771 § 1, 82 Fed. Reg. 9,339 (Jan. 30, 2017); Exec. Order 13,777 §§ 1-3, 82 Fed. Reg. 12,285 (Feb. 24, 2017).

11. 82 Fed. Reg. 9,339, 9,339. This order is presently being challenged at the U.S. District Court for the District of Columbia in *Public Citizen v. Trump*, No. 17-00253 RDM (filed Feb. 8, 2017). Plaintiffs assert that the Order is unlawful because it preempts statutory requirements (i.e., the Clean Air & Clean Water Acts) implemented by regulation, and for other reasons. Declaratory and injunctive relief is sought. The Administration is

The order establishes an annual budgeting process whereby each agency or executive department is provided a budgeted allowance for the net cost of new regulations (i.e., the cost of a new regulation less the cost savings from the two regulations eliminated), and further specifies that the net cost for all such regulatory changes in 2017 will be zero.[12] An exception is provided for new regulations mandated by law, as well as regulation categories exempted by the Director of the Office of Management and Budget (OMB), who is responsible for providing guidance to implement the order.[13]

Executive Order No. 13,777, *Presidential Executive Order on Enforcing the Regulatory Reform Agenda*, requires agencies to designate Regulatory Reform Officers and establish Regulatory Reform Task Forces, which are directed to evaluate existing Agency regulations to identify those which "eliminate jobs[] or inhibit job creation; are outdated, unnecessary or ineffective; impose costs that exceed benefits" or infringe upon other specified values.[14] The task forces are further directed to issue reports on each agency's progress toward implementing these regulatory reform objectives and to identify regulations for repeal or replacement.[15] Performance indicators to measure this progress are added to the Agency's Annual Performance Plan.[16]

On March 24, 2017, EPA Administrator Scott Pruitt issued a Memorandum entitled *Executive Order 13,777: Enforcing the Regulatory Reform Agenda* implementing the directives in these two Executive Orders, designating an EPA Regulatory Reform Officer and establishing the required Regulatory Reform Task Force.[17] The Memorandum further requires that major EPA Offices (i.e. Air and Radiation, Water, etc.) provide recommendations to the Task Force on specific rules to be considered for repeal or replacement, and to establish public consultation procedures to obtain input from those affected by EPA regulations.[18] A similar process has been initiated by the Department of the Interior.[19]

Three additional Executive Orders were issued during this time frame addressing specific environmental and energy related matters, and proposing review

seeking dismissal for lack of jurisdiction and ripeness (i.e., no regulation has yet been adversely affected by the Order). *See Seeing Appeal, Judge Rejects DOJ Bid To Stay Suit On Trump's 2-for-1 Order*, INSIDEEPA (May 23, 2017), https://insideepa.com/daily-news/seeing-appeal-judge-rejects-doj-bid-stay-suit-trumps-2-1-order.

12. 82 Fed. Reg. at 9,339.

13. *Id.*

14. Exec. Order No. 13,777, §§ 2, 3; 82 Fed. Reg. 12,285 (Mar. 1, 2017).

15. *Id.* at 12,286.

16. *Id.* Guidance in implementing these requirements has been issued by OMB. *See* Memorandum from Dominic J. Mancini to Regulatory Reform Officers and Regulatory Policy Officers at Executive Departments and Agencies (Apr. 28, 2017); *OMB Guide Highlights Burdens EPA Faces Issuing Rules Under 2-1 Order*, INSIDEEPA (May 1, 2017), https://insideepa.com/daily-news/omb-guide-highlights-burdens-epa-faces-issuing-rules-under-2-1-order.

17. Memorandum from E. Scott Pruitt to Acting Deputy Administrator (Mar. 24, 2017).

18. *Id.* at 4; Request for Comment, Evaluation of Existing Regulations, 82 Fed. Reg. 17,793 (Apr. 13, 2017); Press Release, EPA, News Release from Headquarters - Regulatory Reform Underway at EPA; *Environmentalists Detail Legal Arguments Against 'Arbitrary' EPA Rule Proposal*, INSIDEEPA (May 17, 2017), https://insideepa.com/daily-news/environmentalists-detail-legal-arguments-against-arbitrary-epa-rule-repeal. 55,000 comments have been received, the great majority of which seek preservation of existing regulations.

19. DEP'T OF THE INTERIOR: REGULATORY REFORM IMPLEMENTATION, https://www.doi.gov/regulatory-reform/implement (last visited July 30, 2017).

or reversal of associated Obama-era regulations. These include Executive Order No. 13,778, *Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the Waters of the United States Rule*; Executive Order No. 13,783, *Promoting Energy Independence and Economic Growth*; and Executive Order No. 13,795, *Implementing an America-First Offshore Energy Strategy*.[20] The implementation of these orders is discussed in later sections of this Report. However, four matters with potential broad significance to Trump Administration future environmental regulation deserve mention here.

First, section 3 of Executive Order No. 13,783, *Promoting Energy Independence and Economic Growth*, revoked or rescinded a substantial body of Obama Administration guidance requiring federal departments and agencies to consider the effect of their actions on climate change.[21] The numerous reports and directives revoked or rescinded by President Trump include, for example, Executive Order No. 13,653, *Preparing the United States for the Impacts of Climate Change*, and the Council on Environmental Quality's final guidance on how federal departments and agencies were to consider GHG emission reduction and the effects of climate change in National Environmental Policy Reviews.[22]

Second, section 5 of President Trump's Executive Order on *Energy Independence* also withdrew the enhanced social cost of carbon metrics the Obama Administration developed for use in regulatory impact and cost benefit analyses, finding those metrics were "no longer representative of governmental policy," and returning to the Bush-era analysis (OMB Circular A-4 of September 17, 2003) described as "widely accepted for more than a decade as embodying the best practices for conducting regulatory cost-benefit analysis."[23] Reverting to the Bush-era method is expected to limit the actions that could be considered cost-effective mitigation options for climate change and other environmental matters.[24]

Third, as subsequent discussion will show, opponents of the Trump Administration initiatives are vigorously engaged in appellate litigation designed to prevent the reconsideration or withdrawal of Obama Administration rules or stays in compliance deadlines with those rules. EPA has sought to stay this litigation, but often without success. Temporary stays have been granted, but these are ending and it is unclear whether the Courts will continue them.

Consistent with its deregulatory agenda, the Trump Administration has also proposed a major reduction in EPA's operating budget from $8.04 billion to $5.65

20. Exec. Order 13,778, 82 Fed. Reg. 12,497 (Mar. 3, 2017); Exec. Order 13,783, 82 Fed. Reg. 16,093 (Mar. 31, 2017); Order 13,795, 82 Fed. Reg. 20,815 (May 3, 2017).

21. 82 Fed. Reg. 16,093 at 16,094. President Trump signed Exec. Order 13,783 while visiting EPA Headquarters on March 28, 2017. *See* News Release, EPA, EPA to Review Clean Power Plan under President Trump's Executive Order (Mar. 28, 2017). Administrator Pruitt is quoted in the Release as ascribing the following significance to the President's action: "[T]he [P]resident, by his signature today is rejecting the narrative that this country cannot be both pro-energy and pro-environment. We have done that throughout our history. We can actually achieve good jobs, good growth and pro-energy policies at the same time as protecting our environment."

22. Exec. Order 13,653, 78 Fed. Reg. 66,819 (Nov. 6, 2013); Memorandum from Christina Goldfuss to Heads of Fed. Dep'ts & Agencies (Aug. 1 2016).

23. 82 Fed. Reg. 16,093 at 16,095-96; *see also Legal Hurdles Await as Trump Scraps Agency Tools to Weigh GHG Impacts*, INSIDEEPA *(*Mar. 30, 2017), https://insideepa.com/daily-news/legal-hurdles-await-trump-scraps-agency-tools-weigh-ghg-impacts.

24. Legal Hurdles Await, *supra* note 23.

billion for fiscal year 2018.[25] Early evidence of Congressional reaction indicates that the proposed 31% reduction will not be approved as early House Committee action proposes an EPA fiscal year 2018 budget of $7.5 billion or only a 7% reduction.[26]

EPA Administrator Pruitt has initiated a number of actions to implement both the philosophy and specifics of the Administration's Executive Orders.[27] For example, in early April, he launched a "Back-to-Basics Agenda" to refocus EPA upon its intended Mission as viewed by the Administration.[28] "[T]he Agenda focuses on the three E's: Environment - Protecting the environment; Economy - Sensible regulations that allow economic growth; and Engagement - Engaging with state and local partners."[29] Additional objectives of the Agenda include returning power and decision-making authority on environmental issues to the states and creating an environment where jobs and the economy can grow.[30] A revision to the Obama-developed EPA FY14-18 Strategic Plan to render it consistent with the Administration's Executive Orders, and by particularly reducing its focus on climate change mitigation, has also been prepared.[31]

II. OIL & GAS

A. Methane Emission Regulations

As explained in last year's Committee Report, the Obama Administration adopted a final rule in May 2016 requiring "'new, modified and reconstructed equipment, processes and activities' in the oil and gas industr[ies]" to achieve specified methane and other emission limits.[32] "This New Source Performance Standard" was expected, along with other actions, to reduce such emissions from

25. *White House Rejects Calls to Maintain Popular EPA Programs in FY18 Budget*, INSIDEEPA (May 23, 2017), https://insideepa.com/daily-news/white-house-rejects-calls-maintain-popular-epa-programs-fy18-budget.

26. *White House Rejects Calls to Maintain Popular EPA Programs in FY18 Budget*, *supra* note 25; *Amid Sea of Cuts, FY 18 Budget Seeks To Boost Funds For Reshaping EPA*, INSIDEEPA (May 23, 2017), https://insideepa.com/daily-news/amid-sea-cuts-fy18-budget-seeks-boost-funds-reshaping-epa (stating that the Trump budget proposes a 25% reduction in the EPA workforce); *House Bill Would Cut EPA's FY18 Funds, But Far Less than Trump Sought*, INSIDEEPA (July 11, 2017), https://insideepa.com/daily-news/house-bill-would-cut-epas-fy18-funds-far-less-trump-sought.

27. *See* EPA: COMPLYING WITH PRESIDENT TRUMP'S EXECUTIVE ORDER ON ENERGY INDEPENDENCE, https://www.epa.gov/energy-independence (last visited Oct. 6, 2017).

28. EPA: *BACK-TO-BASICS AGENDA*, https://www.epa.gov/home/back-basics-agenda (last visited Oct. 17, 2017); Press Release, EPA, *EPA Launches Back-to-Basics Agenda at Pennsylvania Coal Mine* (Apr. 13, 2017); Press Release, EPA, *EPA Administrator Brings Back-to-Basics Agenda to Missouri Power Plant* (Apr. 20, 2017).

29. Back-to-Basics Agenda, *supra* note 28.

30. *Id.*

31. *See Pruitt Sets Longer-Term Plans to Remake EPA, Secure Deregulatory Agenda*, INSIDEEPA (July 13, 2017), https://insideepa.com/daily-news/pruitt-sets-longer-term-plans-remake-epa-secure-deregulatory-agenda.

32. 2016 Committee Report, *supra* note 1, at 2-3. The Final Rule was appealed to the D.C. Circuit by several industry groups in August 2016. This appeal has been held in abeyance at the request of EPA as the result of a Mid-May Order by the Court. *See* American Petroleum Inst. v. EPA, Docket No. 13-1108 (May 16, 2016) (quoting Final Rulemaking, Emission Standards for New, Reconstructed, and Modified Sources, 81 Fed. Reg. 35,824, 35,825 (June 3, 2016) (to be codified at 40 C.F.R. pt. 60).

the oil and gas industry by 40 to 45%.[33] In addition, EPA issued an Information Collection Request to obtain data necessary to define an emission limitation for existing oil and gas facilities.[34]

On March 28, 2017, the new Administration issued Executive Order No. 13,783, *Promoting Energy Independence and Economic Growth*. That Order states:

> It is in the national interest to promote clean and safe development of our Nation's vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation. . . .
>
> It is further in the national interest to ensure that the Nation's electricity is affordable, reliable, safe, secure, and clean, and that it can be produced from coal, natural gas, nuclear material, flowing water, and other domestic resources, including renewable sources.
>
> Accordingly, it is the policy of the United States that executive departments and agencies . . . immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law.[35]

Agency Heads are directed to immediately review all existing regulations, agency guidance or other actions that may burden the development or use of domestically produced energy ("with particular attention to oil, natural gas, coal and nuclear"), excepting agency actions mandated by law or necessary for the public interest.[36] Agency Heads are to submit a draft and then a final Report (i.e., by late September 2017) stating the results of this review, and shall suspend, rescind or revise any actions/regulations found to violate the Executive Order's policy standard.[37] OMB is to monitor and manage this reporting process, and has provided guidance as to how it should be conducted.[38]

Section 7 of the order directs EPA to "review the final rule entitled 'Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified

33. 2016 Committee Report, *supra* note 1, at 2-3.

34. *Id.* at 3.

35. 82 Fed. Reg. 16,093 at 16,093. The Order continues in subsections (d) & (e) to provide that agencies "should take appropriate actions to promote clean air and clean water for the American people," and that "necessary and appropriate environmental regulations . . . [which] . . . are of greater benefit than cost" and which "achieve environmental improvements for the American people" based on the "best available peer-reviewed science and economics," comply with the law.

36. *Id.* § 2.

37. *Id.*

38. *Id.*; Memorandum from Dominic J. Mancini, *supra* note 16; *OMB Guide Seeks to Strictly Enforce Trump's Energy Independence Order,* INSIDEEPA (May 11, 2017), https://insideepa.com/daily-news/omb-guide-seeks-strictly-enforce-trumps-energy-independence-order.

Sources,'" and either suspend, revise or rescind the rule and related guidance if inconsistent with the administration's new policy or publish notice in the Federal Register of its intent to do so.[39] On April 4, 2017, EPA published notice that "it is reviewing the 2016 Oil and Gas New Source Performance Standards and, if appropriate, will initiate . . . proceedings to suspend, revise or rescind [them]."[40] EPA provided the following statement of the criteria that it will use:

> In conducting this review, EPA will follow each of the principles and policies set forth in the Executive Order. . . . The Agency will reevaluate whether this Rule or alternative approaches are appropriately grounded in EPA's statutory authority and consistent with the rule of law. The EPA will assess whether this Rule or alternative approaches would appropriately promote cooperative federalism and respect the authority and powers that are reserved to the States. EPA will also examine whether this Rule or alternative approaches effect the Administration's dual goals of protecting public health and welfare while also supporting economic growth and job creation. EPA will review whether this Rule or alternative approaches appropriately maintain the diversity of reliable energy resources and encourage the production of domestic energy sources to achieve energy independence and security.[41]

EPA subsequently granted petitions for reconsideration of several aspects of the Emissions Standards rule (including its fugitive emissions limitation), and granted a stay of the rule's compliance deadlines (i.e., June 2017).[42] EPA has also issued proposed rules staying the effectiveness of the Rule.[43] Earlier, EPA had withdrawn its Information Collection Request seeking data to permit establishment of emission limitations for existing oil and gas facilities, noting that it was doing so to permit Administrator Pruitt to reassess the need for that information, in light of the multi-million dollar cost to industry of providing the data and following a request by nine Attorneys General and two Governors that it take that action.[44]

Environmentalists immediately appealed EPA's action staying the Oil and Natural Gas Performance Standards and, on July 3, 2017, the D.C. Circuit reversed, concluding in a 2-1 decision that Clean Air Act section 307 (d)(7)(B), the authority cited by EPA to support its granting of the stay during its reconsideration

39. *Id.* at 7.

40. Proposed Rule, Review of the 2016 Oil and Gas New Source Performance Standards for New, Reconstructed, and Modified Sources, 82 Fed. Reg. 16,331 (2017).

41. *Id.* at 16,332. The Proposed Rule further notes that EPA "will assess this [r]ule and alternative approaches to determine whether they will provide benefits that substantially exceed their costs."

42. Letter from EPA Administrator E. Scott Pruitt, Convening a Proceeding for Reconsideration of Final Rule, "Oil and Natural Gas Sector Emission Standards for New, Reconstructed and Modified Sources;" Press Release, Reconsideration of Final Rule, Oil & Natural Gas Sector: Emission Standards for New, Reconstructed and Modified Sources (2017).

43. Proposed Rule, Oil & Natural Gas Sector: Emission Standards for New, Reconstructed and Modified Sources: Stay of Certain Requirements, 82 Fed. Reg. 27,645 (June 16, 2017); Proposed Rule, Oil & Natural Gas Sector: Emission Standards for New, Reconstructed and Modified Sources: Three Month Stay of Certain Requirements, 82 Fed. Reg. 27,641 (June 16, 2017).

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

of the Rule, was not applicable.[45] EPA had determined that a number of industry objections to the Rule either did not arise until after or could not practically be presented during EPA's consideration of the Rule's adoption, the standard stated in the section for granting a stay.[46] The majority disagreed, finding that the objections had or could have been raised.[47] Also, a coalition of fifteen Attorneys General submitted a June 29 letter to EPA threatening suit over its failure to proceed to develop and implement methane emission limitations applicable to existing oil and natural gas facilities.[48]

B. Offshore Oil and Gas Leases

On April 28, 2017, the Trump Administration, under the Outer Continental Lands Act, issued Executive Order No. 13,795, *Implementing an America-First Offshore Energy Strategy*.[49] The Order states the following Findings and Policy:

> America must put the energy needs of American families and businesses first and continue implementing a plan that ensures energy security and economic vitality for decades to come. The energy and minerals produced from lands and waters under Federal management are important to a vibrant economy and to our national security. Increased domestic energy production on Federal lands and waters strengthens the Nation's security and reduces reliance on imported energy. Moreover, low energy prices, driven by an increased American energy supply, will benefit American families and help reinvigorate American manufacturing and job growth. . . .
>
> It shall be the policy of the United States to encourage energy exploration and production, including on the Outer Continental Shelf, in order to maintain the Nation's position as a global energy leader and foster energy security and reliance for the benefit of the American people, while ensuring that any such activity is safe and environmentally responsible.[50]

The Order directs the Secretary of the Interior — and, where appropriate, the Secretary of Commerce — to revise the schedule of proposed offshore oil and gas lease sales to include annual lease sales in the western and central Gulf of Mexico, Chukchi Sea, Beaufort Sea, Cook Inlet and the Mid- and South Atlantic.[51] It further directs the appropriate Secretary to develop and adopt a streamlined permitting approach for privately funded seismic data research and collection to determine the offshore energy resource potential of these offshore areas; directs the Agencies to refrain from designating or expanding National Marine Sanctuaries unless a full accounting of any energy or mineral resource potential for the area

45. Clean Air Act Council v. EPA, No. 17-1145 (D.C. Cir. 2017). The Court suspended its mandate for 14 days to permit EPA time to appeal its ruling.

46. *Id.* at 14.

47. *Id.* at 20.

48. *States Eye Suit Over EPA Delay Crafting Methane Rule for Existing Drilling,* INSIDEEPA (July 7, 2017), https://insideepa.com/daily-news/states-eye-suit-over-epa-delay-crafting-methane-rule-existing-drilling.

49. 43 U.S.C. § 1331 (2014); Exec. Order No. 13,795, 82 Fed. Reg. 20,815 (May 3, 2017).

50. *Id*. §§ 1, 2.

51. *Id.* § 3.

has been completed and evaluated; directs that a review be completed within 180 days of all prior such designations and designations of Marine National Monuments to include an analysis of lost opportunities for energy production or mineral exploitation; and directs reconsideration of six additional federal rules or actions intended to protect offshore environments to ensure that unnecessary interference with energy and mineral production is avoided.[52]

On May 1, 2017, Secretary Zinke signed Secretarial Order 3,350 to implement the Executive Order including development of a revision of the Obama-era 2017-2022 Five Year Outer Continental Shelf Leasing Program to consider expanding leasing in the five areas noted above (under current rules 94% of existing shelf lands are off limits for energy production), resume consideration of applications for permits to conduct seismic studies to establish the magnitude of energy resources present in the regions (existing data having been developed from studies 30 years ago) and to review the Rules identified in the Order for possible reconsideration.[53]

C. Regulations Affecting Oil & Natural Gas Production & Flaring on Federal Lands

Section 7 of Executive Order 13,783 also directs the Secretary of the Interior to review three rules governing emissions from the production of oil and gas on Federal and Indian lands, including permissible flaring or venting of natural gas in such operations.[54] Two of the Rules update existing 50-year-old regulations having the same purpose, with revisions intended to reflect modern well equipment, operating procedures and environmental protections and laws.[55] Oil and gas operations regulated are operations by private entities that own the mineral rights under land owned or administered by the federal government.[56] Such Operators are required to file a plan of operation for approval, which plan must demonstrate that park resources and values will be protected, and may further be required to obtain a drilling and production permit under certain conditions.[57] A performance bond may also be required.[58] The third rule seeks to reduce wastage of natural gas from venting, flaring and leaks, limiting the circumstances when venting and flaring is permitted and requiring periodic inspections for leaks and corrective actions where leaks are found.[59] The regulation also clarifies when produced gas lost

52. *Id.* §§ 3-11.

53. Press Release, Dep't of the Interior, Secretary Zinke Commends President Trump's Offshore Executive Order (Apr. 28, 2017); Press Release, Dep't of the Interior, Interior Department Advances America-First Offshore Energy Strategy (May 10, 2017); Press Release, Dep't of the Interior, President Trump and Secretary Zinke Open up Comment Period for New 5-Year National Offshore Oil and Gas Leasing Program (June 29, 2017).

54. Exec. Order No. 13,783, *supra* note 20, § 7(b).

55. General Provisions and Non-Federal Oil and Gas Rights, 81 Fed. Reg. 7,792 (Nov. 4, 2016); Final Rulemaking, Management of Non-Federal Oil and Gas Rights, 81 Fed. Reg. 79,948 (Nov. 14, 2016) (to be codified at 50 C.F.R. pts. 28-29).

56. 81 Fed. Reg. at 7,792.

57. *Id.*

58. *Id.*

59. Final Rulemaking, Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 83,008 (Nov. 18, 2016) (to be codified at 43 C.F.R. pts. 3100, 3160, 3170).

through flaring, venting and leaks nevertheless must be the subject of royalty payments.[60]

III. ELECTRIC GENERATION

A. Climate Change

1. The Paris Accord

The 21st Conference of the Parties under the United Nations Framework Convention on Climate Change (UNFCC), also known as the Paris Agreement, is in full force.[61] Out of 197 Parties, 154 have ratified the Paris Agreement representing the required level of World GHG emissions.[62] The first session of the Conference of the Parties that were part of the Paris Agreement took place in Marrakech, Morocco in conjunction with COP 22 in November 2016.[63]

One of the components of the Paris Agreement is the submission of Intended Nationally Determined Contributions (INDCs), a requirement that asks all Parties to put forth their climate action plans to reduce greenhouse gas emissions.[64] These INDCs are "recorded in a public registry maintained by the [S]ecretariat."[65] To date, 147 Parties have submitted their first INDCs.[66]

China, the largest emitter of CO_2 emissions, submitted its INDC in June 2015.[67] Among its key goals, China commits to peaking CO_2 emissions by approximately 2030 or sooner; lower CO_2 emissions per unit of GDP by 60% to 65% from 2005 levels, and to increase the share of non-fossil fuels in China's energy mix by 20%.[68] India, the third largest producer of greenhouse gas emissions, submitted its INDC in October 2015.[69] Among its key targets, India plans to increase the share of non-fossil fuel based power capacity by 40%, reduce emissions intensity by 33% to 35% from 2005 levels by 2030, and sequester carbon by creating carbon sinks of 2.5 to 3 billion tons of CO_2 equivalent by increasing forest cover.[70]

60. *Id.*

61. UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE: UNFCCC — 20 YEARS OF EFFORT AND ACHIEVEMENT, http://unfccc.int/timeline (last visited Oct. 16, 2017).

62. *Id.*

63. UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE: MARRAKECH CLIMATE CHANGE CONFERENCE — NOVEMBER 2016, http://unfccc.int/meetings/marrakech_nov_2016/meeting/9567.php (last visited July 30, 2017).

64. UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, PARIS AGREEMENT, http://unfccc.int/files/home/application/pdf/paris_agreement.pdf (last visited Oct. 16, 2017).

65. *Id.*

66. UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, INDCS AS COMMUNICATED BY PARTIES, http://www4.unfccc.int/Submissions/INDC/Submission%20Pages/submissions.aspx (last visited Oct. 16, 2017).

67. ENHANCED ACTIONS ON CLIMATE CHANGE: CHINA'S INTENDED NATIONALLY DETERMINED CONTRIBUTIONS, http://www4.unfccc.int/Submissions/INDC/Published%20Documents/China/1/China's%20INDC%20-%20on%2030%20June%202015.pdf (last visited July 30, 2017).

68. *Id.*

69. INDIA'S INTENDED NATIONALLY DETERMINED CONTRIBUTION: WORKING TOWARDS CLIMATE JUSTICE, http://www4.unfccc.int/ndcregistry/PublishedDocuments/India%20First/INDIA%20INDC%20TO%20UNFCCC.pdf (last visited July 29, 2017).

70. *Id.*

The United States submitted its INDC in March 2015 which called for a reduction in greenhouse gas emissions by 26 to 28% below 2005 levels by 2025.[71]

In June 2017, President Trump announced his decision to withdraw the United States from the Paris Agreement citing unfair requirements imposed on the U.S. and potential for damage to the U.S. economy and workforce.[72] The withdrawal also eliminates United States support for the Green Climate Fund.[73]

Other countries, along with individual states and municipalities in the United States, are moving forward.[74] On June 6-8, 2017, China hosted a high-level meeting for energy ministers to discuss ways to deploy clean energy.[75] California Governor Jerry Brown signed an agreement to work with China to lower greenhouse gas emissions and expand cooperation between China and California on renewable energy, zero-emission vehicles, and low-carbon development.[76] Moreover, a coalition of mayors, governors, university presidents, and businesses led by Michael Bloomberg submitted a statement of unity stating that much of America is still in the Paris Agreement despite the decision made by the President.[77] The coalition plans to submit a pledge, followed by an INDC, which will aggregate climate action plans of these stakeholders.[78] The UNFCC currently lacks a framework to accept submissions from non-national governments and it is unclear how the aggregated emissions reduction will be tracked.[79]

Despite efforts to ensure that the goals of the Paris Agreement are implemented, there is no enforcement mechanism and the agreement is non-binding.[80] In June 2017, the European Parliament voted to make the targets to curb greenhouse gas emissions of the European Union members legally binding.[81] Sweden,

71. UNITED STATES INTENDED NATIONALLY DETERMINED CONTRIBUTION, http://www4.unfccc.int/ndcregistry/PublishedDocuments/United%20States%20of%20America%20First/U.S.A.%20First%20NDC%20Submission.pdf (last visited July 29, 2017).

72. THE WHITE HOUSE: STATEMENT BY PRESIDENT TRUMP ON THE PARIS CLIMATE ACCORD, https://www.whitehouse.gov/the-press-office/2017/06/01/statement-president-trump-paris-climate-accord (last visited July 29, 2017).

73. *Id.*

74. CLEAN ENERGY MINISTERIAL 8 (CEM8), http://cleanenergyministerial.org/News/cem8-the-clean-energy-challenge-demands-shared-global-leadership-84057 (last visited July 29, 2017).

75. *Id.*

76. Press Release, Office of Governor Edmund G. Brown, Jr., Governor Brown Meets with President Xi of the People's Republic of China, Signs Agreement With National Government To Boost Green Technology (June 6, 2017).

77. *Mike Bloomberg Sends Statement to the United Nations Following Unprecedented Outpouring of Support for Paris Agreement*, MIKE BLOOMBERG (June 5, 2017), https://www.mikebloomberg.com/news/mike-bloomberg-sends-statement-united-nations-following-unprecedented-outpouring-support-paris-agreement (last visited July 29, 2010). Michael Bloomberg serves as the United Nations Secretary-General's Special Envoy for Cities and Climate Change.

78. *Id.*

79. *Id.*

80. John Cassidy, *A Skeptical Note on the Paris Climate Deal*, NEW YORKER (Dec. 14, 2015), https://www.newyorker.com/news/john-cassidy/skeptical-note-paris-climate-deal.

81. TEXT ADOPTED: BINDING ANNUAL GREENHOUSE GAS EMISSION REDUCTIONS TO MEET COMMITMENTS UNDER THE PARIS AGREEMENT (2017); Press Release, European Parliament, Paris Agreement: Parliament Backs New Carbon Cuts, Debates U.S. Withdrawal (June 14, 2017).

Germany, and France are the only European countries on track to meet their targets.[82] The other 27 countries that account for 60% of European emissions are lagging behind.[83] China and India, by contrast, are ahead of their implementation timelines.[84]

Despite these efforts, scientists indicate they are insufficient to keep the temperature rise below 2 degrees Celsius over preindustrial levels.[85] The UNFCC will review the status of party efforts to meet the Paris Accord emission reduction objectives (through the INDC submissions) in 2018 and subsequently every five years. Such reviews are intended to encourage members to advance their emission reduction efforts such that Accord Objectives will ultimately be achieved. [86]

The international community has also made progress in protecting the ozone layer by adopting amendments to the Montreal Protocol of 1987, in which countries agreed to phase out the production of ozone-depleting substances.[87] Since then, the Montreal Protocol has gone through eight revisions. The United Nations Environment Programme (UNEP) estimates that the ozone layer is slowly recovering and will return to 1980 levels between 2050 and 2070.[88] In October 2016, the Parties to the Montreal Protocol convened in Kigali, Rwanda to make an amendment to phase out the production and consumption of hydrofluorocarbons (HFCs) according to specific timetables.[89]

The International Civil Aviation Organization (ICAO) met in October 2016 to undertake new global market-based measures (GMBM) to control CO_2 emissions.[90] In March 2017, the ICAO Council adopted new aircraft CO_2 emissions standards which will apply to new aircraft designs from 2020.[91]

2. EPA Clean Power Plan

The Obama Administration's Clean Power Plan comprises three separate rulemakings, two of which were final rules and one of which was only proposed

82. Press Statement, Carbon Market Watch, Just Three EU Countries Step up to the Plate for Paris Climate Deal – Ranking (Mar. 28, 2017).

83. *Id.*

84. CLIMATE ACTION TRACKER, http://climateactiontracker.org/countries/india.html (last visited July 29, 2017).

85. ENERGY INFORMATION ADMINISTRATION: WORLD ENERGY OUTLOOK 2016, https://www.iea.org/newsroom/news/2016/november/world-energy-outlook-2016.html (last visited July 30, 2017).

86. *Id.*

87. Press Release, UNEP Newscentre, Ozone Layer on Track to Recovery: Success Story Should Encourage Action on Climate (September 10, 2014).

88. *Id.*

89. United Nations Environment Programme, *The Kigali Amendment to the Montreal Protocol: Another Global Commitment to Stop Climate Change*, UNEP NEWSCENTRE (Dec. 2016), http://www.unep.org/africa/news/kigali-amendment-montreal-protocol-another-global-commitment-stop-climate-change.

90. INTERNATIONAL CIVIL AVIATION ORGANIZATION: 39TH TRIENNIAL ASSEMBLY, https://www.icao.int/Meetings/a39/Pages/default.aspx (last visited July 29, 2017).

91. Press Release, International Civil Aviation Organization, ICAO Council Adopts New CO_2 Emissions Standard for Aircraft (Mar. 6, 2017).

when that administration ended.[92] These three rules established new source performance standards respecting greenhouse gases (GHG) for electric generating units under Clean Air Act section 111(b), emission limitations upon those same pollutants for existing generation under Clean Air Act section 111(d), and a back-up federal program to impose GHG emission limitations if state regulation proved insufficient to achieve reductions needed to satisfy United States commitments under the Paris Accord.[93]

Section 4 of Executive Order No. 13,783 directs the EPA to review each of the three Clean Power Plan Rules and to suspend, revise, or rescind such rules or other actions found inconsistent with the Trump Administration's objectives set forth in that Order.[94] EPA acted immediately to implement these directives.[95] On April 3, 2017, EPA published a notice withdrawing proposed rules to establish a back-up federal program as described above, associated model trading rules and a Clean Energy Incentive Program designed to encourage actions to mitigate climate change in low-income communities.[96] EPA explained that further review of the proposed rules was required against the policies established in the Executive Order, adding that the withdrawn rules were designed to support the two final Clean Power Plan rules that EPA also intended to review during a stay granted by the Supreme Court.[97]

On April 4, 2017, EPA announced it would review both of the final Clean Power Plan rules issued by the Obama Administration — the new source performance standard and the emission limitations for existing generation.[98] EPA cited the need to examine the consistency of the rules with the policies adopted in Executive Order No. 13,783 and further noted that EPA's authority to issue those

92. Final Rulemaking, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60); Final Rulemaking, Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,509 (Oct. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 70-71); Proposed Rule, Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014, 80 Fed. Reg. 64,966 (Oct. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 62, 75). The contents of the Clean Power Plan are more fully described in the Committee's 2016 Report, *supra* note 1, at 14-17.

93. 42 U.S.C. § 7411(b), (d) (2014).

94. Exec. Order No. 13,783 (2017).

95. Withdrawal of Proposed Rules: Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations; and Clean Energy Incentive Program Design Details, 82 Fed. Reg. 16,144 (Apr. 3, 2017) (to be codified at 40 C.F.R. pt. 60).

96. *Id*. The proposed Clean Energy Incentive Program can be found at Proposed Rule, Clean Energy Incentive Program Design Details, 81 Fed. Reg. 42,940 (June 30, 2016) (to be codified at 40 C.F.R. pts. 60, 62).

97. 82 Fed. Reg. 16,144, at 16,145.

98. Review of the Clean Power Plan, 82 Fed. Reg. 16,329 (Apr. 4, 2017) (to be codified at 40 C.F.R. pt. 60); Review of the Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Generating Units, 82 Fed. Reg. 16,330 (Apr. 4, 2017) (to be codified at 40 C.F.R. pt. 60). EPA, as to each Rule to be reviewed, explained its proposed further review procedure as follows: "If EPA's review concludes that suspension, revision or recession of this Rule may be appropriate, EPA's review will be followed by a rulemaking process that will be transparent, follow proper administrative procedures, include appropriate engagement with the public, employ sound science, and be grounded in the law." 82 Fed. Reg. at 1630 & 1631.

rules had been challenged by roughly one-half of the States.[99] On March 30, 2017, Administrator Pruitt followed the Proposed Rules and Notice with a letter to all State Governors "advising them that they are under no obligation to adhere to the Clean Power Plan (CPP) Rule."[100]

EPA has also received several Petitions seeking reconsideration and reversal of its 2009 'Endangerment Finding,' i.e., that greenhouse gas emissions endanger the public health and the environment.[101] This finding is generally viewed as the legal basis for EPA's entire program of GHG regulations under the Clean Air Act.[102] Petitioners argue that scientific and other observable data since the finding was issued in 2009 have not supported its necessity, and further, that EPA committed a non-fixable error by failing to submit the proposed 2009 finding to its Scientific Advisory Committee for review and comment before its adoption.[103] No action has been scheduled yet on these Petitions.

As noted, each final rule that underlies the Clean Power Plan is presently pending on judicial review in the District of Columbia Circuit.[104] That court held oral argument on the final rule governing existing generation in September 2016; the case reviewing EPA's final rule on new source performance standards has been fully briefed, but not argued. The Administration has requested that the litigation in both cases be stayed indefinitely while the EPA reviews and otherwise acts upon both rules.[105] Environmentalists have opposed the requests for judicial stays, requesting the Court to either decide the cases or remand the rules to EPA.[106] On April 28, 2017, the full Court, as to the existing generation rule, and a three judge

99. *Id.* at 16,330-31. *See, e.g.,* West Virginia v. EPA, No. 15-1363 (D.C. Cir. 2015) (appeals of Clean Power Plan involving 27 States); North Dakota v. EPA, No. 15-1381 (and consolidated dockets) (D.C. Cir. 2015) (appeals of New Performance Standards involving 24 States).

100. Press Release, EPA, EPA Administrator sends Clean Power Plan Guidance Letter to Governors (Mar. 20, 2017); Letter from E. Scott Pruitt, EPA Administrator, to State Governors (Mar. 30, 2017). Nevertheless, California has announced, in a symbolic move intended to encourage other States to follow its lead, that it will submit its state compliance plan under the Obama Clean Power Plan. That plan is expected to rely upon the State's recently extended, economy-wide cap-and-trade system to achieve the Obama-era federal targets. *See In Symbolic Move, California to Submit Final CPP Compliance Plan to EPA*, INSIDEEPA (July 31, 2017), https://insideepa.com/daily-news/symbolic-move-california-submit-final-cpp-compliance-plan-epa.

101. Final Rule, Endangerment and Cause and Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009).

102. *On Eve of Trump Order, EPA Faces Petitions to Reverse GHG Risk Finding*, INSIDEEPA (Mar. 27, 2017), https://insideepa.com/daily-news/eve-trump-order-epa-faces-petitions-reverse-ghg-risk-finding.

103. *Id.*; Liberty Packing Co., Petition to Reconsider Endangerment and Cause and Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) Docket No. EPA-HQ-OAR-2009-0171: FRI-9091-8; RIN 2060-ZA14 (filed May 17, 2017).

104. *See generally* West Virginia v. EPA, No. 15-1363 (D.C. Cir. 2015) (appeals of Clean Power Plan involving 27 States); *see generally* North Dakota v. EPA, No. 15-1381 (D.C. Cir. 2015).

105. Linda Tsang & Alexandra M. Wyatt, *Clean Power Plan: Legal Background and Pending Litigation in West Virginia v. EPA*, CONGRESSIONAL RESEARCH SERVICE (Mar. 8, 2017).

106. Should the Court remand to the EPA, some legal analysts suggest that action would terminate the stay ordered by the Supreme Court on the existing generation rule and permit Environmental Groups to file additional suits seeking to compel EPA to act to adopt emission standards similar to those of the Obama-era Rules, the latter being those found supported by existing EPA records. *Mindful of CPP Stay, Groups Spar over Possible D.C. Circuit Rule Remand*, INSIDEEPA (May 15, 2017), https://insideepa.com/daily-news/mindful-cpp-stay-groups-spar-over-possible-dc-circuit-rule-remand.

panel, as to the new source performance standard, directed that the cases be held in abeyance for 60 days.[107]

Delays in the effectiveness and possible withdrawal of the Clean Power Plan and methane emission rules were doubtless a significant consideration in the Administration's decision to withdraw from the Paris Accord.[108] The United States had proposed a 26% to 28% reduction in its GHG emissions from 2005 levels as its contribution to the Paris Accord objective of holding climate change related temperature increases to below 2 degrees Celsius.[109] Absent the effectiveness of this series of regulations, many observers assert that the proposed U.S. contribution could not be achieved.[110]

3. Cap and Trade Regulation; California & RGGI Regional Developments

On July 25, 2017, California's Governor, Jerry Brown, approved Assembly Bill No. 398, an update to the California Global Warming Solutions Act of 2006.[111] The bill extends the state's climate change program from 2020 through 2030 and implements a cap and trade system that requires companies to purchase permits to release carbon dioxide and other greenhouse gasses.[112] The Assembly also passed a Constitutional Amendment providing a mechanism for input on how the program revenues are spent.[113] California also passed Assembly Bill No. 617, which strengthens monitoring and regulation of air pollution from non-mobile sources.[114]

California's greenhouse gas auction system survived a recent court challenge.[115] Plaintiffs alleged that the auction represented an illegal tax, since all taxes must be approved by a two-thirds majority of the Legislature.[116] However, the Court held that regardless of whether the program was appropriate in 2006

107. West Virginia v. EPA, No. 15-1363 (Apr. 28, 2017); North Dakota v. EPA, No. 15-1381 (Apr. 28, 2017); *EPA Seeks Continued Abeyance of CPP Suits*, INSIDEEPA (June 29, 2017), https://insideepa.com/daily-feed/epa-seeks-continued-abeyance-cpp-suits.

108. In his Press Release supporting President Trump's decision, DOI Secretary Zinke stated:

> "We all agree that clean air and clean water are top priorities, but this deal was an example of another give-away to foreign interests and locks America into a permanent competitive disadvantage. America has the resources and expertise to lead the world in responsible energy development and technology. To not use our resources to our advantage is simply wrong. . . . In order to meet the benchmarks in the Paris Accord, it's estimated the U.S. would lose $3 trillion in output, over six million industrial jobs, three million manufacturing jobs, and will absolutely decimate the coal industry." Press Release, DOI, Secretary Zinke Applauds President Trump's Action to Restore America's Energy Destiny (June 1, 2017).

109. 2016 Committee Report, *supra* note 1, at 13-15.

110. *Id.*

111. CAL. ASSEM. BILL 398, https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB398 (last visited July 30, 2017).

112. *Id.*

113. CAL. ASSEM. CONST. AMEND. NO. 1, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180ACA1 (last visited July 30, 2017).

114. CAL. ASSEM. BILL 617, http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB617 (last visited July 30, 2017).

115. Cal. Chamber of Commerce v. State Air Res. Bd., 10 Cal. App. 5th 604 (3d Dist. 2017).

116. *Id.*

when it was created, the passage of the 2012 amendments by an appropriate majority constituted ratification of the program.[117] Further, the court concluded that the cap and trade program did not constitute a tax for the purposes of California's Proposition 13 requirements.[118] The California Chamber of Commerce filed a petition for review with the California Supreme Court, which declined to take the case.[119]

The Regional Greenhouse Gas Initiative (RGGI) is a mandatory market-based greenhouse gas emission reduction program.[120] It covers the power sector in the following states: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont.[121] The cap was reset for 2014 at 91 million short tons, and declines annually at 2.5% each year from 2015 through 2020.[122]

States sell allowances through auctions and use the proceeds to fund energy efficiency, renewable energy, and other consumer benefit programs.[123] Results of the latest auction were announced on June 9, 2017, with 14,597,470 CO_2 allowances sold at a clearing price of $2.53, generating $36.9 million.[124] In total, the program has raised over $2.6 billion through 36 auctions.[125]

RGGI has recently initiated talks with Virginia to join the Group as a full or partial member, and many observers believe that New Jersey, a member until 2011, will rejoin the Group once the current Governor has left office.[126] RGGI officials are also developing and discussing with member states several alternative plans to reduce the current surplus in allowances once the current allowance cap expires in 2020. One such proposal provides for a 6.5% reduction beginning in 2019.[127]

117. *Id.*

118. *Id.*

119. Associated Press, *California Supreme Court Won't Take Carbon Auction Case* (June 28, 2017), https://www.usnews.com/news/best-states/california/articles/2017-06-28/california-supreme-court-wont-take-carbon-auction-case. *See also* Cal. Chamber of Commerce, 10 Cal. App. 5th 604.

120. REGIONAL GREENHOUSE GAS INITIATIVE, https://www.rggi.org (last visited July 30, 2017).

121. *Id.*

122. *Id.*

123. CO_2 ALLOWANCES SOLD FOR $2.53 IN 36TH RGGI AUCTION, https://www.rggi.org/docs/Auctions/36/PR060917_Auction36.pdf (last visited July 30, 2017).

124. *Id.*

125. *Id.*

126. *RGGI Confirms 'Early' Talks with Virginia on Expanding Trading Program,* INSIDEEPA (June 27, 2017), https://insideepaclimate.com/daily-news/rggi-confirms-early-talks-virginia-expanding-trading-program.

127. *RGGI Offers Plan for Cap Adjustment, Winning Early Environmentalist Praise*, INSIDEEPA (June 29, 2017), https://insideepaclimate.com/daily-news/rggi-offers-plan-cap-adjustment-winning-early-environmentalist-praise.

4. State Programs to Support Retention of Nuclear Power

a. Illinois

In early December 2016, the Illinois legislature passed the Future Energy Jobs Act.[128] The act provides for expansion of the state's energy efficiency programs, up to $750 million in funding for low income programs, and $180 million (growing to $220 million) per year in funding for renewables development.[129] Additionally, the act allows one of the state's utilities to receive up to $235 million per year in Zero Emission Credits intended to keep two of its nuclear power plants operating.[130] A zero-emission credit is a tradeable credit that represents the environmental attributes of the energy produced from one megawatt hour produced by a nuclear power plant.[131] Distribution utilities must then purchase credits to account for a specified percentage (16% in Illinois) of their delivered energy.[132] The act became effective on June 1, 2017.[133] The Illinois Power Authority released its wind and solar procurement the same day.[134]

The Electric Power Supply Association and several electric generating companies filed a suit in the Northern District of Illinois requesting that the court declare the portions of the act establishing the Zero Emission Credit subsidies invalid because they are preempted by the Federal Power Act and violate the Dormant Commerce Clause.[135] The court disagreed and dismissed the case on July 14, 2017.[136] An appeal is currently pending in the United States Court of Appeals for the Seventh Circuit.[137]

b. New York

The New York Public Service Commission adopted a clean energy standard, effective August 1, 2016.[138] Under the standard, all load serving entities may purchase renewable energy credits and must purchase zero emission credits from the

128. PUB. ACT 099-0906, http://www.ilga.gov/legislation/billstatus.asp?DocNum=2814&GAID=13&GA=99&DocTypeID=SB&LegID=96125&SessionID=88 (last visited July 30, 2017).

129. *Id.* at §§ 1-56(b), 1-75(c).

130. *Id.* at § 1-75(d)(5); *see* FUTURE ENERGY JOBS ACT: A WIN FOR ILLINOIS, http://www.futureenergyjobsact.com/resources/pdf/FEJA-Fact-Sheet.pdf (last visited July 30, 2017).

131. 20 ILL. COMP. STAT. 3855/1-10 (2017).

132. 20 ILL. COMP. STAT. 3855/1-75(d)(5) (2017).

133. Pub. Act 099-0906, *supra* note 131.

134. ILLINOIS POWER AGENCY: WIND AND SOLAR PROCUREMENT (INITIAL FORWARD PROCUREMENTS), https://www.ipa-energyrfp.com/wind-and-solar (last visited Oct. 17, 2017).

135. Complaint, Electric Power Supply Ass'n. v. Star, No. 17-CV-01164 (N.D. Ill. 2017).

136. Electric Power Supply Ass'n v. Star, No. 17-CV-01164 (N.D. Ill. 2017).

137. Electric Power Supply Ass'n v. Star, No. 17-2445 (7th Cir. 2017).

138. NEW YORK PUB. SERV. COMM'N: ORDER ADOPTING A CLEAN ENERGY STANDARD, http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7b44C5D5B8-14C3-4F32-8399-F5487D6D8FE8%7d (last visited Oct. 17, 2017).

New York State Energy Research and Development Authority.[139] The first compliance year is January 1, 2017 through December 31, 2017.[140] For this period, 56,142 Tier 1 renewable energy credits were for sale at $21.16 per megawatt-hour and Zero Emission Credits were available for $17.5394 per megawatt-hour.[141] Credits are tracked through the New York Generation Attribute Tracking System.[142]

A challenge to the renewable energy standard was dismissed on July 25, 2017.[143] In this case, the plaintiffs claimed that the zero-emission credit program is preempted under the Federal Power Act and that it violates the Dormant Commerce Clause.[144] The court found that Congress intended to preclude equitable relief to private parties under the Federal Power Act.[145] Further, the court held that the plaintiffs failed to state a Dormant Commerce Clause claim.[146]

c. Ohio

Legislation is currently pending in Ohio to enact a zero emission credit system, providing $17 per ton of carbon not put into the air.[147] However, progress on the bill has stalled in the current session.[148]

5. Coal Industry Developments

Section 6 of Executive Order No. 13,783, *Promoting Energy Independence and Economic Growth*, seeks to end an Obama Administration moratorium on leasing coal mining rights on federal lands.[149] Unlike its directives to the EPA, the Executive Order specifically requires that the Secretary of the Interior shall "amend or withdraw" the prior Secretary's Order 3,338 dated January 15, 2016 (Discretionary Programmatic Environmental Impact Statement to Modernize the Federal Coal Program) and shall "lift any and all moratoria on Federal land coal leasing activities related to Order 3338."[150] The Order further directs the Secretary to "commence Federal coal leasing activities consistent with all applicable laws and regulations."[151]

139. NEW YORK STATE ENERGY RESEARCH & DEVELOPMENT AUTHORITY: REC AND ZEC PURCHASES FROM NYSERDA, https://www.nyserda.ny.gov/All-Programs/Programs/Clean-Energy-Standard/REC-and-ZEC-Purchasers (last visited Oct. 17, 2017).

140. *Id.*

141. *Id.*

142. *Id.*

143. Coal. for Competitive Energy v. Ziebelman, No. 16-CV-08164 (S.D.N.Y. 2017).

144. *Id.*

145. *Id.* at 8, 13.

146. *Id.* at 47.

147. S. 128, 132nd Gen. Assemb. (Ohio 2016).

148. John Funk, *FirstEnergy's Nuclear Zero Emission Credits May Have Stalled*, CLEVELAND (June 8, 2017, 7:46 PM), http://www.cleveland.com/business/index.ssf/2017/06/firstenergys_nucear_zero_emiss.html (last visited Oct. 17, 2017).

149. Exec. Order No. 13,783, *supra* note 17, § 6.

150. *Id.*

151. *Id.*

On March 29, 2017, Interior Secretary Ryan Zinke issued two Secretarial Orders to implement the Executive Order's directives.[152] Secretarial Order 3348 overturned the Obama-era moratorium on new coal leases on federal lands, noting that mining on such lands produces approximately 40% of coal mined in the Unites States, and further ended work upon a programmatic environmental impact statement to be completed in 2019 intended to examine possible improvements to the program to be implemented if and once the moratorium ended.[153] The Secretarial Order states that such an analysis is not needed.[154] Secretarial Order 3349 initiates the review of climate change and other related Interior Department actions that may hamper responsible energy development and thus violate the Executive Order's policy directive.[155] The Secretary also established a new Royalty Policy Committee to assure that the American public receives the full value of the natural resources to be produced under these and other Department actions in royalty payments.[156] Previously, the Department had approved a new $22 million coal lease in central Utah.[157]

In his Statement supporting the Executive Order, Secretary Zinke stated:

> We can't power the country on pixie dust and hope. . . . President Trump took bold and decisive action to end the War on Coal and put us on track for American energy independence. . . . American energy independence has three major benefits to the environment, economy and national security.
>
> First, it's better for the environment that the U.S. produces energy. Thanks to advancements in drilling and mining technology, we can responsibly develop our energy resources and return the land to equal or better quality than it was before. I've spent a lot of time in the Middle East, and I can tell you with 100[%] certainty it is better to develop our energy here under reasonable regulations and export it to our allies, rather than have it produced overseas under little or no regulations.
>
> Second, energy production is an absolute boon to the economy, supporting more than 6.4 million jobs and supplying affordable power for manufacturing, home heating, and transportation needs. In many communities coal jobs are the only jobs. Former Chairman Old Coyote of the Crow Tribe in my home state of Montana said it best, 'there are no jobs like coal jobs.' I hope to return those jobs to the Crow people.

152. Press Release, Dep't of the Interior, Secretary Zinke Takes Immediate Action to Advance American Energy Independence (Mar. 29, 2017); Press Release, Dep't of the Interior, Secretary Zinke Statement in Support of President Trump's American Energy Executive Order (Mar. 28, 2017).

153. *Id.*

154. *Id.*

155. *Id.*

156. Press Release, Dep't of the Interior, "Secretary Zinke Issues Lease for 56 Million Tons of Coal in Central Utah" (Mar. 15, 2017).

157. *Id.*

> And lastly, achieving American energy independence will strengthen our national security by reducing our reliance on foreign oil and allowing us to assist our allies with their energy needs.[158]

Also, on May 19, 2017, EPA published in the Federal Register a proposed rule to approve under section 1422 of the Safe Drinking Water Act, [159] an Application of the State of North Dakota to be granted primary enforcement authority to regulate Class VI injection wells in the state.[160] Class VI injection wells are those used in carbon capture and sequestration programs.[161] In the Proposed Rule, EPA concludes, consistent with its regulations implementing section 1422, that North Dakota is capable of administering such an injection program in a manner that will avoid endangering underground sources of drinking water.[162]

6. Significant Climate Change Related Litigation

a. Juliana v. United States

On November 10, 2016, the United States District Court for the District of Oregon found in *Juliana v. United States* that the plaintiffs had standing under the public trust doctrine to pursue an action for declaratory and injunctive relief alleging that the government violated their substantive due process rights by failing to take necessary action on climate change.[163] The plaintiffs "are a group of young people between the ages of eight and nineteen" and others, who are "acting as guardian for future generations."[164] Plaintiffs allege "'[b]y their exercise of sovereign authority over our country's atmosphere and fossil fuel resources, . . . [the government] permitted, encouraged, and otherwise enabled continued exploitation, production, and combustion of fossil fuels, . . . deliberately allow[ing] atmospheric CO_2 concentrations to escalate to levels unprecedented in human history[.]"[165]

In adopting Magistrate Judge Coffin's Findings and Recommendations, Judge Aiken found that this case does not raise a nonjusticiable political question.[166] This may represent a significant change in judicial approach to the political question doctrine as Judge Aiken stated, "Federal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it."[167]

158. *Id.*

159. 42 U.S.C. § 300h-1 (2013).

160. State of North Dakota Underground Injection Control Program: Class VI Primacy Approval, 82 Fed. Reg. 22,949 (May 19, 2017) (to be codified at 40 C.F.R. pt. 147). EPA's regulations governing approval of such programs are codified at 40 C.F.R. pts. 124, 144-45.

161. EPA: UNDERGROUND INJECTION CONTROL, https://www.epa.gov/uic/class-vi-wells-used-geologic-sequestration-co2.

162. 82 Fed. Reg. 22,949.

163. Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016).

164. *Id.* at 1233.

165. *Id.*

166. *Id.* at 1224.

167. *Id.* at 1262.

b. Murray Energy Corp. v. EPA

In *Murray Energy Corp. v. EPA*, the United States Court of Appeals for the Fourth Circuit held that the EPA does not have a judicially reviewable non-discretionary duty under the Clean Air Act "to evaluate the potential employment impact" of its regulatory activities on the coal industry.[168] At issue was whether the EPA's consideration of costs was non-discretionary under Clean Air Act section 321(a) and therefore subject to judicial review under section 304(a)(2).[169] The Fourth Circuit held that the CAA does not impose a "specific and discrete duty amenable to section 304(a)(2) review."[170] Consequently, the court vacated the district court's grant of summary judgment and remanded the matter with instructions to dismiss for want of jurisdiction.[171] The impact of the decision, however, may be limited as EPA Administrator Pruitt has announced that EPA will voluntarily perform the requested employment impact study.[172]

B. Air

1. Ozone National Ambient Air Quality Standard

On September 7, 2016, the EPA issued a final rule titled *Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS* (CSAPR Update Rule).[173] This CSAPR Update Rule addresses the summertime (May – September) transport of ozone pollution in 22 eastern states.[174] Responding to a D.C. Circuit remand, the CSAPR Update Rule establishes new ozone season NOX emissions budgets and removes three states whose budgets were remanded (North Carolina, South Carolina, and Florida) from the CSAPR ozone season NOX trading program.[175] Numerous challenges to the CSAPR Update Rule are pending in the D.C. Circuit.[176]

On November 17, 2016, EPA proposed a rule specifying implementation requirements for the 2015 revised 8-hour ozone National Ambient Air Quality Standards ("NAAQS").[177] EPA established a revised 8-hour ozone NAAQS

168. Murray Energy Corp. v. EPA, 861 F.3d 529, 532 (4th Cir. 2017).

169. *Id.* at 533; 42 U.S.C. § 7621(a) (2016) (the EPA "shall conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provision of [the CAA] and applicable implementation plans, including where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement").

170. *Murray Energy Corp.*, 861 F.3d at 536.

171. *Id.* at 537.

172. *Weekly Report*, INSIDEEPA (July 5, 2017), https://insideepa.com/daily-news/finding-no-jurisdiction-4th-circuit-ends-mandate-epa-jobs-review.

173. Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 Fed. Reg. 74,504 (2016) (to be codified at 40 C.F.R. pts. 52, 78, 97).

174. *Id.*

175. EME Homer City Generation, L.P. v. EPA, 795 F.3d 118, 132 (D.C. Cir. 2015). A further discussion of the Supreme Court and D.C. Circuit Court's rulings on the CSAPR is found in the Committee's 2016 report, *supra* note 1, at 23-24. New budgets were set for Maryland, New Jersey, New York, Ohio, Pennsylvania, Texas, Virginia, and West Virginia. *See* CO_2 Allowances, *supra* note 125.

176. State and industry lawsuits against the CSAPR Update Rules are consolidated as *Wisconsin v. EPA,* Case No. 16-1406 (D.C. Cir. 2016).

177. Implementation of the 2015 National Ambient Air Quality Standards for Ozone: Nonattainment Area Classifications and State Implementation Plan Requirements, 81 Fed. Reg. 81,276 (Nov. 17, 2016) (to be codified at 40 C.F.R. pts. 50 and 51).

standard in 2015, lowering the standard from 75 to 70 parts per billion.[178] States, companies, and environmental organizations have challenged the 2015 ozone NAAQS.[179] The states and industry groups argue that background levels of ozone prevent attaining the 70 parts per billion standard in some locations.[180] On EPA's motion, the U.S. Court of Appeals for the D.C. Circuit has continued the oral argument and indefinitely delayed any decision on the challenges to the 2015 8-hour ozone NAAQS.[181] EPA requested the stay to provide time to determine whether it should reconsider the rule or some part of it.[182] Subsequently, EPA extended the deadline for promulgating initial area designations for the 2015 ozone NAAQS to October 1, 2018.[183] Among the justifications EPA cited for the delay was a need to consider background levels of ozone.[184] Several groups promptly filed a petition seeking to vacate the extension as illegal and irrational.[185]

2. Regional Haze

The Clean Air Act includes "as a national goal the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas which impairment results from manmade air pollution."[186] The requirements for addressing regional haze mandate that states develop State Implementation Plans ("SIPs") to address emissions that contribute to regional haze.[187] SIPs must include determinations of Best Available Retrofit Technology ("BART") for certain stationary sources that emit pollutants that impair visibility and long term strategies to ensure reasonable progress towards the national goal.[188] EPA allows the trading programs in the CSAPR to serve as an alternative to determining source-by-source BART.[189] Similarly, EPA considered the CSAPR's predecessor, the Clean Air Interstate Rule ("CAIR"), an acceptable substitute for BART.[190] If EPA disapproves of the SIP, it substitutes a Federal Implementation Plan (FIP).[191]

178. National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65,292 (Oct. 26, 2015) (to be codified at 40 C.F.R. pts. 50, 51, 52, 53, and 58).

179. Murray Energy Corp. v. EPA, No. 15-1385 (D.C. Cir. 2016).

180. Joint Opening Brief of Industry Petitioners, at 24, Murray Energy Corp. v. EPA, No. 15-1385 (D.C. Cir. 2016).

181. Murray Energy Corp. v. EPA, No. 15-1385 (D.C. Cir. 2016).

182. Respondent EPA's Motion to Continue Oral Argument at 4, Murray Energy Corp. v. EPA, No. 15-1385 (D.C. Cir. 2017).

183. Extension of Deadline for Promulgating Designations for the 2015 Ozone National Ambient Air Quality Standards, 82 Fed. Reg. 29,246 (June 28, 2017) (to be codified at 40 C.F.R. pt. 81).

184. *Id.* at 29,247.

185. Am. Lung Ass'n. v. EPA, No. 17-1172 (D.C. Cir. July 12, 2017).

186. 42 U.S.C. § 7491(a)(1) (2014).

187. 42 U.S.C. §§ 7491, 7492 (2014); *see also* 40 C.F.R. §§ 51.300-309 (2016) (implementing regulations).

188. 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* 40 C.F.R. § 51.300-309 (2016) (implementing regulations); *see also* 40 C.F.R. pt. 51, app. Y (BART guidelines for electric generating plants).

189. 77 Fed. Reg. 33,642.

190. *Id.* at 33,648; Utility Air Regulatory Group v. EPA, 471 F.3d 1333 (D.C. Cir. 2006) (affirming "CAIR-for-BART").

191. 42 U.S.C. § 7410(c)(1) (2014).

With the CSAPR's replacement of CAIR, the EPA disapproved certain SIPs relying on CAIR.[192] The EPA's treatment of CSAPR and CAIR for purposes of the BART is the subject of pending challenges.[193] Petitioners oppose EPA's reliance on CSAPR as BART, arguing it offers inadequate haze reduction and is unlawful.[194] In contrast, certain states and industry groups have challenged EPA's rejection of some SIPs that continued to cite to CAIR as a substitute for BART, arguing that CAIR resulted in permanent reductions and that EPA acted inconsistently without justification.[195] In the interim, EPA has proposed to approve a SIP's reliance on CSAPR.[196]

Individual state regional haze SIPs have also been the subject of rulings.[197] In January 2016, EPA partially disapproved the Texas and Oklahoma SIPs and replaced portions of them with a FIP.[198] EPA based its disapproval of Texas's SIP on a disagreement over the amount of dust that is naturally occurring in the protected regions and asserted that source-specific analysis was required to approve Texas' long-term strategy to achieve the SIP's reasonable progress goals.[199] EPA partially disapproved of Oklahoma's SIP, namely, its reasonable progress goals, based solely on the effects of Texas emissions.[200] The FIP required specific emission control upgrades at eight electrical generating units by 2019 and retrofits at another seven generating units by 2021.[201]

In *Texas v. EPA*, the U.S. Court of Appeals for the Fifth Circuit granted a motion to stay the FIP.[202] The court ruled that petitioners demonstrated a strong likelihood of success on the merits because "EPA improperly failed to defer to Texas's application of the statutory factors and improperly required a source-specific analysis not found in the Act or Regional Haze Rule."[203] The court also ruled that "[p]etitioners have a strong likelihood of success in showing that EPA's disapproval of the consultation between Oklahoma and Texas was arbitrary and ca-

192. 77 Fed. Reg. 33,642.

193. Joint Brief of State and Industry Interventor-Resp'ts, Utility Air Regulatory Group (UARG) v. EPA, (D.C. Cir. 2017) (No. 12-1342), 2017 WL 388070.

194. Reply Brief of Conservation Groups at 8, UARG v. EPA, No. 12-1342 (D.C. Cir. Feb. 27, 2017).

195. Joint Brief of State and Industry Interventor-Resp'ts, Utility Air Regulatory Group (UARG) v. EPA, (D.C. Cir. 2017) (No. 12-1342), 2017 WL 388070.

196. Approval and Promulgation of Implementation Plans; Louisiana; Regional Haze State Implementation Plan, 82 Fed. Reg. 22,936 (May 19, 2017) (to be codified at 40 C.F.R. pt. 52).

197. *See generally* Texas v. EPA, 829 F.3d 405 (5th Cir. 2017); *see generally* Nebraska v. EPA, 812 F.3d 662 (8th Cir. 2016).

198. Approval and Promulgation of Implementation Plans; Texas and Oklahoma; Regional Haze State Implementation Plans; Interstate Visibility Transport State Implementation Plan to Address Pollution Affecting Visibility and Regional Haze; Federal Implementation Plan for Regional Haze, 82 Fed. Reg. 296 (Jan. 5, 2016) (to be codified at 40 C.F.R. pt. 52).

199. *Id*. at 300, 302.

200. *Id*. at 302.

201. *Id*. at 305.

202. *Texas*, 829 F.3d at 411 (5th Cir. 2017).

203. *Id*. at 428. This contrasts with *Nebraska*, 812 F.3d, where the state performed a BART determination for a specific source and the court upheld EPA's rejection of the determination as based on a flawed analysis. *See also* Phoenix Cement Co. v. EPA, 647 Fed. App'x 702 (9th Cir. 2016) (deferring to EPA determination of sources subject to BART in partially disapproving Arizona's SIP).

pricious" because neither the statute or regulation require source-specific consultations and EPA had never before disapproved of state consultations under the Regional Haze Rule.[204] On March 22, 2017, the court granted a motion made by EPA to remand the case to allow EPA to revise the FIP while continuing the stay.[205]

3. Mercury and Air Toxics Standards

After the Supreme Court's 2015 ruling in *Michigan v. EPA*, requiring EPA to consider costs before formulating and applying Mercury and Air Toxics Standards (MATS) to power plants, the D.C. Circuit remanded MATS without *vacatur*, leaving the compliance obligations in place.[206] EPA completed its cost review, again determining that the cost of compliance with MATS was reasonable.[207] Multiple states and industry groups challenged the finding on several grounds, including reliance upon "co-benefits," an issue not reached by the Supreme Court.[208] On EPA's motion, the D.C. Circuit has stayed litigation of the MATS.[209] EPA requested the stay because "EPA officials appointed by the new Administration are closely reviewing the Supplemental Finding to determine whether the Agency should reconsider the rule or some part of it."[210]

The Department of Energy ("DOE") has issued orders pursuant to section 202(c) of the Federal Power Act, to allow electrical generating units to continue operations, irrespective of a deadline imposed under MATS.[211] Under FPA section 202(c), compliance with such orders that

> results in noncompliance with, or causes such party to not comply with, any Federal, State, or local environmental law or regulation, such omission or action shall not be considered a violation of such environmental law or regulation, or subject such party to any requirement, civil or criminal liability, or a citizen suit under such environmental law or regulation.[212]

204. *Texas*, 829 F.3d at 429.

205. Order, Texas v. EPA, No. 16-60119 (5th Cir. Mar. 22, 2017).

206. Michigan v. EPA, 135 S. Ct. 2699 (2015). A discussion of *Michigan v. EPA* and subsequent D.C. Circuit rulings on remand is found in the Committee's 2016 report, *supra* note 1, at 22.

207. 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. 24,420 (Apr. 25, 2016) (to be codified at 40 C.F.R. pt. 63).

208. *Texas*, 829 F.3d.

209. The court granted EPA a stay in the two MATS cases pending: Murray Energy Corp. v. EPA, No. 16-1127 (D.C. Cir. 2017) and ARIPPA v. EPA, No. 15-1180 (D.C. Cir. 2017). *ARIPPA*, and consolidated cases, challenge EPA denials of petitions to reconsider the MATS rule. *See generally* Kaitlin C. Straker & J. Michael Showalter, *EPA Litigation Snapshot: Pivotal Cases See Continued Delays*, ENERGY & ENVIRONMENTAL LAW ADVISOR (May 15, 2017), http://www.energyenvironmentallawadviser.com/2017/05/epa-litigation-snapshot-pivotal-cases-see-continued-delays.

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

211. 16 U.S.C. § 824a(c) (2016); DOE, ORDER NO. 202-17-2 (June 16, 2017) (authorizing Dominion Energy Virginia to operate two units to maintain grid reliability); DOE, Order No. 202-17-1 (Apr. 14, 2017) (authorizing Grand River Energy Center to operate coal-fired generating unit to provide reactive power support).

212. 16 U.S.C. § 824a(c) (2013).

In 2014, EPA relaxed certain requirements under MATS for periods of startup and shutdown, when emissions can exceed regulatory limits.[213] Among the standards, EPA provided for a work place standard, instead of imposing a numeric limit, during those periods that give power plants additional time to engage pollution controls.[214] In cases, which were later consolidated, environmental petitioners challenged the rule and a subsequent denial of their petition for reconsideration.[215] The court has stayed the case pending the outcome of another case involving challenges to similar startup and shutdown provisions, *Sierra Club v. EPA*.[216]

In *U.S. Sugar Corp. v. EPA*, the court addressed challenges to other aspects of EPA's handling of periods of startup, shutdown, and malfunction ("SSM").[217] The case challenged three rules.[218] The EPA imposed a work-practice standard to address hazardous air pollutants for major and area source boilers during periods of startup and shutdown.[219] It did not provide any accommodation for malfunctions.[220] Concerning commercial and industrial solid waste incinerator units, EPA applied the numeric maximum achievable control technology ("MACT") standards at all times, regardless of periods of SSM.[221]

Industry petitioners argued that the MACT standards for sources of hazardous air pollutants at issue were required to account for periods of malfunction to be achievable.[222] They also argued that EPA "acted arbitrarily and capriciously

213. Reconsideration of Certain Startup/Shutdown Issues: National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 79 Fed. Reg. 68,777, 68,779-68,780 (Nov. 19, 2014) (to be codified at 40 C.F.R. pts. 60, 63).

214. *Id*. at 68,780.

215. Order, Chesapeake Climate Action Network v. EPA, Case Nos. 15-1-15, 16-1349 (D.C. Cir. Nov. 15, 2016).

216. Sierra Club v. EPA, No. 16-1021 (D.C. Cir. 2017). *Sierra Club v. EPA* was severed from the cases consolidated by *U.S. Sugar Corp. v. EPA*, 830 F.3d 579 (D.C. Cir. 2016).

217. U.S. Sugar Corp. v. EPA, 830 F.3d 579 (D.C. Cir. 2016), *modified*, 844 F.3d 268 (D.C. Cir. 2016); *cert den*. *sub nom*. Am. Municipal Power, Inc. v. EPA, No. 16-1168 (2017).

218. *U.S. Sugar Corp.*, 830 F.3d at 591-92 (discussing challenges to National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters, 76 Fed. Reg. 15,608 (Mar. 21, 2011) (to be codified at 40 C.F.R. pt. 63), as amended, 78 Fed. Reg. 7,138 (Jan. 31, 2013) (to be codified at 40 C.F.R. pt. 63); National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers, 76 Fed. Reg. 15,554 (Mar. 21, 2011) (to be codified at 40 C.F.R. pt. 63), as amended, 78 Fed. Reg. 7,488 (Feb. 1, 2013) (to be codified at 40 C.F.R. pt. 63); Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incinerator Units, 76 Fed. Reg. 15,704 (Mar. 21, 2011) (to be codified at 40 C.F.R. pt. 60), as amended, Commercial and Industrial Solid Waste Incineration Units: Reconsideration and Final Amendments; Non-Hazardous Secondary Materials that Are Solid Waste, 78 Fed. Reg. 9,112 (Feb. 7, 2013) (to be codified at 40 C.F.R. pts. 60, 241)).

219. *Id.* at 599.

220. *Id.*

221. *Id.* at 609.

222. *Id*. at 608. *See also id*. at 591 (the case involved "thirty challenges to three regulations promulgated by the . . . EPA").

by failing to set a work-practice or a GACT [generally available control technologies] management-practice standard for malfunction periods."[223] On the other hand, environmental petitioners argued that reliance on work-practice standards was not supported by the record and failed to achieve "the maximum degree of reduction in emissions."[224]

EPA chose not to address malfunctions, asserting that it will use its enforcement discretion regarding malfunctions "on a case-by-case basis."[225] In prior decisions, the D.C. Circuit had vacated rules exempting periods of SSM from compliance, and providing an affirmative defense for emission limit exceedances caused by malfunctions, ruling that the EPA was not authorized under the CAA to create a defense to civil liability.[226]

The court upheld the work place standards, ruling that "the statute explicitly defers to the Administrator's judgment regarding a standard's 'achievability,' even though it directs him to consider particular factors in making that assessment."[227] The court rejected the notion that section 7412(d)(2), defining MACT, "unambiguously required the EPA to adopt standards that result in the maximum reduction of emissions that is technologically feasible."[228] Similarly, the court rejected the industry petitioners' challenge to EPA's decision not to account for periods of malfunction.[229] The court ruled that "the statutory language on its face prevents the EPA from taking into account the effect of potential malfunctions when setting MACT emission standards," and therefore, "its approach is reasonable."[230] The court also ruled that EPA acted within its discretion in not setting work place standards for startup and shutdown concerning commercial and industrial solid waste incinerator units.[231]

4. New Source Review

The CAA's New Source Review ("NSR") program requires operators undertaking modifications of a source to calculate post-project emissions to determine if the project will result in a significant increase in emissions, and therefore require permitting.[232] NSR allows operators to exclude from its calculation of post-project emissions "that an existing unit could have accommodated during the [baseline period] . . . and that are also unrelated to the particular project, including any increased utilization due to product demand growth."[233] In *United States v. DTE*

223. *U.S. Sugar Corp.*, 830 F.3d at 608.

224. *Id*. at 662; 42 U.S.C. § 7412(a)(E)(2) (1999).

225. *Id.* at 607.

226. Sierra Club v. EPA, 551 F.3d 1019, 1023-24, 1028 (D.C. Cir. 2008); Natural Res. Def. Council v. EPA, 749 F.3d 1055, 1062–64 (D.C. Cir. 2014). However, the case did not address whether such "an affirmative defense may be appropriate in a State Implementation Plan." *Id*. at 1064 n.2 (citing Luminant Generation Co. v. EPA, 714 F.3d 841 (5th Cir. 2013) (upholding EPA's partial approval of an affirmative defense provision in a SIP).

227. *U.S. Sugar Corp.*, 830 F.3d at 663.

228. *Id.*

229. *Id.* at 609-10.

230. *Id*. at 608.

231. *Id*. at 608-10.

232. 42 U.S.C. §§ 7475, 7503 (2014); 40 C.F.R. § 52.21 (a)(2)(b) (2016).

233. 40 C.F.R. § 52.21(b)(41)(ii)(c) (2016).

Energy Co., the court addressed the question of whether an operator's projections are subject to a post-project challenge.[234]

In that case, DTE Energy submitted a notice to the Michigan Department of Environmental Quality that a $65 million dollar project at its Monroe plant was exempt from permitting because the entire projected emissions increase, well-above NSR significant project thresholds, were excluded based on the demand growth exclusion.[235] The notice did not provide any supporting material for the calculation.[236] EPA brought an enforcement action, but the District Court ruled that the EPA could not bring the action based on questioning the pre-construction estimates.[237] The Sixth Circuit ruled that "DTE proceeded at its own risk" by not waiting for an EPA determination on the necessity of a permit.[238] The court held EPA could challenge the legitimacy of the pre-construction estimates after the fact.[239] The court also ruled that post-construction emissions data, e.g., the lack of an actual post-construction significant emissions increase, does not foreclose the challenge because compliance is determined before construction.[240]

In another case involving NSR, *Helping Hand Tools v. United States*, the court upheld EPA's doctrine of "redefining the source" and its framework for evaluating the best available control technology ("BACT") for greenhouse gas emissions from facilities burning biomass fuels.[241] The project at issue was the construction of a new biomass fueled cogeneration unit located at a lumber manufacturing facility.[242] The petitioner objected to the PSD permit because the BACT analysis did not consider solar power and a greater natural gas mix as clean fuel control technologies.[243]

A BACT analysis must consider all available control technologies.[244] However, EPA does not require consideration of control technologies that would "redefine the source," i.e., that would require a complete redesign of the facility.[245] The court ruled that "biomass fuel was an inherent part of the design," where the biomass would come from the existing mills and timberlands owned by the operator.[246] In doing so, the court also upheld the EPA's Bioenergy BACT Guidance for greenhouse gases, which provides, in part, that when a facility relies primarily on biomass, control technologies considered "'may be limited to (1) utilization of biomass fuel alone, (2) energy efficiency improvements, and (3) carbon capture

234. United States v. DTE Energy Co., 845 F.3d 735 (6th Cir. 2017).
235. *Id.* at 737.
236. *Id.* at 739.
237. *Id.* at 738-39.
238. *DTE Energy Co.*, 845 F.3d at 740.
239. *Id.*
240. *Id.* at 741.
241. Helping Hand Tools v. United States, 848 F.3d 1185 (9th Cir. 2016).
242. *Id.* at 1189.
243. *Id.*
244. 42 U.S.C. § 7479(3) (2014).
245. *Helping Hand*, 845 F.3d at 1194-95 (summarizing the doctrine).
246. *Id.* at 1197.

and sequestration.'"[247] The court, deferring to EPA expertise, ruled that the Bioenergy BACT Guidance is "thorough, rational, and consistent with EPA's prior practice."[248]

The Trump Administration has indicated it will undertake NSR reforms.[249] However, in litigation, it has continued to support the position of the prior administration that NSR permit violations are "ongoing," and therefore not subject to the statute of limitations.[250]

5. Delay and Reconsideration of EPA Risk Management Program

On March 13, 2017, EPA took action to reconsider the "Accidental Release Prevention Requirements: 'Risk Management Programs Under the Clean Air [Act],'" delaying the effective date of the rule until June 19, 2017.[251] Then on June 9, 2017, the EPA administrator signed a final rule further delaying the effective date of the RMP rule for an additional 20 months, until February 19, 2019.[252]

The purpose of the RMP is to: (1) "address and improve accident prevention program elements;" (2) "enhance [] emergency preparedness requirements;" and (3) "ensure [that] LEPCs (Local Emergency Planning Committees), local emergency response officials, and the public can access information in a user-friendly format to help them understand the risks at RMP facilities and better prepare for emergencies."[253] On February 28, 2017, EPA received a petition requesting reconsideration and a stay of the rule from trade associations, leading the agency to delay implementation of the rule.[254]

C. Water

1. Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category

On November 3, 2015, EPA finalized a rule revising Clean Water Act standards applicable to certain power plants.[255] The rule established the first federal limits on the levels of toxic materials in wastewater that can be discharged from power plants, as well as created additional requirements for wastewater streams

247. EPA, FINAL FY 2018-2019 OFFICE OF AIR AND RADIATION (OAR) NATIONAL PROGRAM MANAGER GUIDANCE; *Helping Hand*, 845 F.3d at 1192.

248. *Id.* at 1199.

249. EPA, *supra* note 249, at 3 (With respect to NSR, "EPA will repeal, replace, or modify existing regulations to streamline the federal permitting process and reduce regulatory burdens for domestic manufacturers").

250. Opening Brief for the United States, United States v. Luminant Generation Co., No. 17-10235 (5th Cir. 2017).

251. Press Release, EPA, CORRECTION: EPA Extends the Effective Date of Risk Management Plan Rule (March 15, 2017).

252. Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act: Further Delay of Effective Date, 82 Fed. Reg. 27,133 (Jun. 14, 2017) (to be codified at 40 C.F.R. pt. 68).

253. EPA: FINAL AMENDMENTS TO THE RISK MANAGEMENT PROGRAM (RMP) RULE, https://www.epa.gov/rmp/final-amendments-risk-management-program-rmp-rule#additional-resources (last visited July 30, 2017).

254. *Id.*

255. 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).

from flue gas desulfurization, fly ash, bottom ash, flue gas mercury control, and gasification of fuels.[256] Multiple petitions for judicial review of the rule were filed and were consolidated in the U.S. Court of Appeals for the Fifth Circuit under *Southwestern Electric Power Co. v. EPA*.[257]

On April 12, 2017, EPA granted petitions for reconsideration of the rule from the Utility Water Act Group and the U.S. Small Business Administration.[258] On April 25, 2017, EPA published a notice that the agency would be postponing certain compliance dates that had not yet passed pending judicial review.[259] EPA published a proposed rule postponing the compliance dates on June 6, 2017 and held a public hearing on the proposal on July 31, 2017.[260] On April 24, 2017, the Fifth Circuit granted EPA's motion to hold proceedings in abeyance until August 12, 2017 while the agency undertakes reconsideration.[261]

2. Waters of the United States

On June 29, 2015, EPA published the Clean Water Rule, which further defined and expanded the scope of "waters of the United States" that are covered under the Clean Water Act.[262] Multiple parties challenged the rule, particularly its claimed effect of replacing state with federal authority over small streams and water bodies, and the cases were consolidated before the U.S. Court of Appeals for the Sixth Circuit, which also stayed nationwide implementation of the final rule pending further action of the court.[263] In September 2016, industry parties filed a petition for writ of certiorari to the U.S. Supreme Court, requesting review of the Sixth Circuit's ruling that held the Sixth Circuit had jurisdiction to hear the challenges to the rule, instead of the district courts.[264] On January 13, 2017, the Supreme Court granted review of the issue and the case will likely be heard in late 2017.[265]

On February 28, 2017, President Trump issued an Executive Order requiring EPA and the U.S. Army Corps of Engineers to review the final Clean Water Rule

256. *Id.* at 67,841.

257. U.S. Judicial Panel Court Order, No. 15-60821 (5th Cir. Dec. 9, 2015).

258. Letter from EPA to Hunton & Williams and U.S. Small Business Administration (Apr. 12, 2017).

259. Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 19,005 (Apr. 25, 2017) (to be codified at 40 C.F.R. pt. 423).

260. 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); EPA: STEAM ELECTRIC POWER GENERATING EFFLUENT GUIDELINES — 2015 FINAL RULE, https://www.epa.gov/eg/steam-electric-power-generating-effluent-guidelines-2015-final-rule#hearing (last visited Oct. 17, 2017).

261. Order, Southwestern Elect. Power Co. v. EPA, No. 15-60821 (5th Cir. Dec. 9, 2015). *See* 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) (to be codified at 40 C.F.R. pt. 423).

262. 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).

263. Order of Stay, Ohio v. U.S. Army Corps of Eng'rs, 803 F.3d 804 (6th Cir. 2015).

264. Petition for Writ of Certiorari, Nat'l Ass'n. of Mfrs. v. Dep't of Defense, No. 16-299 (2016).

265. Nat'l Ass'n. of Mfrs. v. Dep't of Defense, No. 16-299 (2016).

to ensure it is consistent with current policy and to propose a rule revising or rescinding the Clean Water Rule as appropriate.[266] On July 27, 2017, EPA published a notice proposing to re-codify the regulations that existed before the 2015 Clean Water Rule.[267] Although the federal government had requested that the U.S. Supreme Court hold the litigation in abeyance while it reconsidered the rule, the Supreme Court denied that motion on April 3, 2017.[268]

3. Water Issues in FERC Proceedings

On August 8, 2016, the U.S. Court of Appeals for the Third Circuit held that federal courts have jurisdiction to review state water quality certifications required under the Clean Water Act in *Delaware Riverkeeper Network v. Pennsylvania Department of Environmental Protection*.[269] Various environmental groups challenged water quality related permitting actions by the Pennsylvania and New Jersey state environmental agencies for a pipeline project by Transcontinental Gas Pipe Line Company, L.L.C.[270] The court held that it had jurisdiction over the permitting actions, including water quality certifications, because the state agencies were acting pursuant to federal law by issuing them.[271] Specifically, the court noted that water quality certifications were an "integral element in the regulatory scheme established by the Clean Water Act."[272] Ultimately, the court held that the state agencies did not act arbitrarily and capriciously in issuing the various permits and certifications and denied the petitions for review.[273]

On May 23, 2017, the U.S. Court of Appeals for the District of Columbia Circuit ruled that FERC can issue conditional certificates to authorize natural gas pipelines before a pipeline applicant receives a section 401 certification under the Clean Water Act.[274] The court noted that because the certificate explicitly conditioned the approval of construction on the pipeline applicant's obtaining the water quality certification, FERC had not authorized discharges into waters in violation of the Clean Water Act.[275]

4. Liability for Pollution Releases from Coal Ash Storage into Ground Waters

Two recent decisions have held that the Clean Water Act applies to pollutants that are discharged into groundwater that is hydrologically connected to navigable waters.[276] In *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, L.L.C.*, the

266. Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States," Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Mar. 3, 2017).

267. Proposed Rule, Definition of "Waters of the United States" – Recodification of Pre-existing Rules, 82 Fed. Reg. 34,899 (July 27, 2017) (to be codified at 33 C.F.R. pt. 328).

268. *See generally Nat'l Ass'n. of Mfrs.*, No. 16-299.

269. Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot., 833 F.3d 360, 371 (3d Cir. 2016).

270. *Id.* at 367.

271. *Id.* at 371-73.

272. *Id.* at 371.

273. *Id.* at 367.

274. Del. Riverkeeper Network v. FERC, 857 F.3d 388 (D.C. Cir. 2017).

275. *Id.*

276. Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, L.L.C., 141 F. Supp. 3d 428 (M.D.N.C. 2015); Sierra Club v. Virginia Electric & Power Co., 2017 WL 1095039 (E.D. Va. 2017).

plaintiffs argued that the disposal of coal ash in lagoons violated the Clean Water Act because the groundwater under the lagoons was hydrologically connected to the Yadkin River.[277] The district court agreed, noting that it had jurisdiction when "pollutants travel from a point source to navigable waters through hydrologically connected groundwater serving as a conduit between the point source and the navigable waters."[278] Additionally, in *Sierra Club v. Virginia Elec. & Power Co.*, a case involving similar allegations regarding the disposal of coal ash, the court denied the defendants' motion to dismiss, noting that many courts had held that the Clean Water Act applies when the groundwater is hydrologically connected to waters governed by the statute.[279]

IV. OTHER

A. Offshore Wind Energy Development

On March 16, 2017, the DOI announced completion of the U.S.'s seventh competitive lease sale of offshore land for renewable wind energy development in federal waters.[280] The sale involved 122,405 acres offshore of Kitty Hawk, North Carolina, producing revenue of approximately $9.1 million for the Federal Government.[281] The prior six such competitive lease sales had previously generated $58 million in revenue involving over one million acres.[282] Recently, the U.S.'s first commercial offshore wind farm became operational on such a lease – the five-turbine, 30 MW Block Island Wind facility developed by Deep Water Wind at a cost of $290 million.[283] The successful high bidder is required to submit a Site Assessment Plan within one year, and if that is approved, will then have four and one half years to submit a Construction and Operations Plan.[284] If that is approved, the lessee will then have 25 years to construct and operate the project.[285]

B. Endangered Species and Migratory Birds

The Endangered Species Act (ESA) identifies two types of critical habitat: areas occupied by the endangered species at the time it is listed as endangered and areas not occupied by the species at the time of listing.[286] In *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv*., the court ruled that "[t]here is no habitability requirement in the text of the ESA or the implementing regulations" for designating areas not occupied as critical habitat.[287] In *Markle Interests*, at issue were 1,544 acres of private land subject to a long-term timber lease, which the owners

277. *Yadkin*, 141 F. Supp. 3d at 444-45.

278. *Id.* at 445.

279. Sierra Club v. Virginia Electric & Power Co., 247 F. Supp. 3d 753, 757-58, 763 (E.D. Va. 2017).

280. Press Release, Dep't of the Interior, Interior Department Auctions 122,000 Acres Offshore Kitty Hawk, North Carolina for Wind Energy Development (Mar. 16, 2017).

281. *Id.*

282. *Id.*

283. *Id.*

284. Dep't of the Interior, *supra* note 282.

285. *Id.*

286. 16 U.S.C. § 1532(5)(A)(i)–(ii) (2013).

287. Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv., 827 F.3d 452, 468 (5th Cir. 2016).

intended to use for timber operations and residential and commercial development.[288] Petitioners argued that the Service could not determine the land is "'essential for the conservation of the species,'" as required by 16 U.S.C. § 1532(5)(A)(ii) (2013), when it is not currently habitable by the species, "nor 'currently supporting the conservation of the species in any way,' nor reasonably likely to support the conservation of the species in the 'foreseeable future.'"[289] They also argued that the designation resulted in the loss of $33.9 million in development value, requiring the Services to exclude the area from the designation.[290]

The court deferred to the Service's finding the area is "essential," and ruled that it could not review the Service's consideration of economic impacts in determining whether to exclude an area.[291] Noting that the ESA "does not articulate any standard governing when the Service must exclude an area from designation," the court held that assuming "that the economic benefits of exclusion outweigh the conservation benefits of designation [whether to exclude an area] . . . is committed to the agency's discretion and is not reviewable."[292] In a dissenting opinion, Judge Priscilla Owen noted that "the majority opinion's[] interpretation of 'essential' means that virtually any part of the United States could be designated as 'critical habitat' for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it."[293] Similarly, in a dissenting opinion from denial of rehearing *en banc*, the dissenting circuit court judges wrote that "the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated."[294]

Alaska Oil & Gas Ass'n v. Pritzker addressed the consideration of climate change in the determination to list a species under the ESA.[295] Specifically, the "case turn[ed] on one issue: When NMFS [National Marine Fisheries Service] determines that a species that is not presently endangered will lose its habitat due to climate change by the end of the century, may NMFS list that species as threatened under the Endangered Species Act?"[296] Citing climate projections, the NMFS determined that "the loss of sea ice over shallow waters in the Arctic would leave the Pacific bearded seal subspecies . . . endangered by the year 2095."[297] The ESA defines a threatened species as "any species which is likely to become

288. *Id.* at 481.

289. *Id.* at 467 (internal citations omitted).

290. *Id.* at 473 (citing 16 U.S.C. § 1533(b)(2) (2013)).

291. *Markle Interests*, 827 F.3d at 478.

292. *Id.* at 473 (emphasis omitted).

293. *Id*. at 483.

294. Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv., 848 F.3d 635, 637 (5th Cir. 2017).

295. Alaska Oil & Gas Ass'n v. Pritzker, 840 F.3d 671 (9th Cir. 2016); *see also* Alaska Oil & Gas Ass'n v. Nat'l Marine Fisheries Serv., Case No. 4:14-CV-00029-RRB (D. Alaska Mar. 17, 2016) (upholding the listing of the Arctic ringed seals as threatened based on climate change projections to the end of the century); Defenders of Wildlife v. Jewell, 176 F. Supp. 3d 975 (D. Mont. 2016) (determination not to list wolverine as threatened was arbitrary and capricious for failing to account for effects of climate change).

296. *Id.* at 674.

297. *Id.*

an endangered species *within the foreseeable future*."[298] The NMFS's prior practice was to set the year 2050 as the outer limit of its analysis of the "foreseeable future."[299] The court ruled that NMFS's new "interpretation of 'foreseeable future' to a more dynamic, species-specific and evidence-based definition" is well-reasoned and consistent with the ESA.[300] With respect to the reliability of forecast beyond 2050, the court ruled that "NMFS provided a reasonable and scientifically supported methodology for addressing volatility in its long-term climate projections, and it represented fairly the shortcomings of those projections – that is all the ESA requires."[301]

On September 27, 2016, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service ("Services") issued a final rule revising regulations regarding the procedures by which the Services evaluate petitions to add or remove a species from the list of endangered or threatened species.[302] In responding to comments regarding required content of petitions, the Services wrote that they "will not base their 90-day findings on any claims for which supporting source materials have not been provided in the petition," while maintaining "the discretion to consider, as appropriate, readily available information that provides context necessary to evaluate . . . a petition . . . in making a determination as to whether the petition presents substantial information."[303] The Services also specify in the rule that they will no longer accept multi-species petitions, requiring instead a single species per petition.[304]

On January 10, 2017, the U.S. Department of the Interior's Office of the Solicitor issued a memorandum, arguing that incidental take is prohibited under the Migratory Bird Treaty Act (MBTA).[305] The MBTA makes it illegal to "pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess . . . any migratory bird . . . or any part, nest, or egg of any such bird."[306] Circuit courts have issued conflicting rulings on whether the MTBA's prohibitions extend to unintentional takings.[307] The Solicitor's opinion was accompanied by a new section of the U.S. Fish & Wildlife Service Manual that defines incidental take of migratory birds as a taking "that directly and foreseeably results from, but is not the purpose of, an

298. 16 U.S.C. § 1532(20) (2013) (emphasis added).

299. *Alaska Oil & Gas Ass'n*, 840 F.3d at 681.

300. *Id.* at 682.

301. *Id.* at 680.

302. Endangered and Threatened Wildlife and Plants; Revisions to the Regulations for Petitions, 81 Fed. Reg. 66,462 (2016) (to be codified at 50 C.F.R. pt. 424); *see also* 16 U.S.C. § 1533(b)(3) (2013)(specifying requirements to address petitions).

303. *Id.* at 66,463.

304. *Id*. at 66,467-68 ("Only one species may be the subject of a petition, which may include, by hierarchical extension based on taxonomy and the Act, any subspecies or variety, or (for vertebrates), any potential distinct population segments of that species").

305. *Id*. at 66,484-85; Memorandum from U.S. Dep't of the Interior, Office of the Solicitor to Director, Fish & Wildlife Service, Incidental Take Under the Migratory Bird Treaty Act (Jan. 10, 2017).

306. 16 U.S.C. § 703 (2004).

307. *Compare* United States v. CITGO Petroleum Corp., 801 F.3d 477 (5th Cir. 2015) (MBTA's take prohibition does not include the unintentional take of migratory birds) *with* United States v. Apollo Energies, Inc., 611 F.3d 679 (10th Cir. 2010) (MBTA requires a defendant to proximately cause the statute's violation).

activity."[308] The new manual section notes that the Service "[f]ocuses its enforcement resources on those project proponents that fail to identify and implement appropriate and practicable mitigation measures that avoid bird injury or mortality."[309]

C. Toxic Substances Control Act - New Regulations

As reported in the Committee's 2016 Report, the Frank R. Lautenberg Chemical Safety for the 21st Century Act was signed into law on June 22, 2016.[310] The Act required EPA to adopt rules implementing the statue within one year. Thus, on June 22, 2017, Administrator Pruitt announced EPA's issuance of three new final rules, a guidance document to assist parties in complying with the Act's requirements, and scoping documents for the Agency's first ten risk evaluations under the Act.[311]

The Chemical Safety Act requires EPA to prioritize and conduct "risk assessments" to determine the danger posed by "toxic chemicals" to the public safety and to the environment.[312] The three new final rules, issued June 22, 2017, established the process by which EPA will identify chemicals requiring prioritization for study and risk evaluation, and defines the factors that will govern how chemicals will be prioritized and how risk assessments will be accomplished.[313] A system of reporting requirements applicable to industry production and use of chemicals subject to the above studies is also established.[314] A summary of the planned risk evaluation process, and a First Year Implementation Plan under the Act have also been released.[315]

308. U.S. FISH & WILDLIFE SERVICE, INCIDENTAL TAKE PROHIBITED UNDER THE MIGRATORY BIRD TREATY ACT at 3.5A (2017).

309. *Id.*

310. 2016 Committee Report, *supra* note 1, at 26.

311. Press Release, EPA, EPA Marks Chemical Safety Milestone on 1st Anniversary of Lautenberg Chemical Safety Act (June 22, 2017); Guidance to Assist Interested Persons in Developing and Submitting Draft Risk Evaluations under the Toxic Substances Control Act, 82 Fed Reg. 33,765 (July 20, 2017); EPA: SCOPES OF THE RISK EVALUATION TO BE CONDUCTED FOR THE FIRST TEN CHEMICAL SUBSTANCES UNDER THE TOXIC SUBSTANCES CONTROL ACT, https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/scopes-risk-evaluations-be-conducted-first-ten-chemical (last visited Oct. 17, 2017).

312. Press Release, EPA, EPA Marks Chemical Safety Milestone on 1st Anniversary of Lautenberg Chemical Safety Act (June 22, 2017).

313. *Id.*

314. EPA: TSCA INVENTORY NOTIFICATION (ACTIVE-INACTIVE) REQUIREMENTS, https://www.epa.gov/tsca-inventory/tsca-inventory-notification-active-inactive-rule (last visited Oct. 17, 2017); 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); Procedures for Chemical Risk Evaluation under the Amended Toxic Sub-stances Control Act, 82 Fed. Reg. 33,726 (July 20, 2017) (to be codified at 40 C.F.R. pt. 702).

315. EPA: TSCA INVENTORY NOTIFICATION (ACTIVE-INACTIVE) RULE, https://www.epa.gov/tsca-inventory/tsca-inventory-notification-active-inactive-rule (last visited July 30, 2017); Risk Evaluations for Existing Chemicals under TSCA, https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/risk-evaluations-existing-chemicals-under-tsca (last visited July 30, 2017); EPA: THE FRANK R. LAUTENBERG CHEMICAL SAFETY FOR THE 21ST CENTURY ACT IMPLEMENTATION ACTIVITIES, https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/frank-r-lautenberg-chemical-safety-21st-century-act (last visited July 30, 2017).

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