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AN ENVIRONMENTAL AND ENERGY LAW PRACTICE

2023 Environmental and Energy Law Forecast

FEDERAL

AIR:

Federal Climate Change to Remain a Priority in 2023

Katherine L. Vacarro, Esq.

Addressing climate change will remain among the Biden Administration's top priorities during 2023, and the end goal is the same: reducing greenhouse gas emissions by up to 50 percent by 2030. But after some setbacks in 2022, the Administration was forced to take a step back and reevaluate its options. Notably, instead of Biden's Build Back Better bill which died on the vine early last year without the support of West Virginia Senator Manchin, the Administration will use the Inflation Reduction Act of 2022 (the "IRA") to allocate funding for reducing greenhouse gas (GHG) emissions in every sector of the economy, including electricity production, transportation, industrial manufacturing, buildings, and agriculture. The IRA amends the federal Clean Air Act to create a new program called the "Greenhouse Gas Reduction Fund." The Environmental Protection Agency (EPA) will administer the $27 billion fund by providing competitive grants to encourage projects that reduce GHG emissions, with an emphasis on projects that benefit low-income and disadvantaged communities, which ties nicely with the Administration's other top environmental priority, environmental justice.

Biden's EPA is also expected to pivot in 2023 in response to the Supreme Court's mid-2022 decision in *West Virginia v. EPA*, which concluded that EPA lacks the authority under the Clean Air Act to require broad GHG emission reductions across the power sector by forcing a generation shift away from coal-fired plants. Although the Court stopped short of imposing an outright ban on such an approach, it came close, finding that Congress would first need to amend the Clean Air Act to expressly grant EPA the requisite authority. EPA will therefore need to look closely at future approaches to forcing industry-wide GHG emission reductions from power generation, and indeed, EPA already delayed rolling out a proposal for reducing GHG emissions from existing power plants, which was originally expected in July 2022, and instead created a new regulatory "docket to collect public input to guide the Agency's efforts to reduce emissions of [GHGs] from new and existing fossil fuel-fired electric generating units." The proposal is now expected in March 2023, the same month EPA is targeting to release its plan to limit GHG emissions from cars and trucks beginning with model year 2027.

Outside the Clean Air Act framework, the Administration released just last week, new "Guidance on the Consideration of Greenhouse Gas Emissions and Climate Change" to assist federal agencies better assess and disclose climate impacts when they conduct environmental reviews of permit applications for clean energy and other infrastructure projects. In particular, the new guidance instructs agencies to mitigate GHG emissions to the greatest extent possible and emphasizes that the depth of analysis should be

proportional to a project's impacts. Specifically, projects that will reduce GHG emissions can have less detailed GHG emissions analysis. The Council on Environmental Quality is accepting public comments on the new guidance through March 10, 2023.

With these and other regulatory initiatives underway, the Administration is poised for an active year focused on climate change.

New Source Review: What to Expect in 2023

Carol F. McCabe, Esq.

The coming year is likely to be active in the realm of New Source Review, with the Biden Administration moving forward with several actions that will reverse prior administrations and serve to tighten New Source Review requirements. First, in December 2022, EPA rescinded the policy memo by former EPA Administrator Scott Pruitt titled "New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected Actual Applicability Test in Determining Major Modification Applicability." It was no surprise that EPA rescinded this Trump-era memo, which had as its centerpiece a pronouncement that EPA would not "second-guess" projected actual emissions estimates by permittees, particularly where actual emissions remain below significance thresholds after the change in question. Perhaps an indicator of future enforcement priorities, EPA's recission of the Pruitt memo serves to remind permittees to proceed carefully through NSR applicability determinations because they may be examined in detail after the fact, including calculations of projected actual emissions and the role of the demand growth exclusion in that context.

Second, EPA will move forward with its Reconsideration of Fugitive Emissions Rule (the Reconsideration Rule), for which the comment period closes on February 14, 2023. The proposed Reconsideration Rule would repeal a Bush-era rule that sought to clarify that increases in fugitive emissions need not be counted toward New Source Review significance thresholds in the major modification context for sources that are **not** within source categories that are specifically listed within the regulations. Citing the long and twisted regulatory history of EPA's treatment of fugitive emissions, which includes a "longstanding" interpretive ruling and an "inadvertent" failure to correct the regulatory text over the course of several decades, the Reconsideration Rule would reverse the 2008 rule (which, to add to the confusion, has remained on the books but has been stayed since 2009). In short, under the proposed Reconsideration Rule, fugitive emissions will only be counted toward major source threshold determinations for specific source categories listed in the regulations (such as petroleum refineries, portland cement plants and iron and steel mills), whereas fugitive emission increases will be counted toward significance thresholds in major modification determinations for **all** source categories. In addition, the proposed Reconsideration Rule would remove an exemption from New Source Review for circumstances in which New Source Review would be triggered "*only if fugitive emissions, to the extent quantifiable, are considered in calculating the potential to emit*…" *See* 52.21(i)(1)(vii). While the proposed Reconsideration Rule will promote long-needed clarity within the regulatory language, it is likely to make New Source Review Requirements more difficult to navigate for certain major sources in non-listed source categories. In particular, questions of quantification and modeling of fugitive emissions and determinations of Best Available Control Technology are sure to arise and create additional permitting burden and uncertainty for permittees.

Third, on January 6, 2023, EPA announced its decision to revisit the National Ambient Air Quality Standards (NAAQS) for PM2.5. EPA announced its proposed decision to revise the primary (health-based)

annual $PM_{2.5}$ standard from its current level of 12.0 µg/m^3 to within the range of 9.0 to 10.0 µg/m^3. EPA also proposed not to change the current secondary (welfare-based) annual $PM_{2.5}$ standard, primary and secondary 24-hour $PM_{2.5}$ standards, and primary and secondary PM_{10} standards. As part of the proposal, EPA would require a change to the PM2.5 air monitoring network design criteria, to add an environmental justice component to ensure that monitors are sited in communities that are subject to increased risk of PM2.5 related health effects. While the NAAQS revision will not immediately affect permittees, EPA monitoring shows that 62 counties, including several located in Pennsylvania, would not meet a tightened NAAQS PM2.5 standard of 9.0 µg/m^3. Once these counties are designated nonattainment, major sources of PM2.5 or its precursors will face new requirements for nonattainment New Source Review. EPA will accept comment on the proposal for 60 days after its publication in the Federal Register.

Fourth, the Biden Administration has set its sights on the Trump-era Project Emission Accounting Rule, which was finalized in November 2020, allowing permittees to account for increases *and* decreases in emissions (the "sum of the difference") in "Step 1" of the two-step analysis for determining whether a project causes a significant net emission increase triggering New Source Review requirements. Importantly, if a project increase is determined not to be significant in Step 1, then the permittee need not proceed to the Step 2 netting analysis to consider all increases and decreases during the contemporaneous period against the New Source Review significance threshold for major modifications. While generally favored by industry, the Project Emission Accounting Rule was strongly criticized by certain states and was the subject of a Petition for Reconsideration submitted by a coalition of environmental advocacy groups in January 2021. The Petitioners argued that the Project Emission Accounting Rule: 1) failed to ensure that decreases considered in Step 1 are related to the proposed project; 2) would allow a source to avoid New Source Review by using non-contemporaneous decreases in Step 1; and 3) failed to ensure that claimed emission decreases would actually occur and be maintained. In a letter to Petitioners dated October 12, 2021, EPA denied the Petition for Reconsideration on the basis that the Petition did not meet the Clean Air Act criteria for mandatory reconsideration under Section 307(d)(7)(B). However, EPA indicated that it would undertake a rulemaking to review the Project Emission Accounting Rule consistent with President Biden's Executive Order 13990 *Protecting Public Health and the Environment by Restoring Science to Tackle the Climate Crisis.* Based on EPA's Fall 2022 Regulatory Agenda, the rulemaking will be forthcoming in the near term. Although EPA has not provided detail on its planned proposal, it seems likely that the scope of EPA's effort will address concerns expressed in the Petition, along with related concepts affecting the manner in which emission increases are calculated in the NSR context.

Finally, EPA has announced an initiative to clarify minor New Source Review program requirements for state and local air permitting agencies. This effort would seek to ensure accountability in meeting the NAAQS and transparency in ensuring meaningful engagement by the public in minor source permitting actions. EPA's focus will include synthetic minor sources, non-major modifications at major sources, "true minor" sources, and even general permits. EPA action on this initiative is expected in the summer of 2023.

After More than Six Long Years, EPA Scheduled to Finalize the Risk Management Program (RMP) Accidental Release Prevention Requirements

Michael Dillon, Esq. and Technical Consultant Michael C. Nines, P.E., LEED AP

As most recently reported in our 2021 forecast, major revisions to the Risk Management Program (RMP) regulations have been batted around since early 2017 when, as one of the final actions of the Obama Administration, EPA proposed major revisions to the program. The RMP Rule implements Section 112(r)

of the 1990 Clean Air Act amendments and requires facilities that use extremely hazardous substances to develop a Risk Management Plan to prevent accidental release to the adjacent community. Two administrations and over six years since the 2017 amendments to the rule, EPA is planning to issue a final rulemaking on significant revisions to the RMP Rule that appear slated to become final in August 2023.

On January 13, 2017, the EPA published a final RMP Rule (2017 Amendments) to prevent and mitigate the effect of accidental releases of hazardous chemicals from facilities that use, manufacture, and store them. The 2017 Amendments were a result of Executive Order 13650, *Improving Chemical Facility Safety and Security*, which directed EPA (and several other federal agencies) to modernize policies, regulations, and standards to enhance safety and security in chemical facilities. The 2017 Amendments contained various new provisions applicable to RMP-regulated facilities addressing prevention program elements, emergency coordination with local responders, and information availability to the public. On December 19, 2019, EPA promulgated a final RMP rule (2019 Revisions) that repealed several major provisions of the 2017 Amendments and retained other provisions with modifications. Upon taking office in January 2021, President Biden issued Executive Order 13990, *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis* (EO 13990), which directed federal agencies to review existing regulations and take action to address priorities established by the new administration including bolstering resilience to the impact of climate change and prioritizing environmental justice.

As an outgrowth of its review efforts under EO 13990, EPA is expected to publish an update to the RMP Rule later this year that will include many of the elements from the 2017 Amendment, as well as new provisions that are intended to bolster the existing program and provide additional safeguards. Some of the proposed requirements include identifying safer technologies and chemical alternatives, more thorough incident investigations, and third-party auditing, all of which EPA purports would benefit nearby communities. In addition, the final rulemaking is expected to require regulated facilities to consider natural hazards (including those that result from climate change) and loss of power among the hazards that must be addressed in the RMP.

HAZARDOUS SUBSTANCES and REMEDIATION:

Federal Regulation of PFAS Will Continue to Accelerate in 2023

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In November 2022, EPA released a Progress Report on its 2021 *PFAS Strategic Roadmap* which sets forth EPA's plans to regulate per- and polyfluoroalkyl substances (PFAS) through 2024 as well as updates to its regulatory actions for 2023. While regulation of PFAS during 2022 occurred at a breakneck pace, 2023 appears to be no different as EPA is planning a number of significant actions to address PFAS contamination across environmental media. Notably, EPA is seeking to finalize a rulemaking designating two PFAS as CERCLA hazardous substances. In addition, EPA plans to advance a notice of proposed rulemaking seeking to establish national primary drinking water maximum contaminant levels (MCLs) for PFOA and PFOS. The EPA also plans to continue to roll-out over $10 billion in dedicated funding from the Bipartisan Infrastructure Law (BIL), known as the *Infrastructure Investment and Jobs Act,* for investments in drinking water, wastewater, and stormwater infrastructure, as well as funding dedicated to addressing emerging contaminants at legacy Superfund and brownfield sites.

Other notable actions will include EPA's release of the final Effluent Limitation Guideline (ELG) Plan 15, which will contain key steps for addressing PFAS wastewater discharges from a range of industrial categories and establishment of pre-treatment requirements for sources of PFAS (such as chemical manufacturing, landfills, and metal finishing categories). Lastly, EPA will remain focused on improvements to chemical data availability and public access to such data through release of analytical tools that integrate data on PFAS reporting, testing, and occurrences in communities.

Set forth below is a more detailed summary of the regulatory actions that EPA plans to take under each of the following federal legislative programs by the end of 2023.

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

- In the Fall of 2022, EPA published a Notice of Proposed Rulemaking in the Federal Register seeking to designate two PFAS—perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), including their salts and structural isomers—as CERCLA hazardous substances. The designation of PFOA and PFOS as hazardous substances would require facilities to report PFOA and PFOS releases that meet or exceed a reportable quantity, would trigger remediation obligations, and would enable EPA and private parties to recover costs incurred in cleaning up contamination of these substances. EPA anticipates finalizing a rulemaking designating these two PFAS as CERCLA hazardous substances in the Fall of 2023.

- EPA also plans to develop an advance notice of proposed rulemaking in the first quarter of 2023 requesting public input on whether the agency should consider designating as hazardous substances precursors to PFOA and PFOS, whether the agency should consider designating other PFAS as CERCLA hazardous substances, and whether there is information that would allow the agency to designate PFAS as a class or subclass of hazardous substances.

Safe Drinking Water Act and Clean Water Act (SDWA / CWA)

- EPA intends to develop a proposed rule establishing a maximum contaminant level goal (MCLG) for PFOA and PFOS by March 3, 2023 as required by the SDWA, to support a national primary drinking water regulation (NPDWR) for PFOA and PFOS. Thereafter, EPA is required to promulgate a NPDWR for those two substances within 18 months after the proposal, which would be September 3, 2024. However, EPA has announced it is targeting finalizing the NPDWR by the end of 2023.

- On June 15, 2022, EPA issued updated interim drinking water health advisory levels (HALs) for PFOA and PFOS, replacing those EPA issued in 2016. These updated advisories were based upon new data which, according to EPA, suggests that lifetime exposure to even near-zero levels of these chemicals can cause certain adverse health effects. The interim HALs have been challenged by various entities and the data and draft analyses used by EPA to establish the non-enforceable HALs are currently undergoing EPA Science Advisory Board (SAB) review. EPA is reviewing and will respond to the SAB comments on the interim HALs as the Agency moves forward to develop MCLGs to support the NPDWR for PFOA and PFOS as referenced above.

- EPA will begin release of the much-anticipated PFAS occurrence data for public drinking water systems starting in mid-2023 through the Unregulated Contaminant Monitoring Rule 5 (UCMR 5). UCMR 5 requires public water systems to monitor their systems for an expanded list of PFAS compounds. The UCMR 5 effort will identify the presence of 29 different PFAS compounds in the

nation's drinking water systems and their concentrations. The release of UCMR 5 data in real-time, along with quarterly rolling data releases to the public, is sure to generate great interest and is anticipated to further drive regulatory actions and decision-making.

- Also in the offing is the potential development of a Regulatory Determination decision for drinking water for a large group of PFAS. In November 2022, the EPA published its Contaminant Candidate List 5 (CCL 5). The CCL is a list of contaminants that are currently not subject to any proposed or promulgated NPDWR but are known or anticipated to occur in public water systems. In a major development, the EPA's publication of the CCL 5 includes PFAS as a group, which according to EPA's structural definition of PFAS, would include over 10,000 individual chemical PFAS substances. EPA must now determine whether or not to regulate at least five contaminants from the CCL 5 (including PFAS as a group) in a separate process called a Regulatory Determination. The Agency will make Regulatory Determinations for the CCL 5 contaminants for which there are sufficient health effects and occurrence data and which present the greatest public health concern.

- Validation of Draft EPA Method 1633 will continue in 2023. This method is a single laboratory validated, direct injection EPA method for detection of 40 PFAS in wastewater, surface water, groundwater, soil, biosolids, sediment, landfill leachate, and fish tissue. EPA is also anticipated to continue with validation of Draft EPA Method 1621, which is a single laboratory validated method to screen for organofluorines in wastewater. The draft method is labeled as a screening method because it does not quantify all organofluorines with the same accuracy and has some known interferences.

- The final ELG Plan 15 is expected to be released in 2023, The Plan will describe analyses, studies, and rulemakings related to ELGs and pretreatment standards. ELGs are national, technology-based regulations developed to control industrial wastewater discharges to surface waters and into publicly owned treatment works. ELGs are intended to represent the greatest pollutant reductions that are economically achievable for an industry. Notably, ELG Plan 15 will seek to revise the ELGs for the (1) Organic Chemicals, Plastics, and Synthetic Fibers (OCPSF) category to address PFAS wastewater discharges from facilities manufacturing PFAS, (2) revise the Metal Finishing ELGs to address PFAS discharges from chromium electroplating facilities, and (3) conduct detailed studies on PFAS in wastewater discharges from landfills as well as textile and carpet manufacturers.

- Development of final national recommended ambient water quality criteria for PFOA and PFOS to protect aquatic life will continue in 2023. Draft ambient water quality criteria were previously published in April 2022. EPA will now prepare a response to public comments document, update the draft PFOA and PFOS criteria documents considering public comments, and consider new toxicity data published since September 2021 prior to the agency issuing final recommended criteria. Once finalized, states and authorized tribes can adopt the recommended criteria into water quality standards to protect against effects on aquatic life.

Clean Air Act (CAA)

- While originally referenced in the *PFAS Strategic Roadmap* for a target date of Fall 2022, EPA is anticipated to continue evaluating options during 2023 to regulate PFAS under the Clean Air Act, including listing certain PFAS as hazardous air pollutants (HAPs).

- As part of this effort, EPA is developing test methods to detect PFAS in stack emissions and ambient air. These include Other Test Method-50 (OTM-50), which the EPA's Office of Research and Develop is currently developing for detection of PFAS products of incomplete combustion (PICs), anticipated for publication in 2023. OTM are EPA test methods that have not yet gone through the agency's rulemaking process but are urgently needed to support agency initiatives. EPA is also considering development of sampling and analysis methods for targeted and non-targeted PFAS ambient air measurements. Applications will include fence-line monitoring for fugitive emissions, deposition, and receptor exposure using field deployable Time of Flight/Chemical Ionization Mass Spectrometer and summa canisters and sorbent traps techniques.

- An update of EPA's *Interim Guidance on Destroying and Disposing of Certain PFAS and PFAS-Containing Materials That Are Not Consumer Products* is planned by December 2023. EPA's Interim Guidance originally published in December 2020 outlined the current state of the science on techniques and treatments that may be used to destroy or dispose of PFAS and PFAS-containing materials from non-consumer products, including Aqueous Film Forming Foam , soil and biosolids, textiles, spent filters, membranes, resins, granular carbon, and other waste from water treatment, landfill leachate containing PFAS, and solid, liquid, or gas waste streams containing PFAS from facilities manufacturing or using PFAS. The guidance does not apply to consumer products, such as non-stick cookware and water-resistant clothing. The guidance generally describes thermal treatment, landfill, and underground injection technologies that may be effective in the destruction or disposal of PFAS and PFAS-containing materials. EPA plans to update this important guidance based on the evolution of PFAS treatment techniques, research and development, and analytical techniques to measure PFAS.

Resource Conservation and Recovery Act (RCRA)

EPA plans to issue one of two planned Notices of Proposed Rulemaking designating certain PFAS as Hazardous Constituents under the RCRA program in response to a June 23, 2021 petition by Governor Michelle Lujan Grisham of New Mexico for PFAS to be regulated under RCRA, either as a class or as individual chemicals. The first proposed rulemaking would add PFOA, PFOS, PFBS, and GenX to the RCRA Hazardous Constituents list under Appendix VIII. This action is anticipated to be published through a Notice of Proposed Rulemaking in August 2023 that would subject these four chemicals to corrective action requirements and would be a necessary building block for future work to regulate PFAS as a listed hazardous waste. The second rulemaking would clarify that the RCRA Corrective Action Program has the authority to require investigation and cleanup for wastes that meet the statutory definition of hazardous waste, as defined under RCRA section 1004(5). This modification would further clarify that emerging contaminants such as PFAS can be cleaned up through the RCRA corrective action process.

Emergency Planning and Community Right-to-Know Act (EPCRA)

A final rule to strengthen PFAS reporting required under the Toxic Release Inventory (TRI) will be developed in 2023. EPA's proposed rule (published in December 2022) would eliminate the de minimis exemption for PFAS manufacturing, processing, or other use reporting thresholds of 100 pounds for each of the listed PFAS subject to TRI reporting. The current reporting framework allows facilities that report to TRI to disregard certain de minimis concentrations of PFAS chemicals in mixtures or trade name products (below 1 percent concentration for each of the TRI-listed PFAS). The final rule would presumably eliminate the availability of the de minimis exemption and require facilities to report on PFAS regardless of their concentration in products. Also important, the EPA's proposed rule removed the availability of the de

minimis exemption for purposes of the Supplier Notification Requirements for all chemicals on the list of chemicals of special concern. This change is designed to help ensure that purchasers of mixtures and trade name products containing such chemicals are informed of their presence in mixtures and products they purchase. Normally, if these constituents are below certain de minimis levels, they are not published or reported on documents such as Safety Data Sheets (SDS) and similar documents provided by suppliers of raw materials.

Toxics Substances Control Act (TSCA)
EPA is engaged in several actions related to PFAS under TSCA. See our 2023 TSCA forecast for further information.

TSCA Actions Expected to be Plentiful in 2023

Todd D. Kantorczyk, Esq. and Technical Consultant Michael C. Nines, P.E., LEED AP

The Toxic Substances Control Act (TSCA) promises to be the source of much regulatory activity in 2023 with more "whole chemical substance" risk determinations, risk management rules, updates to TSCA rules on confidentiality, and PFAS reporting expected. The expected activities are summarized below.

TSCA Risk Evaluation and Management Rule Status
At the end of 2022, EPA announced the availability of the final revision to the risk determination for carbon tetrachloride whereby it was found to present an unreasonable risk of injury to human health when evaluated under its condition of use. The carbon tetrachloride determination is the latest risk determination made in accordance with EPA's June 2021 announcement that it would revisit the risk evaluations for the "first ten" high priority substances completed during the Trump administration. Like the previous revised risk determinations, the revised risk determination for carbon tetrachloride utilized a "whole chemical approach," which at this stage does not differentiate between conditions of use and assumes that workers will not always wear the appropriate personal protective equipment. Industry groups have questioned whether these policy choices implemented as part of the revised risk determinations are consistent with TSCA, and legal challenges may be forthcoming. Nevertheless, additional final revised risk assessments using this approach, including for trichloroethylene, are expected in 2023.

In addition to the remaining risk determinations referenced above, EPA is expected to release several proposed Risk Management Rules to address the unreasonable risk of injury to health the agency has identified in the final risk evaluations. Proposed rules are anticipated in early 2023 for methylene chloride, perchloroethylene (PCE), trichloroethylene (TCE), carbon tetrachloride, and several others.

CBI Claims under TSCA
In addition, in May 2022 EPA published a proposed rule concerning submitting and supporting confidential business information (CBI) claims under TSCA. The proposed rule, which is expected to be finalized in 2023, attempts to consolidate the TSCA CBI provisions currently found in other TSCA regulations and EPA's FOIA regulations into a new Part 703. Substantively, the proposed regulations are generally consistent with the guidance and forms EPA has been using to implement the confidentiality provisions of the 2016 Lautenberg Act amendments to TSCA. In particular, the new rules confirm that CBI claims must be accompanied by substantiation at the time of submission and provide standardized questions that must be answered on items such as the extent and likelihood of competitive harm upon release of the

information. Consistent with the standardized approach, the proposed rule contemplates using the electronic Central Data Exchange (CDX) platform to submit nearly all substantiation information and for EPA to use it to communicate to submitters any follow-up questions, determinations, or notices of the pending expiration of CBI claims. If a CBI claim is deemed deficient, it will be communicated through CDX and the submitter will have ten days to correct the deficiency.

TSCA Fee Rule

In November 2022, EPA issued supplemental notice of proposed rulemaking addressing changes to the TSCA fee rule first proposed in January 2021. EPA is required to reassess TSCA implementation fees every three years, with the initial fees having taken effect in 2018. Ultimately this proposed rule will promulgate a significant increase in fees manufacturers, importers, and certain processors are required to pay to fund EPA's costs to implement TSCA. The EPA's purpose for supplementing the originally proposed rule is due to revenue shortfalls of about half of what was estimated when EPA first established fees in 2018. The proposed TSCA fee increases are significant and will cover regulated entities required to submit information under Section 4 (test orders/rules), Section 5 notices (pre-manufacturing and exemptions), and Section 6(b) risk evaluations. There proposed rule contemplates some relief for small businesses with reduced fees. Of note, Section 5 Pre-manufacturing Notice (PMN) review fees will jump from $19,020 to $45,000 per chemical. For low-volume exemption (LVE) requests and modifications, the fees will jump from $5,590 to $13,200 per chemical. Lastly, for Section 6 risk evaluations, the EPA is proposing to increase the fee from $2,560,000 to a whopping $5,081,000 for EPA-initiated risk evaluations.

New Procedural Regulations

EPA is planning to propose rules in early 2023 to further streamline new chemical reviews. Due to the Lautenberg amendments to TSCA and increased responsibilities for new chemical reviews, EPA is facing significant challenges in completing reviews within 90 days. EPA intends to propose a rulemaking seeking to revise the new chemicals procedural regulations in 40 CFR part 720 to improve the efficiency of EPA's review process and to align its processes and procedures with the new statutory requirements. The rulemaking will purportedly seek to increase the quality of information initially submitted in new chemicals notices and improve the EPA's processes to reduce unnecessary rework in the risk assessment and the length of time that new chemicals are under review. EPA anticipates this effort will be particularly helpful for Low Volume Exemptions (LVEs), which constitute about 60 percent of TSCA section 5 submissions annually.

PFAS Activities

Under TSCA Section 8(a)(7), which was added as part of National Defense Authorization Act for fiscal year 2020, EPA was required to promulgate a rule by December 31, 2022, requiring each person that has manufactured any of the per- or polyfluoroalkyl substances (PFAS) since January 1, 2011, to report certain information to EPA. The Agency published a proposed rule on June 28, 2021, that required manufacturers and importers of PFAS in any year since 2011 to report chemical identity, categories of use, volumes manufactured or imported, and other information, without any exclusion for small manufacturers. However, based on initial feedback EPA subsequently convened a Small Business Advocacy Review panel and on November 25, 2022, and released and sought comment on an Initial Regulatory Flexibility Analysis (IRFA), which now estimates that small businesses, primarily consisting of article importers, would incur approximately $864 million to complete the one-time reporting. As result of the revised figures, EPA is considering revisions to the PFAS reporting rule recommended by the panel that would limit its applicability through a number of provisions that are analogous to the current Chemical Data Reporting rule exemptions, including creating a list of subject PFAS, establishing a reporting threshold, setting exemptions

for small businesses based on annual sales, and incorporating other exemptions for byproducts, impurities, recyclers, intermediates, and research and development substances. Comments on the IRFA were due by December 27, 2022, meaning that a final rule will likely be promulgated sometime in 2023.

EPA is also developing a significant new use rule (SNUR) under section 5(a)(2) of TSCA for certain uses of Inactive Inventory PFAS. Persons subject to the Inactive Inventory PFAS SNUR would be required to notify the EPA at least 90 days before commencing the manufacture or processing of PFAS for any use that EPA has determined is a significant new use. The required notifications would initiate EPA's evaluation of the intended use within the applicable review period. Manufacturing and processing for the significant new use could not commence until EPA had conducted a review of the notice, made an appropriate determination on the notice, and taken such actions as are required in association with that determination.

PCB Regulations

Finally, we described EPA's proposed revisions to expand the available PCB analytical methods and to amend the PCB cleanup and disposal program requirements in last year's Forecast. Those revisions are currently planned to be finalized in May 2023 and may lead to some much needed updates to the federal PCB analytical and remediation regulations.

Will the Regulated Community Feel the Influx of Superfund Funding in 2023?

Garrett D. Trego, Esq.

Across the first two years of the Biden Administration and Congress' passage of the Infrastructure Investment and Jobs Act and the Inflation Reduction Act, the Superfund tax has been reinstated and billions of new or additional funding has been allocated to the federal Superfund program. The focus of the new funding is to bolster cleanups in environmental justice communities and to kickstart remedial projects where no solvent potentially responsible party has been identified or work is not proceeding at a pace satisfactory to EPA.

Despite the new sources of funding secured in 2021 and 2022, many regulated entities have yet to see significant changes in the Superfund program during these years, even as compared against the prior federal administration. That could change in 2023. Of the Biden EPA's stated priorities from its 2023 budget — "advancing environmental justice, tackling climate change, protecting public health, improving infrastructure, and rebuilding the EPA workforce"—it is perhaps the expanded workforce and the availability of funds to enable EPA to do work itself at sites that will lead to the most significant, practical impacts on the large caseload of the Superfund program. In 2023 and beyond, it is possible that the new sources of funding trickle down to more tangible results, including efforts by EPA to (1) begin work at sites for which remedies have been selected but at which no solvent parties exist to do the work, (2) seek to speed up remediations at sites where cooperating parties have been slow (In EPA's opinion) to proceed by having EPA take over (or threaten to take over) the work, (3) threaten to initiate work at sites for which Unilateral Orders are issued but parties either will not or are otherwise slow to proceed with remediation, (4) push for the more rapid completion of phased work and to initiate work at new operable units within existing sites, and (5) be more ambitious about adding sites to the National Priorities List.

A Look Ahead at FIFRA in 2023

Garrett D. Trego, Esq.

Several developments to watch under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) are summarized below.

Registration Review

FIFRA Section 3(g)(1)(A)(iii) requires that EPA perform 15-year reviews of registered pesticides, including by October 1, 2022, for the more than 700 pesticides registered prior to amendments that took effect in 2006. This large swath of reviews will extend into 2023 and will consider the safety and efficacy of the pesticides through the process enumerated in 40 C.F.R. § 155.40. EPA is also engaged in evaluating the potential effects of registered pesticides on endangered and threatened species (ETS), as well as the potential effects of per- and polyfluoroalkyl substances (PFAS) in pesticides, with a specific EPA 2023 fiscal year budget allocation of $4.9 million directed to the former and a $126 million allocation to PFAS impact studies in general.

Enforcement

Consistent with annual federal civil monetary penalty inflation adjustments, base civil statutory monetary penalties assessed under FIFRA on or after January 6, 2023, will increase to $23,494 (7 U.S.C. § 136l((a)(1)). Since the advent of the Covid-19 pandemic, EPA has taken a more active role in the enforcement of FIFRA against manufacturers, importers, and retailers of unregistered pesticides, particularly those that claim antimicrobial (or virus-fighting) qualities. The high base civil penalties associated with these potential violations can result in surprisingly lucrative civil penalty settlements with the agency. While the pandemic is waning, this more aggressive enforcement approach is likely to continue into 2023.

Preemption of State Tort Claims

A push for the Supreme Court's consideration of the federal preemption defense to toxic tort failure to warn lawsuits under FIFRA will continue. The argument was well articulated in the *certiorari* petition filed in 2021 by Monsanto Company. *Monsanto v. Hardeman*, 142 S.Ct. 2834 (2022) (cert. denied). Monsanto argued that because FIFRA prohibits states from establishing independent pesticide labeling requirements, and pesticide manufacturers are bound to adhere to their EPA-approved labels, state tort failure to warn lawsuits should be preempted. The Ninth Circuit rejected the argument, before the Supreme Court denied *certiorari*. *Hardeman v. Monsanto Co.*, 997 F.3d 941 (9th Cir. 2021). In 2023, defendants are expected to continue to seek review of this important issue in other cases.

ENVIRONMENTAL JUSTICE:

Feds Continued to Integrate Environmental Justice Considerations in 2022, but will Implementation in 2023 Continue on a Similar Pace?

Todd D. Kantorczyk, Esq.

At this time last year, we noted that environmental justice (EJ) concerns would be a top priority at the federal level in 2022, and both EPA and the US Department of Justice (DOJ) in particular did not disappoint. In 2022, both agencies announced significant structural changes and issued major strategy and guidance documents that are intended to elevate EJ concerns when it comes to permitting,

enforcement, funding and regulatory development. With this infrastructure in place, the federal government is poised to push EJ considerations even more forcefully in 2023 when implementing and enforcing federal environmental laws. In the continued absence of a federal EJ statute, however, it will be interesting to see how far EPA and DOJ are willing to press EJ considerations, and whether affected stakeholders such as state governments or the regulated community will challenge federal actions based on EJ concerns.

EPA

In 2022, EPA took a number of steps to—in the words of Administrator Regan— "bake environmental justice and civil rights into the DNA of the Agency." From a structural perspective, on September 24, EPA announced the establishment of a new Office of Environmental Justice and External Civil Rights (EJCR). The new office combines three existing EJ-related offices, and importantly will be headed by a new assistant administrator to be nominated by the President and confirmed by the Senate. These actions elevate the EJCR to the same level as the traditional major EPA programs such as the Office of Water, the Office of Air and Radiation, and the Office of Enforcement and Compliance Assurance, meaning that the EJCR will have a direct line to the Administrator. The new EJCR will have approximately 200 employees and will be responsible for areas related to the Biden Administration's EJ goals, including among other things, compliance with and enforcement of federal civil rights laws with respect to environmental permitting, and overseeing distribution of the $2.7 billion in environmental justice grants related to climate change funding provided by the Inflation Reduction Act.

In addition to making structural changes, EPA also issued a number of policy and guidance documents in 2022 that signal how EPA intends to approach EJ considerations in 2023. For example, in May the USEPA Office of General Counsel released a document entitled *EPA Legal Tools to Advance Environmental Justice*, updating a document originally issued in 2014. The almost 200-page guidance document explores how EPA can address EJ concerns under existing federal environmental statutes such as the Clean Air Act, the Clean Water Act, CERCLA, and Toxic Substances Control Act, emphasizing instances where EPA has the authority to assess, consider and address cumulative impacts and risks. And most recently, on January 11, 2023, EPA released additional guidance on assessing cumulative impacts as an addendum to the *Legal Tools* document. This addendum is intended to provide "further detail and analysis, and some illustrative examples of the Agency's authority to advance environmental justice and equity by addressing cumulative impacts."

Another EJ guidance document for the Office of General Counsel that has received significant attention recently is the *Interim Environmental Justice and Civil Rights in Permitting Frequently Asked Questions* (EJ FAQs), released in August. The EJ FAQs include eighteen questions and responses that are intended to provide federal, state and local environmental permitting agencies EPA's views on how to integrate requirements under civil rights laws when administering environmental permitting programs. Importantly, the EJ FAQ explicitly states that a permitting authority's compliance with federal environmental laws and regulations does not necessarily mean that federal civil rights laws have been satisfied, meaning that permitting agencies must also establish compliance with federal civil rights laws as part of its environmental permitting programs. Furthermore, the EJ FAQs endorse the use of EJ screening tools, such as EJScreen and the identification and assessment of cumulative impacts as part of the permitting process. Most notably, the EJ FAQs raise the prospect of permit denial in instances where a permit decision will have a disparate impact, there are no mitigation measures the permitting authority can take to address the disparate impacts, and the permitting authority cannot identify a "substantial legitimate justification" for the permitting action. The EJ FAQs assert that a decision to deny a permit based upon unjustified disparate impacts is a fact specific determination. EPA goes on to list a number of proactive mitigation measures that

could address a disparate impact, including additional controls or limits, continuous or periodic monitoring, recordkeeping or reporting, a website with real time monitoring data, or third-party monitoring.

DOJ

In 2022, DOJ also implemented structural changes and policies to promote EJ considerations in the context of environmental enforcement. Specifically, on May 5 Attorney General Garland announced three major EJ items. First, he released the Department's "Comprehensive Environmental Justice Enforcement Strategy." The strategy is comprised of four principles:

1. Prioritize cases that will reduce public health and environmental harms to overburdened and underserved communities;
2. Make strategic use of all available legal tools to address environmental justice concerns;
3. Ensure meaningful engagement with impacted communities; and
4. Promote transparency regarding environmental justice enforcement efforts and their results.

Each of the principles is accompanied by a number of actions including the creation of an EJ Steering Committee, the use of Title VI and other civil rights authorities, and tracking progress on cases brought and outcomes achieved under the strategy.

DOJ's second announcement related to the creation of a new Office of Environmental Justice. This office will be charged with implementing the new EJ Enforcement Strategy.

Finally, the Attorney General announced that DOJ would be issuing an interim final rule that would restore its ability to use supplemental environmental projects (SEPs) as part of environmental enforcement settlements and rescind the Trump Administration rule that had removed this authority. In tandem with the final rule, DOJ released a related guidance memorandum on settlement agreements involving payments to non-governmental authorities, in an attempt to provide more procedural safeguards to protect against alleged violations of the Miscellaneous Receipts Act, which was ostensibly the basis for the Trump Administration abandoning SEPs. In the new EJ Strategy document, DOJ touted SEPs as being able to secure significant environmental and public health benefits for impacted communities.

Federal EJ Enforcement in 2022

2022 saw an increase in federal efforts to enforce the EJ principles embodied in the structural and policy changes referenced above. First, EPA continued its more aggressive oversight of state environmental permitting processes that, in EPA's view, do not sufficiently assess and address disparate impacts. For example, as part its evaluation of three civil rights complaints filed by Louisiana residents, on October 12, EPA issued a 56-page "Letter of Concern" stating that their initial investigation of the Louisiana Department of Environmental Quality and the Louisiana Department of Health "raises concerns" that administration of their air permitting programs "may have an adverse and disparate impact on Black residents…." The Letter notes that it is part of an Information Resolution Agreement negotiation process and recommends a series of targeted changes to the Louisiana environmental permitting process for the emission units at issue.

Similarly, in July DOJ announced that it had begun an investigation of Houston city agencies in response to complaints that the agencies had policies that resulted in discriminatory responses to reports of illegal dumping in Black and Latino neighborhoods as compared to more affluent, predominantly White neighborhoods. Specifically, DOJ was going to examine whether the Houston Police Department, the

Department of Neighborhoods, and the Solid Waste Management Department had violated Title VI of the Civil Rights Act when implementing their illegal dumping policies.

Federal EJ Enforcement in 2023—Any Limits?
Based on the recent structural and policy announcements, one can expect in 2023 more of the aggressive federal EJ enforcement seen in 2022. In the context of resolving Title VI complaints, or possibly its own investigations, we will likely see EPA continue to take a more active role in state permitting actions. Likewise, 2023 will likely bring more high-profile DOJ Title VI enforcement matters rooted in EJ concerns. To date, these matters have been addressed without much push back from the targeted entities. However, as both EPA and DOJ advance these EJ policies on the ground in 2023, given the changes in Congress and a Presidential election process beginning to heat up, it will be interesting to note any challenges arguing that either agency has exceeded their authority under existing environmental laws by advancing EJ outcomes.

WATER:
EPA and Army Corps Finalize Clean Water Act Jurisdiction Rule Ahead of Upcoming Supreme Court Decision
Todd D. Kantorczyk, Esq.

At the close of 2022, the EPA and the Department of the Army took the latest step in the ongoing efforts to define the extent of Waters of the United States (WOTUS) subject to federal Clean Water Act (CWA) jurisdiction and announced a final rule that reverts to the WOTUS definition in place before 2015.

Consistent with the draft WOTUS rule, the final WOTUS rule essentially codifies the 1986 WOTUS definition as applied and articulated in guidance following the Supreme Court's 2006 *Rapanos* decision. The framework of the final WOTUS rule establishes five categories of WOTUS:

1. Traditional navigable waters, the territorial seas, and interstate waters ("(a)(1) waters");
2. Impoundments of WOTUS ("(a)(2) impoundments")
3. Tributaries to (a)(1) waters or (a)(2) impoundments when the tributaries are relatively permanent or have a significant nexus to those waters ("jurisdictional tributaries");
4. Wetlands that are either:
    - adjacent to (a)(1) waters
    - adjacent to and with a continuous surface connection to relatively permanent (a)(2) impoundments
    - adjacent to tributaries that meet the relatively permanent standard; or
    - adjacent to (a)(2) impoundments or jurisdictional tributaries when the wetlands meet the significant nexus standard; and
5. Other intrastate lakes and ponds, streams or wetlands that meet either the relatively permanent or significant nexus standards

This WOTUS framework incorporates two standards dating back to the *Rapanos* decision, the "relatively permanent" standard and the "significant nexus" standard. As articulated in the final WOTUS rule, relatively permanent waters are "waters that are relatively permanent, standing or continuously flowing,"

while waters with a significant nexus are described as waters that "either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity" of (a)(1) waters. The proposed rule also provides for eight categorical exclusions such as dry land ditches that do not carry a relatively permanent flow of water, and swales and erosional features. According to EPA, the final WOTUS rule considered over 114,000 public comments on the proposed rule that was published on December 7, 2021. And contrary to previous statements, EPA has recently indicated to the press that they do not expect to issue a second rule that potentially would expand upon the pre-2015 WOTUS definition.

Nevertheless, the final WOTUS rule will likely not be the last word in 2023 on the scope of CWA jurisdiction, as the Supreme Court is scheduled this term to issue its decision in *Sackett v. EPA*. In that case, the Sacketts appealed a Ninth Circuit decision affirming EPA's decision that a wetland on their property qualified as a WOTUS. As part of their appeal, the Sacketts directly challenged the use of the "significant nexus" test from *Rapanos* that was used as part of the final WOTUS rule framework and instead proposed a third test that asks whether the wetland is "inseparably bound up" with a WOTUS. Notably, the final WOTUS rule released in December devotes a significant chunk of text to argue why a WOTUS definition that solely relies on the "relatively permanent" standard and fails to incorporate a "significant nexus" test is inconsistent with the objectives of CWA, and the Acting Solicitor general advised the Court in writing of the availability of the new rule and analysis. Of course, the Sackett's responded with their own letter, arguing that the proposed rule and preamble ignores relevant legislative history.

Once the Supreme Court rules in *Sackett*, EPA and the Corps will likely evaluate the decision and decide whether the final WOTUS rule can stand or needs to be revised in the near term. Regardless of the Supreme Court's decision and the agencies' reaction, if the past is any indication, there will likely be multiple legal challenges filed in response, which could continue to raise questions about the scope of WOTUS under the CWA.

EPA Proposes to Amend its Water Quality Standards Regulation to Better Protect Tribal Reserved Rights

Brenda Hustis Gotanda, Esq.

The United States Environmental Protection Agency (EPA) has proposed amendments to its federal water quality standards (WQS) regulation at 40 C.F.R. Part 131 that are intended to better protect tribal reserved rights by setting forth a uniform approach for establishing WQS in waters where tribal reserved rights to aquatic or aquatic-dependent resources apply. The proposed rulemaking would require that WQS protect water and water-dependent resources reserved to tribes through federal law (e.g., treaties, statutes, executive orders, etc.) in waters of the United States and clarify how EPA and the states must ensure protection of those rights. Some examples of tribal reserved rights identified by EPA include the rights to fish, gather aquatic plants, and to hunt for aquatic-dependent animals. Whereas protection of such reserved rights has previously been addressed on a case-by-case basis, the proposed requirements would establish a nationally-applicable regulatory framework, which EPA believes would provide clarity, predictability and transparency in its review of state WQS and in its own promulgation of WQS in waters where reserved rights apply.

Under the Federal Clean Water Act (CWA), states are required to establish WQS for rivers, lakes, estuaries, and other waters of the United States within their jurisdiction. EPA's regulations set forth certain baseline federal requirements for WQS, which include the designated uses of the waterbody (such as fishing, drinking supply or other uses), water quality criteria necessary to support those uses (such as pollutant limits), and anti-degradation requirements to protect water quality. States must review their WQS at least every three years (triennial review) and, if appropriate, revise or adopt new standards. Any new or revised state WQS must be submitted to EPA for review. In cases where states do not establish required WQS or where state WQS fail to meet applicable requirements, EPA is required to establish WQS under the CWA.

In its rulemaking, EPA proposes to specifically require that WQS protect tribal reserved rights where applicable and to clarify and prescribe regulatory requirements for setting WQS that provide such protection. EPA proposes to define "tribal reserved rights" as "any rights to aquatic and/or aquatic-dependent resources reserved or held by tribes, either expressly or implicitly, through treaties, statutes, executive orders or other sources of Federal law." EPA, however, is not proposing to require WQS that protect the waterbody condition that may have existed at the time a reserved right was established. Rather, EPA intends to protect reasonably anticipated future uses, taking into account factors that may have substantially altered a waterbody. (Relatedly, EPA's regulatory agenda indicates that it plans to issue a separate proposed rulemaking in March 2023 to establish baseline WQS to protect waters on Indian reservations that do not currently have WQS under the CWA. EPA states that over 80 percent of Indian reservations lack such CWA protections.)

In the preamble to the proposal, EPA observes that tribal reserved rights could potentially be impaired by decreased water quality and that some courts have recognized that the right to a specific resource necessarily includes attendant protections in order to be rendered meaningful. As such, the proposal would also require that, to the extent supported by available data and information, WQS protect the exercise of tribal reserved rights unsuppressed by water quality or availability of the aquatic or aquatic-dependent resource. EPA has stated that the unsuppressed level should balance heritage use of a resource with what is currently reasonably achievable for a particular waterbody. Further, determining the unsuppressed level requires consideration of past, present, and reasonably-anticipated future use of the resource, together with what is currently reasonable to achieve for the waterbody.

EPA's proposed rulemaking would also require that WQS protect the health of the tribal reserved right holders to at least the same risk level as provided to the general population of the state. EPA anticipates that this new provision will primarily be used in determining cancer risk levels for purposes of calculating human health criteria. EPA does not propose treating rights holders as a highly exposed population. EPA notes, however, that there may be circumstances where WQS may need to be adjusted to protect tribal reserved rights such as where tribes with reserved fishing rights consume more fish and, therefore, are exposed to greater levels of contaminants in fish, such that there is a differential health risk between rights holders and the general population.

In addition, the proposal includes new documentation requirements applicable to state WQS submissions to EPA designed to aid EPA in evaluating whether the state WQS protects tribal reserved rights, including information about the scope, nature, and current and past use of the tribal reserved rights, as informed by the rights holders, and data and methods used to develop the WQS. Further, the proposal provides that EPA will initiate tribal consultation with rights holders in reviewing state WQS submissions to determine if they protect tribal reserved rights. States would also be required, during their regular WQS triennial

reviews, to re-evaluate whether any WQS needs to be revised to protect any applicable tribal reserved rights.

EPA notes that the proposal does not establish any new requirements that apply directly to regulated point or nonpoint sources of pollution. Such sources, however, could potentially be impacted in the future as a result of changes to WQS implemented to comply with the rulemaking. Where applicable, WQS can serve as the basis for establishing water quality-based effluent limitations in discharge permits or total maximum daily loads under the CWA.

EPA is inviting public and tribal comments on the proposed rulemaking. Written comments must be submitted to EPA on or before March 6, 2023. Two public hearings have also been scheduled (on January 24 and 31) to receive oral comments from interested parties. To attend the public hearing, you must register in advance on EPA's website. EPA is likewise inviting continued consultation with tribes, with the tribal consultation period ending on February 28, 2023.

If you have questions concerning the proposal or the comment opportunity, please contact Brenda Gotanda at 484-430-2327 or Steve Daly at 484-430-2306.

LITIGATION:
Greenwashing Class Actions Forge Ahead in Court
Kate Campbell, Esq.

As companies continue to face pressure to make Environmental, Social and Governance (ESG) disclosures and to market themselves as environmentally sustainable, class action lawsuits for so-called "greenwashing" will continue to make their way through the courts in 2023, with potentially significant decisions on class certification and the merits of these claims expected in the coming year. Among the cases to keep an eye on are:

- *Woolard v. Reynolds Consumer Prods., Inc.*, *et al.*, No. 22-CV-1684 (S.D. Cal.): This is a putative nationwide class action lawsuit against the manufacturer of Hefty trash bags for allegedly misrepresenting that its "Recycling" trash bags are recyclable. According to the complaint, Hefty "Recycling" trash bags are made from low-density polyethylene and are not in fact recyclable. Instead, the complaint alleges, "the bags and all of the otherwise recyclable items within them are not delivered to a recycling facility but are treated as regular solid waste materials," finding their way to landfills or incinerators.

- *Dorris v. Danone Waters of America*, No. 7:22-cv-08717 (S.D.N.Y.): In this case, the manufacturer and seller of Evian Natural Spring Water has been targeted for making the allegedly false and misleading representation that its water bottles are "carbon neutral" and charging a price premium based on this representation. Seeking class certification on behalf of all persons nationwide who purchased the water bottles at issue, the plaintiff alleges that the product causes carbon dioxide to be released into the atmosphere, making the "carbon neutral" claim not true. The complaint further alleges that even if the defendant relied on carbon offsets in making its claim of carbon neutrality, "that too would be false and misleading, as experts note carbon offsets are 'awash with challenges, fuzzy math and tough-to-prove claims…' "

The plaintiffs in these cases will be pursuing their greenwashing claims in the face of a recent defeat, albeit in a state court case that the federal courts may or may not embrace. In *Earth Island Institute v. The Coca-Cola Co.*, No. 2021 CA 001846 B (D.C. Super. Ct. Nov. 10, 2022), a Washington D.C. trial court rejected a non-profit organization's claims that statements made on Coca-Cola's website and on social media were false and deceptive. The court found that neither the company's general statements about sustainability, nor its more specific statements espousing its recycling goals, were sufficient to support a valid consumer fraud claim under D.C. consumer protection laws. According to the court, the statements at issue were "aspirational, limited and vague," and nothing in the law "prohibits an entity from cultivating an image" or branding itself.

Although the analysis can at times be nuanced, there is likely a meaningful distinction between the aspirational, forward-looking statements that were challenged in *Earth Island Institute* and measurable, verifiable statements that promote a company's past or present results. As we embark on a new year, it is a good time for companies of any size to take a hard look at their ESG disclosure programs.

Ramifications of *West Virginia v. EPA*

Alice F. Douglas, Esq.

In June of last year, the U.S. Supreme Court's issued its decision in *West Virginia v. EPA*, 142 S.Ct. 2587 (2022). In overly simple terms, this case was the effective tiebreaker in a years-long battle between the Obama and Trump administrations' respective plans for reducing greenhouse gas (GHG) emissions from electric generating facilities. Obama's Clean Power Plan (CPP) sought to reduce GHG emissions by requiring actions not only at affected facilities but also more broadly across the power sector, by forcing a generation shift away from coal-fired plants. The latter category of reductions is commonly referred to as "beyond the fence line." Trump's Affordable Clean Energy (ACE) rule, by comparison, who have stopped short of requiring any emissions reductions that could not be achieved at the facility level.

Both regulations got held up in litigation and, remarkably, neither one ever took effect. Biden's EPA also stated that it had no plans to revive the CPP. Some were surprised, therefore, that the court agreed to hear West Virginia at all, with Justice Elena Kagan herself observing in her dissent that the court's "docket is discretionary, and because no one is now subject to the [CPP's] terms, there was no reason to reach out to decide this case."

Even more surprising, however, was the legal theory the court relied upon in reaching its decision: that is, the major questions doctrine. Essentially, this doctrine stands for the proposition that agency discretion must be curtailed when an agency has stretched the boundaries of statutory interpretation to claim new authority to address important problems of the day that were not within the agency's jurisdiction previously according to the express language of the statute. While this sounds logical enough, if we look at how the major questions doctrine could take shape in the framework of environmental law, the doctrine seems poised to encroach upon territory that was previously accepted as belonging to the EPA for two main reasons.

First, the major environmental statutes are old and have not been amended in several years. Although it has generally been understood that Congress purposefully drafted these statutes broadly so the EPA would

have the discretion to address the environmental problems of tomorrow, West Virginia could signal the majority of the court's desire for a paradigmatic shift.

Second, the types of problems that EPA seeks to address fall directly under the major questions doctrine umbrella – they are issues of vast economic and political significance that involve complex and difficult-to-foresee policy implications. While it has also been generally understood that the EPA, rather than Congress, had the technical expertise necessary to address these significant environmental policy issues, the majority's reasoning in West Virginia could cut against that premise.

Notably, the West Virginia court did not completely ban the EPA from pursuing the energy-shifting approach described in the CPP as a means of climate regulation. Instead, it said that for the EPA to do so, Congress would need to amend the Clean Air Act to expressly grant the EPA the requisite authority. However, Congress has not amended the Clean Air Act in more than 30 years. We will therefore need to watch how the court's West Virginia decision impacts the Biden administration's climate regulatory agenda more broadly, particularly given the EPA's ambitious goals to reduce GHG emissions from current levels.

Will the Supreme Court Offer Further Guidance on Federal Courts' Climate Change Jurisdiction in 2023?

Garrett D. Trego, Esq.

A variety of plaintiffs, including states and municipalities, are increasingly targeting energy companies with common law lawsuits seeking damages associated with responding to climate change. Plaintiffs generally seek to avoid federal jurisdiction by limiting their claims to purely state common law claims, like negligence and nuisance. The defendants, on the other hand, generally assert that climate change issues are inherently federal—if not global—and thus belong in federal court, if in any domestic jurisdiction at all.

The Supreme Court has not yet ruled on the merits of this jurisdictional issue, but that may change in 2023. In 2011, the Supreme Court held that plaintiffs had no *federal* common law nuisance claims against energy companies based on climate change. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011). And in 2021, the Supreme Court held that federal circuit courts had jurisdiction to consider the parties' removal/remand arguments in these types of cases, but it declined to address the merits and remanded the case to the Fourth Circuit. *BP P.L.C. v. Baltimore*, 593 U.S. ___, 141 S. Ct. 1532 (2021). In 2022, *certiorari* petitions were filed in cases involving *state* common law nuisance claims, originated by state or municipal governments in Colorado, Maryland, and Hawaii, and the Supreme Court may be poised to take up the merits of the ultimate jurisdictional issue for state common law climate change claims.

In an interesting twist, on October 3, 2022, the Supreme Court invited the Solicitor General to file a brief on behalf of the Biden Administration "expressing the views of the United States" on this jurisdictional issue. *Suncor Energy (U.S.A.) Inc. v. Boulder*, 143 S. Ct. 78 (2022). This request may hint at the Court's intention to revisit the issue. The Court's current makeup suggests that it may strongly consider overturning the current decisions from the Fourth and Tenth Circuit Courts in support of remanding the cases for the state courts' adjudication of the state common law climate change claims.

OSHA:

OSHA Continues to Address Staffing Shortage

Jill Hyman Kaplan, Esq. and Brandon P. Matsnev, Esq.

In 2022, the Occupational, Safety and Health Administration (OSHA) added 142 inspectors to its ranks, as part of an effort to reverse a downtrend in agency manpower brought on principally by retirements. The Biden administration's announced goal is to nearly double the number of inspectors by 2024.

According to a November 2022 Department of Labor report, titled "U.S. Department of Labor's Top Management and Performance Challenges," OSHA has faced a staffing shortage. Namely, the total number of inspectors fell from 860 in 2014 to an all-time low of 750 in 2021 (this does not include States with OSHA-approved State Plans). Compounding the problem is that it can take five years for an inspector to become fully trained. As a result, the Department is concerned that this can ultimately lead to fewer inspections and reduced workplace safety compliance.

To address these and other challenges, OSHA's budget has increased in recent years. Its $632 million budget for FY 2023 reflects a $20 million increase from FY 2022—although the Biden administration sought a nearly $90 million increase.

OSHA's recruitment efforts appear to be paying off thus far. Bloomberg Law reports that the total number of federal OSHA inspectors grew from 750 in 2021, to 892 in 2022. It remains to be seen whether OSHA can meet President Biden's goal of doubling its inspector ranks, to around 1500 within the next two years.

Employers should continue to ensure documentation of compliance with OSHA requirements, particularly given OSHA's aggressive efforts to increase manpower and, consequently, inspection numbers. Moreover, anecdotal evidence suggests OSHA is citing more willful and repeat violations as well as assessing higher penalties. This underscores the importance of proactively seeking legal counsel when first learning of an upcoming OSHA inspection, rather than waiting until after receiving a citation, to hopefully help limit the scope of any citation.

OSHA Continues Work on Proposed Updates to its Process Safety Management (PSM) Standard

Michael Dillon, Esq. and Technical Consultant Michael C. Nines, P.E., LEED AP

Since its publication over 30-years ago, OSHA's PSM standard, 40 C.F.R. § 1910.119, has not been updated. That could change based on developments expected to occur in 2023.

Employers are covered by the PSM standard when they have a process with a threshold quantity of a listed chemical or flammable material, or manufacture explosives or pyrotechnics. The PSM standard requires a comprehensive management program that integrates technologies, procedures, and management practices to help assure safe and healthy workplaces. A 2013 ammonium nitrate explosion at a fertilizer storage facility in West, Texas focused attention on the shortcomings of PSM standard and led to an Obama-era Executive Order, which required OSHA to "identify issues related to modernizing the PSM standard."

Since then, the Agency has published a Request for Information (RFI) and subsequently convened a Small Business Advocacy Review (SBAR) Panel to review potential changes needed to the PSM standard. More recently in October 2022, OSHA held an informal stakeholder meeting and invited comments, following which a substantial set of comments from various stakeholders were received by OSHA, which are now under review. During 2023, the Agency is expected to continue this review along with analysis of comments from the RFI and SBAR process.

The potential changes to the scope of the current PSM standard that OSHA is considering include the following: clarifying the exemption for atmospheric storage tanks; expanding the scope to include oil and gas-well drilling and servicing; resuming enforcement for oil and gas production facilities; expansion of PSM coverage and requirements for reactive chemical hazards; updating and expanding the list of highly hazardous chemicals in Appendix A; amending paragraph (k) of the Explosives and Blasting Agents Standard (§ 1910.109) to extend PSM requirements to cover dismantling and disposal of explosives and pyrotechnics; clarifying the scope of the retail facilities exemption; and defining the limits of a PSM covered process.

Potential changes to the PSM standard that OSHA announced it is considering in the September 20, 2022 Federal Register announcement of the October meeting include the following revisions to the noted subsections of 40 C.F.R. § 1910.119:

- Subsection (b) – add a definition of recognized and generally accepted as good engineering practices (RAGAGEP) and a definition of critical equipment;
- Subsection (c) - strengthen employee participation and add stop work authority;
- Subsection (d) - require evaluation of updates to applicable RAGAGEP and continuous updating of collected information;
- Subsection (e) - require formal resolution of Process Hazard Analysis team recommendations that are not utilized; require safer technology and alternatives analysis; clarification to require consideration of natural disasters and extreme temperatures in PSM programs;
- Subsection (j) - add coverage of mechanical integrity of any critical equipment and clarification to better explain ‘‘equipment deficiencies;’’;
- Subsection (l) – clarification to cover organizational changes;
- Subsection (m) - require root cause analysis;
- Subsection (n) - require coordination of emergency planning with local emergency-response authorities;
- Subsection (o) - require third-party compliance audits, include requirements for employers to develop a system for periodic review of and necessary revisions to their PSM management systems, and require the development of written procedures for all elements specified in the standard identification of records required by the standard along with a records retention policy.

OSHA intends to finish analyzing comments received in November 2022 by the late Fall of 2023 in consideration of preparing a proposed rulemaking.

OTHER FEDERAL ISSUES:

Inflation Reduction Act Presents New Funding Opportunities, Fees, and Tax Credits for Green Energy and Infrastructure Improvements in 2023

Diana A. Silva, Esq. and Brielle A. Brown, Esq.

On August 16, 2022, President Biden signed the Inflation Reduction Act (the "Act") into law, marking what is being touted by the Administration as the most significant legislation dedicated to climate investments in U.S. history. Building on the climate and clean energy actions contained in the bipartisan Infrastructure Investment and Jobs Act signed in November 2021, the Act allocates $369 billion dollars for energy security and climate change programs. The stated overall objectives of these investments are to lower consumer energy costs, accelerate private investment in clean energy solutions, and create new jobs.

The climate and energy provisions fall into five general categories that include domestic clean energy manufacturing, decarbonization, targeting investments in environmental justice communities, support to energy consumers, and investments in farmers and forest landowners.

Notable provisions for domestic clean energy manufacturing, which also indirectly promote carbon emission reduction, include (1) production and investment tax credits to accelerate the building of facilities to manufacture solar panels, turbines and batteries, facilities to produce clean fuels, and facilities to process critical minerals and to capture and sequester carbon, and (2) various grants and loans for electric vehicle manufacturing plants.

More directly aimed at decarbonization, funds are also dedicated to the purchase and installation of zero-emission equipment at ports, funding of clean energy technology enhancement and research and Department of Energy building efficiency programs. Rebates and tax credits will be available to consumers to subsidize their transition to clean energy equipment at home (HVAC) and on the road (electric vehicles) which also will indirectly spur the manufacture of the targeted products and enhance carbon reduction efforts. Other incentives to reduce carbon emissions include tax credits for clean energy technology such as solar, wind, hydrogen, nuclear, and carbon capture utilization and sequestration.
The Act also seeks to significantly reduce emissions of methane, which, in the short term, has been reported to be 80 times more potent at global warming than carbon dioxide, through a new methane emissions reductions program. The program creates an annual fee to be charged to nine types of petroleum and natural gas facilities and pipelines, already subject to greenhouse gas reporting requirements, that emit 25,000 metric tons of carbon dioxide equivalent. The methane emissions fee begins in 2024, starting at $900 per metric ton, increasing to $1,200 in 2025, and $1,500 in 2026 and beyond. An exemption to the fee would be available only if the Environmental Protection Agency (EPA) adopts a finalized rule for methane emissions that is in effect in all states where facilities subject to the fee are located that will result in equivalent or greater methane emission reductions.

Environmental justice is addressed through a variety of mechanisms, including grants to state and local governments to develop and implement pollution reduction strategies, grants to nonprofit private agencies, institutions, and organizations, and to individuals, for technical assistance, monitoring and other projects in disadvantaged communities, grants to reduce air pollution at ports, as noted earlier, and grants to address air pollution at schools in low-income communities. EPA announced the availability of $100 million in these grants on January 11, 2023 and is hosting pre-application assistance webinars on January 24 and 26, 2023

In addition, many of the clean energy tax credits mentioned above include either a bonus or set-aside structure to drive investments and economic development in disadvantaged communities.

Finally, the Act makes sizeable investments to support agriculture and rural community responses to climate change. These investments include grants and other financial assistance to support (1) farm use of renewable energy, energy efficient and zero-emission equipment, and carbon capture and storage systems, (2) rural cooperatives' access to renewable energy and associated infrastructure, (3) promotion of fire resilient forests, and (4) natural carbon sequestration through forest conservation.

On November 30, 2022, the Department of Treasury issued initial guidance on the labor standards that facilities must meet to qualify for the clean energy and climate tax incentives. The guidance leaves numerous questions to be answered such as classifications for construction and how to enforce prevailing wage and apprenticeship requirements. However, it is currently the only guidance from a federal agency that details an implementation strategy for the funds outlined in the Act. Throughout 2023, it is expected that guidance from other federal agencies, such as the EPA and HUD, should begin to roll-out, so that businesses can apply for funding allocated in the Act.

Northern Long-Eared Bat Listed as Endangered Species in January 2023

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On November 30, 2022, the U.S. Fish and Wildlife Service (USFWS) issued a final rule designating the Northern Long-Eared Bat (*Myotis septentrionalis*) as an endangered species under the Endangered Species Act of 1973 (ESA). The Northern Long-Eared bat has habitat in 37 U.S. states, spanning nearly the entire eastern seaboard through the Midwest – including significant habitat in all of Pennsylvania, New Jersey, New York, and Delaware. The species spends most of the winter season hibernating within caves, mines, and sinkholes, and lives the remainder of the year in forested habitats. The bat was previously listed as a "threatened" species in April 2015, with corresponding regulations and restrictions on activities occurring in the bat's habitat that was adopted through implementing rules in 2016. But now, the Northern Long-Eared bat will receive the highest level of protection under federal law, with the endangered species designation becoming effective on January 30, 2023.

To receive an "endangered species" designation, a plant or animal must be determined to be in danger of extinction throughout all or a significant portion of its habitat based on an evaluation of five factors. The Northern Long-Eared Bat is listed as an endangered species primarily due to a specific disease impacting the bat, known as "white nose syndrome," which the USFWS has confirmed has spread throughout the bat's territory, particularly concentrated in the Appalachian Mountains region. The USFWS has also determined that the bat is negatively affected by wind-turbines used for energy production (from direct collisions with turbine blades), climate change, and habitat loss. Reclassifying the bat from "threatened" to the heightened "endangered" status will impact various projects, including logging, wind power, and other development projects, which will lose some flexibility that was granted by the prior designation.

The ESA and its implementing regulations establish a series of prohibitions on activities effecting endangered species, and generally deem it illegal to "take" any endangered species. The definition of "take" includes any action to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to do any of those activities. If an activity will result in an "incidental take" in connection with otherwise lawful activities, a party must apply for a permit from the USFWS to cover that potential impact to

the endangered species. The most common impact from a project on the bat's territory relates to tree clearing for development activities, which can range from a local commercial or residential development, a utility infrastructure project, or a new roadway that traverses through forested lands.

When the Northern Long-Eared Bat was previously listed as only "threatened" (vs. endangered), Section 4(d) of the prior rule established certain area and timing restrictions for tree clearing, and compliance with those provisions would allow a project to proceed without obtaining a permit from the USFWS. The primary measure to avoid impacts under the prior Section 4(d) rule was a seasonal prohibition on tree clearing during the warm weather months (April through November), when the bats utilize the trees for their primary habitat. But now with the listing of the bat as an endangered species, the previous Section 4(d) rule will no longer apply, such that projects that will involve a potential impact to habitat – including most tree clearing activities – will now be regulated and potentially subject to permitting.

The final rule listing the Long-Eared Bat as an endangered species includes a non-exclusive list of activities that if carried out in accordance with existing regulations and permit requirements, are determined to be "unlikely" to result in a "take" or other violation of the ESA. The rule also conversely lists those activities that may potentially result in a violation of the ESA. Activities deemed "unlikely" to result in a violation or "take" include, for example, "minimal" tree and vegetation removal any time of year outside of the bat's habitat and more than five miles from hibernacula, "insignificant" amounts of suitable forested habitat removal if it occurs during the bat's hibernation period, tree removal in urban areas, activities that may disturb hibernation areas if the activity occurs during non-hibernation season, removal of human structures so long as the structure does not provide roosting habitat, and wind turbine operations at facilities that follow a USFWS-approved avoidance strategy.

The USFWS is slated to develop and publish additional guidance on the impact of the new classification of the Northern Long-Eared Bat as an endangered species in 2023, which will further delineate the scope and effect of the designation for development projects that occur in the bat's habitat.