ENVIRONMENTAL LAW UPDATE

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I. INTRODUCTION

Environmental law has always been at the confluence of flux and disagreement, and 2023 was no different. In 2023, we witnessed much attention and controversy in the regulatory, judicial, administrative, and enforcement areas related to environmental law. This review aims to identify various trends impacting clients and practitioners in Illinois. The following is a scattershot of current issues, concerns, and commentary on other emerging controversies.

We start as we conclude: 2024 will be another active year for environmental practitioners helping clients navigate the ever-changing regulations, opportunities, and challenges. In Illinois, there will be opportunities in clean energy—wind, solar, and nuclear—along with associated project siting requirements. We can also expect significant and exciting opportunities involving carbon sequestration. And, no matter who wins the election, we can anticipate litigation and spirited enforcement from state, federal, and local authorities on issues related to microplastics. These emerging contaminants are especially concerning when associated with Per- and Polyfluoroalkyl Substances (PFAS). Environmental laws, rules, regulations, and opportunities are not diminishing and require continued vigilance for the benefit of our clients. First, look at 2023 beginning with the U.S. Supreme Court.

II. UNITED STATES SUPREME COURT

A. Waters of the United States

1. Sackett v. EPA

On January 18, 2023, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (COE) published what those agencies considered a final rule revising the definition of "waters of the United States"

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(WOTUS).[2] That rule became effective on March 20, 2023 (the "March 2023 Rule"). [3] On May 25, 2023, the U.S. Supreme Court (SCOTUS) decided *Sackett v. Environmental Protection Agency*.[4] Although SCOTUS did not specifically address the EPA's definition of WOTUS, it certainly called the March 2023 Rule into question.[5]

In *Sackett*, Mr. and Mrs. Sackett purchased property near Priest Lake, Idaho, and began backfilling the lot in order to build a residence.[6] The EPA informed the Sacketts that their property contained wetlands and that the backfilling of those wetlands violated the Clean Water Act's (CWA) prohibition against discharging pollutants—including backfill—into WOTUS.[7] The EPA ordered the Sacketts to restore the site, threatening penalties of over $40,000 per day.[8] According to the EPA, the wetlands on the Sacketts' lot were WOTUS because those wetlands were located near a ditch on the other side of a road, which fed into a non-navigable creek connected to Priest Lake, a navigable intrastate lake.[9] The Sacketts challenged the EPA, but the district court entered summary judgment in favor of the EPA.[10] On appeal, the Ninth Circuit Court of Appeals affirmed the district court, holding that the CWA covered wetlands with an ecologically significant nexus to traditional navigable waters.[11] According to the circuit court, the Sacketts' wetlands satisfied that standard.[12] Note that there was no question the area was indeed a wetland; everyone conceded that the area contained hydrophilic vegetation, hydric soils, and adequate inundation.[13] The contested question was whether or not the wetland was a jurisdictional wetland regulated by the CWA.[14]

After many years of administrative and legal proceedings, including one prior trip to address what constituted "final agency action," the case returned to SCOTUS—this time to determine the proper test for establishing the CWA's jurisdiction over wetlands.[15] Citing its earlier decision in *Rapanos v. United States*, SCOTUS concluded that the CWA's use of "waters" in § 1362(7) referred only to "streams, oceans, rivers, and lakes"

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2 *See* Revised Definition of "Waters of the United States," 88 Fed. Reg. 3004, 3142–43 (Jan. 18, 2023) (to be codified at 33 C.F.R. § 328; 40 C.F.R. § 120).
3 *See id.*
4 Sackett v. EPA, 143 S. Ct. 1322 (2023).
5 *See id.* at 1341–42.
6 *Id*. at 1331.
7 *Id*. (quoting 33 U.S.C. § 1362(7)).
8 *Id*.
9 *Id*. at 1331–32.
10 *Id*. at 1332.
11 *Id*.
12 *Id*.
13 *See id.* at 1332–33.
14 *See id.* at 1332.
15 *Id*.

and to adjacent wetlands "indistinguishable" from those bodies of water due to a continuous surface connection.[16] To assert jurisdiction over an adjacent wetland under the CWA, the EPA was required to establish that the adjacent water constituted WOTUS and that it had a "continuous surface connection with that water, making it difficult to determine where the 'water' end[ed] and the 'wetland' beg[an]."[17]

According to SCOTUS, the uncertain meaning of WOTUS had been a persistent problem, sparking decades of agency action and litigation.[18] SCOTUS noted that, during the relevant period, the "two federal agencies charged with enforcement of the CWA—the EPA and the COE—similarly defined WOTUS broadly to encompass "[a]ll ... waters" that "could affect interstate or foreign commerce."[19] The agencies likewise gave an expansive interpretation of wetlands adjacent to those waters, defining "adjacent" to mean "bordering, contiguous, or neighboring."[20]

In *United States v. Riverside Bayview Homes, Inc.*, SCOTUS confronted the COE's assertion of authority under the CWA over wetlands that "actually abut[ted] on a navigable waterway."[21] Although concerned that the wetlands fell outside "traditional notions of 'waters,'" SCOTUS deferred to the COE, reasoning that the "transition from water to solid ground is not necessarily or even typically an abrupt one."[22]

Following *Riverside Bayview*, the agencies issued the "migratory bird rule," extending CWA jurisdiction to any waters or wetlands that "are or would be used as [a] habitat" by migratory birds or endangered species.[23] SCOTUS rejected that rule after the COE sought to apply it to several isolated ponds located wholly within Illinois.[24] In *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, SCOTUS ruled that the CWA did not "exten[d] to ponds that are *not* adjacent to open water."[25] Although acknowledging there was a non-jurisdictional wetland, the Court could not describe it.[26]

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16 *Id.* at 1336, 1340–41 (quoting Rapanos v. United States, 547 U.S. 715, 739, 755 (2006) (plurality opinion)).

17 *Id.* at 1341 "(quoting Rapanos, 547 U.S. at 742 (plurality opinion))."

18 *See id.* at 1336 ("This frustrating drafting choice has led to decades of litigation, but we must try to make sense of the terms Congress chose to adopt.").

19 *Id.* at 1332 (alterations in original) (quoting 40 C.F.R. § 230.3(s)(3) (2008)).

20 *Id.* (quoting 40 C.F.R. § 230.3(b) (2008)).

21 United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 135 (1985).

22 *Id.* at 132–33.

23 Final Rule: Clean Water Act Section 404 Program Definitions and Permit Exemptions, 53 Fed. Reg. 20764, 20765 (June 6, 1988) (to be codified at 40 C.F.R. pts. 232, 233).

24 *See* Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 174 (2001).

25 *Id.* at 168.

26 *See id.* at 168–74 (providing no detailed description of when, under the CWA, there is no longer jurisdiction over a particular wetland).

In response, the agencies instructed their field agents to determine the scope of the CWA's jurisdiction on a case-by-case basis.[27] Within a few years, the agencies had "interpreted their jurisdiction over 'the waters of the United States' to cover 270-to-300 million acres" of wetlands and "virtually any parcel of land containing a channel or conduit . . . through which rainwater or drainage may occasionally or intermittently flow."[28]

In *Rapanos*, SCOTUS vacated a lower court decision that had held that the CWA covered wetlands near ditches and drains that emptied into navigable waters several miles away.[29] However, no position in *Rapanos* commanded a majority of SCOTUS.[30] Four Justices concluded that the CWA's coverage was limited to certain relatively permanent bodies of water connected to traditional interstate navigable waters and to wetlands that were "as a practical matter indistinguishable" from those waters.[31] Justice Kennedy, concurring only in the judgment, wrote that CWA jurisdiction over adjacent wetlands required a "significant nexus" between the wetland and its adjacent navigable waters. [32] He explained that a "significant nexus" existed when the "wetlands, either alone or in combination with similarly situated lands in the region, significantly affect[ed] the chemical, physical, and biological integrity" of those waters.[33] According to SCOTUS, following *Rapanos*, field agents brought nearly all waters and wetlands under CWA jurisdiction by engaging in fact-intensive "significant-nexus" determinations that turned on a lengthy list of hydrological and ecological factors.[34] According to SCOTUS, nearly all waters and wetlands are potentially susceptible to regulation under this test, putting a staggering array of landowners at risk of criminal prosecution for such mundane activities as moving dirt.[35]

However, according to *Sackett*, to make sense of Congress's choice to define "navigable waters" as WOTUS in the CWA, SCOTUS concluded that the CWA's use of "waters" encompassed "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, [and] lakes.'"[36] To determine when a wetland is part of adjacent WOTUS, SCOTUS agreed with the *Rapanos* plurality that the use of "waters" in § 1362(7) may be reasonably read to include only wetlands that are

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27 *See* Rapanos v. United States, 547 U.S. 715, 722 (2006) (plurality opinion).
28 *Id.* at 722.
29 *Id.* at 757.
30 *Id.*
31 *Id.* at 755.
32 *Id.* at 779-80 (Stevens, J., dissenting).
33 *Id.* at 779-80.
34 *See id.* at 755 (plurality opinion).
35 *See id.*
36 *Id.* at 739.

"indistinguishable from waters of the United States."[37] This occurs only when wetlands have "a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands."[38]

In sum, CWA wetlands jurisdiction extends only to wetlands that are "as a practical matter indistinguishable from waters of the United States."[39] This requires the party asserting jurisdiction to establish "first, that the adjacent [body of water constitutes] . . . 'water[s] of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."[40]

With regard to administrative deference accorded agencies charged with administering a statute under *Chevron, USA, Inc. v. National Resource Defense Council, Inc.*, the EPA argued that SCOTUS should properly defer to the EPA's interpretation of WOTUS.[41] SCOTUS refused, holding that the EPA's interpretation was inconsistent with the CWA's text and structure, and clashed with "background principles of construction" that apply to the interpretation of the relevant provisions.[42] For years, these agencies' interpretations of WOTUS have been accorded deference based on guidance provided by SCOTUS in *Chevron*.[43] Today, however, *Chevron* and 1984 seem so long ago, especially in light of SCOTUS's analysis in *Sackett*[44]—more on new federalism below.[45]

According to the Court in *Sackett*, the EPA's interpretation gives rise to serious vagueness concerns in light of the CWA's criminal penalties, thus implicating the due process requirement that penal statutes be defined "with sufficient definiteness that ordinary people can understand what conduct is prohibited."[46] Finally, SCOTUS rejected the EPA's argument that Congress had somehow ratified the EPA's regulatory definition of "adjacent" when it amended the CWA to include the reference to adjacent wetlands.[47] According to SCOTUS, the plain text of §§ 1362(7) and 1344(g) show that "adjacent" cannot include wetlands that are merely nearby otherwise covered waters.[48]

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37 *Id*. at 755.
38 *Id*. at 742.
39 *Id*.
40 *Id*.
41 Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 863 (1984).
42 *See* Bond v. United States, 572 U.S. 844, 857 (2014).
43 *See Chevron*, 467 U.S. at 863.
44 *Id*.
45 *See* discussion *infra* at Section II.B.
46 McDonnell v. United States, 579 U.S. 550, 576 (2016).
47 Rapanos v. United States, 547 U.S. 715, 749 (2006) (plurality opinion).
48 *Id*.

Moreover, the EPA's argument could not be reconciled with the Court's repeated recognition that § 1344(g)(1) "does not conclusively determine the construction to be placed on . . . the relevant definition of 'navigable waters.'"[49] Finally, according to SCOTUS, the EPA's interpretation falls short of establishing the sort of "overwhelming evidence of acquiescence" necessary to support its argument in the face of Congress's failure to amend § 1362(7).[50] In short, SCOTUS rejected the EPA's various policy arguments about the ecological consequences of a narrower definition of "adjacent."[51] SCOTUS now requires that Congress provide "exceedingly clear language" if it wishes to alter the federal/state balance or the Government's power over private property.[52]

SCOTUS would not defer to the EPA's interpretation of the rule defining WOTUS to include wetlands adjacent to covered waters if those wetlands possessed only a significant nexus to traditional navigable waters.[53] SCOTUS held for wetlands to qualify as WOTUS and be considered subject to the CWA, the wetlands must be indistinguishably part of a body of water that itself constitutes "waters" under the CWA.[54] Finally, SCOTUS determined wetlands located on residential lots are isolated wetlands and do not constitute WOTUS.[55]

3. The EPA's Response to Sackett

On August 29, 2023, the EPA and the COE acquiesced to SCOTUS's ruling in *Sackett* and announced a new final rule (the "August 2023 Rule") amending the March 2023 Rule's definition of WOTUS.[56] According to the agencies, the new rule provides clarity necessary to advance the goals of protecting the nation's waters from pollution and degradation while moving forward with infrastructure projects, economic opportunities, and agricultural activities.[57]

In the agencies' press release on August 29, 2023, the EPA's Administrator, Michael S. Regan, noted: "While I am disappointed by the Supreme Court's decision in the *Sackett* case, EPA and the Army have an

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49 Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 171 (2001).

50 *Id*.

51 *Id*. at 169-70.

52 United States Forest Serv. v. Cowpasture River Pres. Ass'n, 590 U.S. 604, 642 (2020) (Sotomayor, J., dissenting).

53 Sackett v. EPA, 598 U.S. 651, 684 (2023).

54 *Id*.

55 *Id*.

56 Press Release, EPA, To Conform with Recent Supreme Court Decision, EPA and Army Amend "Waters of the United States" Rule (Aug. 29, 2023), available at https://www.epa.gov/newsreleases/conform-recent-supreme-court-decision-epa-and-army-amend-waters-united-states-rule.

57 *Id*.

obligation to apply this decision alongside our state co-regulators, Tribes, and partners."[58] Furthermore, according to Mr. Regan:

> We've moved quickly to finalize amendments to the definition of 'waters of the United States' to provide a clear path forward that adheres to the Supreme Court's ruling. EPA will never waiver from our responsibility to ensure clean water for all. Moving forward, we will do everything we can with our existing authorities and resources to help communities, states, and Tribes protect the clean water upon which we all depend.[59]

According to Michael L. Connor, Assistant Secretary of the Army for Civil Works, "We have worked with EPA to expeditiously develop a rule to incorporate changes required as a result of the Supreme Court's decision in *Sackett*."[60] According to Connor: "With this final rule, the Corps can resume issuing approved jurisdictional determinations that were paused in light of the *Sackett* decision. Moving forward, the Corps will continue to protect and restore the nation's waters in support of jobs and healthy communities."[61]

Again, the agencies' March 2023 Rule defining WOTUS was not "directly before the Supreme Court;"[62] however, the more or less unanimous "decision in *Sackett* made clear that certain aspects of the [March 2023 Rule] [we]re invalid."[63] The EPA and the COE stressed that their August 2023 Rule was limited and changed only parts of the March 2023 Rule.[64] For example, the August 2023 Rule "remove[d] the significant nexus test [found in *Rapanos*[65]] from consideration in identifying tributaries and other waters as federally protected."[66]

3. Various Reactions to the EPA's August 2023 Rule Following Sackett

As far as the EPA and the COE are concerned, things are settled, but there are rumblings that the agencies' August 2023 Rule violates *Sackett.*[67] That may be so given that the unanimity of the decision is found only after cobbling together four separate opinions.[68] So far, the EPA's post-*Sackett*

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58 *Id.*
59 *Id.*
60 *Id.*
61 *Id.*
62 *Id.*
63 *Id.*; *see also* Sackett v. EPA, 598 U.S. 651, 679-84 (2023).
64 EPA, *supra* note 73.
65 Rapanos v. United States, 547 U.S. 715, 755-57 (2006).
66 EPA, *supra* note 73.
67 *Definition of "Waters of the United States": Rule Status and Litigation Update*, EPA, https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update (last visited Mar. 15, 2024).
68 *See generally Sackett*, 698 U.S. 651.

interpretation is followed only in twenty-three states, with twenty-seven operating under the pre-2015 rule.[69] At least two states have filed suits in the district courts in North Dakota and Texas.[70] Both cases challenge the EPA's interpretation of the post-*Sackett* rule.[71] The American Farm Bureau Federation and the American Petroleum Institute joined the Texas lawsuit, and the Cass County Farm Bureau and the North Dakota Farm Bureau joined the North Dakota lawsuit.[72] Every indication is that there are choppy waters ahead, yet Congress is silent. In any event, from *Sackett*, we now understand that CWA jurisdiction requires a continuous surface water connection and not mere adjacency as previously interpreted by the federal agencies charged with administering the CWA.[73]

Nearly one year later, as predicted, *Sackett* has opened the door for renewed scrutiny of federal jurisdiction under the CWA.[74] If the Supreme Court's goal in Sackett had been to clear the water on CWA jurisdiction, recent decisions appear murkier.

In *United States v. Andrews*, the United States accused a landowner of filling 13.3 acres of a 16.3-acre wetland.[75] Andrews claimed that he was permitted to build on wetlands located on his private property.[76] The court followed *Sackett's* narrow definition of WOTUS, and found that the wetlands on Andrews' property fit the definition and held that Andrews had violated the CWA by filling in wetlands on his property without a permit.[77]

United States v. Bobby Wolford Trucking & Salvage, Inc., was decided before the *Sackett* decision and resulted in a Consent Decree on December 8, 2020.[78] After *Sackett*, Wolford sought to modify the Consent Decree.[79] The court found that the defendant had unlawfully created a barrier between the

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69 EPA, *supra* note 86.

70 W. Va. v. EPA, 597 U.S. 697 (2022); Texas v. U.S. EPA, 662 F.Supp.3d 739 (S.D. Tex. 2023).

71 *Id.*

72 *Id.*

73 *Sackett*, 598 U.S. at 651.

74 *See e.g.*, United States v. Andrews, 677 F. Supp. 3d 74 (D. Conn. 2023); United States v. Bobby Wolford Trucking & Salvage, Inc., No. C18-0747, 2023 WL 8529643 (W.D. Wash. December 8, 2023); San Francisco Baykeeper v. City of Sunnyvale, No. 20-cv-00824, 2023 WL 8587610 (N.D. Cal. Dec. 11, 2023); Reyes v. Dorchester County of South Carolina, No. 21-cv-00520, 2023 WL 5345549 (D.S.C. Aug. 21, 2023); Kohler Co. v. Wisconsin Department of Natural Resources, 2024 WI App 2, ¶ 1, 410 Wis. 2d 433, 438, 3 N.W. 3d 172 ; Lewis v. United States, 88 F.4th 1073 (5th Cir. 2023); Glynn Environmental Coalition, Inc. et al. v. Sea Island Acquisition, LLC, No. CV 219-050, 2024 WL 1088585 (S.D. Ga. Mar. 1, 2024); United States v. Bayley, No. 20-cv-05867, 2023 WL 9689569 (W.D. Wash. Oct. 23, 2023), *appeal docketed*, No. 24-901 (9th Cir. Feb. 21, 2024).

75 United States v. Andrews, 677 F. Supp. 3d 74, 76-77 (D. Conn. 2023).

76 *Id.* at 89.

77 *Id.* at 87-90.

78 United States v. Bobby Wolford Trucking & Salvage, Inc., No. C18-0747, 2023 WL 8529643, at *1 (W.D. Wash. Dec. 8, 2023).

79 *Id.* at *1.

wetlands and the navigable waterway that did not qualify as an interruption of the surface water described in *Sackett*.[80]

In *San Francisco Baykeeper v. City of Sunnyvale*, the court noted that *Sackett* did not alter the conclusion that seasonally intermittent waters are "relatively permanent" and therefore are within the jurisdiction of CWA.[81] Additionally, tidal waters remain within the definition of WOTUS.[82] Finally, the court noted that *Sackett* did not eliminate the "long-standing rule that manmade waters can qualify as WOTUS."[83] Thus, a channel that had a continuous flow of water during certain times of the year qualified as WOTUS under the "relatively permanent" standard.[84]

Reyes v. Dorchester County of South Carolina, involved a residential stormwater ditch.[85] After experiencing flooding, the Reyes contacted the county and asked them to install a drainage pipe.[86] The county refused, so Reyes hired a contractor to stem the flooding without the permit required by the County's stormwater ordinance.[87] The county issued a violation notice for filling a stormwater pond without a permit.[88] The Reyes challenged the county's determination of violation but were not successful.[89] Thereafter, they filed a complaint seeking relief for a regulatory taking—arguing that, after *Sackett*, the county did not have regulation authority over stormwater facilities.[90] The district court held that *Sackett* addressed federal CWA jurisdiction and specifically noted that "[s]tates will continue to exercise their . . . authority to combat water pollution by regulating land and water use."[91]

In *Kohler Co. v. Wisconsin Department of Natural Resources*, the Kohler Company was developing a new golf course.[92] Initially, the Wisconsin Department of Natural Resources issued a permit to discharge dredge or fill material into 3.69 acres of wetlands on the property.[93] The decision was challenged by an interested environmental group.[94] In the administrative review process the permit was reversed, and Kohler appealed,

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80 *Id.*

81 San Francisco Baykeeper v. City of Sunnyvale, No. 20-cv-00824, 2023 WL 8587610, at *4 (N.D. Cal. Dec. 11, 2023).

82 *Id.*

83 *Id.* at *5.

84 *Id.*

85 Reyes v. Dorchester County of South Carolina, No. 21-cv-00520, 2023 WL 5345549, at *1 (D.S.C. Aug. 21, 2023).

86 *Id.*

87 *Id.*

88 *Id.*

89 *Id.* at *2.

90 *Id.* at *8.

91 *Id.* (quoting Sackett v. EPA, 598 U.S. 651, 683 (2023)).

92 Kohler Co. v. Wisconsin Department of Natural Resources, 2024 WI App 2, ¶ 1, 410 Wis. 2d 433, 438, 3 N.W. 3d 172, 174.

93 *Id.*

94 *Id.*

asserting that, under *Sackett*, if wetlands on the property were not subject to federal CWA jurisdiction, the state of Wisconsin was also barred from regulating them.[95] The court rejected Kohler's argument and noted that the state had "general supervisory control over waters of the state"—which included authority over wetlands.[96] The court held that *Sackett* did not apply to states' authority to regulate wetlands otherwise not found to be jurisdictional WOTUS and not regulated under federal CWA jurisdiction.[97]

Lewis v. United States concerned two 20-acre tracts used for pine timber operations.[98] There had been three approved jurisdictional determinations in 2016, 2017, and 2020—each administratively challenged then contested in court.[99] Ultimately, the appeals were consolidated in the Fifth Circuit Court of Appeals.[100] While the consolidated appeals were pending, SCOTUS decided *Sackett.*[101] Accordingly, the Fifth Circuit took additional briefing and heard oral argument.[102] Ultimately, the Fifth Circuit held that the property did not have wetlands with a continuous surface connection to traditional WOTUS.[103] The court noted that the nearest relatively permanent body of traditional WOTUS was connected through culverts, non-relatively permanent tributary, and roadside ditches.[104] Accordingly, the court found that there was no federal CWA jurisdiction.[105]

Glynn Environmental Coalition, Inc. v. Sea Island Acquisition, LLC, involved a private cause of action seeking to enforce the CWA.[106] The COE had issued a permit to Sea Island authorizing it to fill a wetland.[107] The plaintiffs brought a citizen suit alleging Sea Island had conducted unpermitted filling, and that the permit determination had expired.[108] The defendant filed a motion to dismiss which was granted by the district court but later reversed and remanded upon appeal by the circuit court.[109] After the district court reopened the case, it allowed the defendant to file supplemental briefing on *Sackett*—decided after the plaintiffs had filed their complaint.[110] The court held that *Sackett* applied not only prospectively but retroactively

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95 *Id.* at ¶ 18 n.8, 410 Wis. 2d at 447 n.8, 3 N.W. 3d at 179 n.8.
96 *Id.* at ¶¶ 1-2, 410 Wis. 2d at 438-39, at 174-75.
97 *Id.*
98 Lewis v. United States, 88 F.4th 1073, 1076 (5th Cir. 2023).
99 *Id.* at 1076-77.
100 *Id.* at 1077.
101 *Id.*
102 *Id.*
103 *Id.* at 1078-80.
104 *Id.* at 1078.
105 *Id.*
106 Glynn Environmental Coalition, Inc. et al. v. Sea Island Acquisition, LLC, No. CV 219-050, 2024 WL 1088585, at *1 (S.D. Ga. Mar. 1, 2024).
107 *Id.*
108 *Id.*
109 *Id.*
110 *Id.* at *1-2.

so the complaint did not support a federal CWA claim.[111] Specifically, the allegations did not allege a continuous surface connection between the purported wetland and a recognized WOTUS.[112] According to the court, there was a "clear demarcation" between the creek and the subject property, and as such, there was no continuous surface connection therefore no federal jurisdiction.[113]

Finally, in *United States v. Bayley*, the parties disagreed on whether *Sackett* applied when the area at issue was a "bulkhead."[114] The district court explained that Sackett applied when determining whether a wetland was considered WOTUS under the CWA.[115] The district court ruled that *Sackett* was inapplicable where a question of federal CWA jurisdiction did not involve a wetland. [116] Therefore, Sackett was not triggered because the land at issue was a "bulkhead" not a wetland.[117] There may be more to come on this issue as a notice of appeal was filed with the Ninth Circuit on February 21, 2024.[118]

4. Reconciling County of Maui v. Hawaii Wildlife Fund

Compare SCOTUS's holding in *Sackett* with its earlier holding in *County of Maui v. Hawaii Wildlife Fund*.[119] The Hawaii Wildlife Fund (HWF) sued the County of Maui (the "County"), alleging that the County had violated the CWA by discharging effluent into WOTUS without a National Pollutant Discharge Elimination System (NPDES)[120] permit at four injection wells.[121] The County argued that only point sources required an NPDEA permit.[122] The County claimed that the effluent was discharged into groundwater, considered a nonpoint source, so it was not required to obtain

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111 *Id.* at *3-5.

112 *Id.* at *4-5.

113 *Id.* at *5.

114 United States v. Bayley, No. 20-cv-05867, 2023 WL 9689569, at *5 (W.D. Wash. Oct. 23, 2023), *appeal docketed*, No. 24-901 (9th Cir. Feb. 21, 2024).

115 *Id.*

116 *Id.*

117 *Id.*

118 United States v. Bayley, No. 24-901 (9th Cir. docketed Feb. 21, 2024).

119 County of Maui v. Haw. Wildlife Fund, 590 U.S. 165, 183-86 (2020), *abrogating*, Upstate Forever v. Kinder Morgan Energy Partners, L.P., 887 F. 3d 637 (4th Cir. 2018); Kentucky Waterways Alliance v. Ky. Utils. Co., 905 F. 3d 925 (6th Cir. 2018).

120 *County of Maui*, 590 U.S. at 196 (Alito, J., dissenting).

121 *Id.* at 171.

122 *Id.* at 173 ("A point source or series of point sources must be 'the *means of delivering* pollutants to navigable waters.' . . . A pollutant is 'from' a point source only if a point source is the last 'conveyance' that conducted the pollutant to navigable waters.").

an NPDEA permit.[123] The district court entered summary judgment in favor of HWF because the effluent had an easily ascertainable trajectory into the ocean, making the groundwater the functional quivalent to a "navigable water."[124] The district court denied the County's motions for certification for interlocutory appeal and for a stay of further proceedings during the pendency of the appeal.[125] The County appealed to the Ninth Circuit, which affirmed the lower court's decision albeit explaining the appropriate standard differently.[126] The Ninth Circuit dictated that a "permit is required when 'the pollutants are *fairly traceable* from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water.'"[127] On appeal, SCOTUS "held that the [CWA] requires a permit when there is a direct discharge [of pollutants] from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*."[128]

Between *County of Maui* and *Sackett*, SCOTUS has created two separate standards for federal jurisdiction: (1) a functional equivalent standard;[129] and, (2) a continuous surface water connection standard.[130] That is, for purposes of Section 401 of the CWA, federal jurisdiction is established if there is a "*functional equivalent of a direct discharge*."[131] However, for wetlands jurisdiction involving Section 404 of the CWA, federal jurisdiction requires a continuous surface water connection.[132]

In a concurring opinion in *Sackett*, Justice Kagan wrote:

> [T]he majority's non-textualism barred the EPA from addressing climate change by curbing power plant emissions in the most effective way. Here, that method prevents the EPA from keeping our country's waters clean by regulating adjacent wetlands. The vice in both instances is the same: the

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123 *Id.* ("They add that, if 'at least one nonpoint source (e.g., unconfined rainwater runoff or groundwater)' lies 'between the point source and the navigable water,' then the permit requirement 'does not apply.'").

124 *Id.* at 171-72. The Illinois Supreme Court has determined "navigable waters" to be those that are "naturally, by customary modes of transportation, . . . 'of sufficient depth to afford a channel for use [in] commerce.'" *See* Holm v. Kodat, 2022 IL 127511, ¶ 29 (quoting Du Pont v. Miller, 141 N.E. 423, 425 (Ill. 1923)).

125 Haw. Wildlife Fund v. County of Maui, No. 12-00198, 2015 WL 328227 (D. Haw. Jan. 23, 2015), *aff'd*, 886 F. 3d 737 (2018), *vacated*, 590 U.S. 165, 171-72 (2020).

126 *County of Maui* ,590 U.S. at 172.

127 *Id.* at 183.

128 *Id.*

129 *Id.*

130 Sackett v. EPA, 598 U.S. 651, 678 (2023).

131 *County of Maui*, 590 U.S. at 183.

132 *Sackett*, 598 U.S. at 678.

> court's appointment of itself as the national decision-maker on environmental policy.[133]

Again, federalism will be addressed below.[134]

5. Status of Jurisdictional Determinations by the COE

From this point on, the COE "will resume issuing . . . jurisdictional determinations" under the August 2023 Rule.[135] According to the COE, because the sole purpose of the August 2023 Rule was to amend specific provisions of the March 2023 Rule considered invalid under *Sackett*, the August 2023 Rule took effect immediately without soliciting public comment.[136]

Following the recent decisions, the Chicago District of the Corps of Engineers announced that it is refining its workload priorities with regard to stand-alone jurisdictional determination (JD) align with the Corps HQ priorities.[137] Stand-alone JDs are those that are not associated with a Department of the Army permit action and may be necessitated by state and local government requirements for Corps-verified delineations and JDs for activities and transactions unrelated to Department of the Army permit applications.[138] According to the Corps, preliminary Jurisdictional Determinations (PJD), Approved JDs (AJD) and Delineation Concurrences are not prerequisites for submitting a Department of the Army permit application.[139]

At this point, for pending stand-alone JD requests that have already been assigned to a Project Manager, the Corps will finish those that are currently in coordination with EPA.[140] For JDs contemplated for future developments, the Corps encourages submission of permit applications/PCNs or no permit required (NPR) requests even if the projects are in the early planning stages.[141] According to the Corps, these requests may be incomplete due to the limited availability of details during a project's early planning stages.[142] Upon receipt of a request, the Corps will work closely with the applicant to outline requirements and next steps, including a

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133 *Id.* at 714-15 (Kagan, J., concurring).
134 *See* discussion *infra* Section II.B.
135 EPA, *supra* note 73.
136 *Id.*
137 E-mail from Soren Hall, U.S. Army Corps of Engineers, to William Anaya, Partner, UB Greensfelder LLP, (Apr. 22, 2024, 3:03 PM) (on file with author).
138 *Id.*
139 *Id.*
140 *Id.*
141 *Id.*
142 *Id.*

pre-application consultation-level discussion and the completion of a JD when necessary.[143]

According to the Corp, its mission is to regulate activities in the nation's waters and wetlands and provide the public with timely service when reviewing Department of the Army permit applications for projects that propose impacts to waters of the United States.[144] The growing volume of stand-alone JD requests is delaying the Corps' ability to provide efficient reviews of Department of the Army permit applications[145]. The Corps' Regulatory Branch will also continue to work with state and local government entities to further inform them of the unintended consequences of local requirements for Corps JDs that are unrelated to Department of the Army permit applications.[146]

B. SCOTUS AND FEDERALISM 2023

1. The Dormant Commerce Clause

The Commerce Clause within the U.S. Constitution vests in Congress the power "to 'regulate commerce . . . among the several states.'"[147] The dormant commerce clause, a court-created doctrine, prohibits states from discriminating against, or unduly burdening interstate commerce.[148] Generally, it is used to strike down state laws seeking to discriminate in favor of domestic, in-state commerce at the expense of interstate commerce by increasing burdens upon out-of-state industries and businesses.[149]

In May 2023, SCOTUS decided *National Pork Producers Council v. Ross*, denying a challenge to California's Proposition 12.[150] Through Proposition 12, California sought to bar sales of "whole pork meat from animals confined in a manner inconsistent with California standards . . . ."[151] National Pork Producers challenged this ban as a violation of the dormant commerce clause, arguing that the restrictions negatively impacted pork producers outside of California.[152] SCOTUS disagreed, upholding the California initiative.[153] SCOTUS held that state initiatives regulating standards of meat production do not violate the dormant commerce clause if

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143 *Id.*
144 *Id.*
145 *Id.*
146 *Id.*
147 Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 368 (2023) (citing U.S. CONST. art. I, § 8, cl. 3).
148 *Id.* at 369-70.
149 *Id.*
150 *Id.* at 356.
151 *Id.*
152 *Id.* at 368.
153 *Id.* at 390-91.

they do not "purposely discriminate against out-of-state economic interests."[154] It stated this is true even if the initiative had the "practical effect of controlling commerce outside the State."[155]

Critics argue SCOTUS's analysis could block the importation of goods, although compliant with the manufacturing state's labor laws, not made in compliance with the receiving states' labor laws.[156] Similarly, the dormant commerce clause could apply to goods imported into California that create water pollution in the state of manufacture, even though the goods do not create water pollution in California.[157] Other critics describe *National Pork Producers* as experimental federalism, creating a multitude of legal roadblocks to agricultural products that must be negotiated through various state laws.[158] Experimental federalism or not, this case represents the expanding view of state's rights as articulated by SCOTUS. [159]

2. The Major Question Doctrine

Earlier, on June 30, 2022, SCOTUS decided *West Virginia v. Environmental Protection Agency*—adopting the "major question doctrine" of review to determine the EPA's authority under the Clean Air Act (CAA).[160] According to the major question doctrine, in certain extraordinary cases involving statutes that confer authority upon an administrative agency, "the agency must point to clear congressional authorization for the [authority] it claims."[161]

In *West Virginia*, the EPA had promulgated the Affordable Clean Energy (ACE) regulation under the CAA.[162] According to the ACE rule, existing coal-fired power plants were required to control emissions using a "best system of emission reduction standard" established by the EPA to reduce greenhouse gas emissions.[163] The ACE rule was implemented in lieu of the "generation shifting" approach under the previous administration.[164]

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154 *Id.* at 371.

155 *Id.*

156 *Id.* at 397-98 (Roberts, J., concurring in part and dissenting in part).

157 *See Dormant Commerce Clause—Interstate Commerce—State Law—Extraterritoriality*—National Pork Producers Council v. Ross, 137 HARV. L. REV. 330, 332 (2023) [hereinafter *Dormant Commerce Clause*] (stating that Proposition 12 prohibited the sale of pigs that were cruelly confined and applied to all pork sold in California, regardless of where the pigs were bred).

158 *See, e.g.*, *id.* at 334 (analyzing Justice Gorsuch's concern that the opinions of some of his colleagues would "undermine[] the promises of federalism).

159 *See Nat'l Pork Producers Council*, 598 U.S. at 356.

160 W. Va. v. EPA, 597 U.S. 697, 700 (2022).

161 *Id.*

162 *Id.* at 699.

163 *Id.* at 697.

164 *Id.*

The EPA unsuccessfully argued that Congress had provided the EPA the authority to implement the rule in the section of the CAA establishing the New Source Performance Standards.[165] SCOTUS disagreed and found that the EPA could not identify any clear Congressional authorization for the ACE rule and declared the rule void.[166] Unless and until a "major question" is specifically addressed by Congress, agencies are prohibited from implementing rules addressing major questions under the rubric of deference.[167]

C. SCOTUS's 2024 Docket

Although currently on the SCOTUS docket is a challenge to the EPA's Good Neighbor Plan from the states of Ohio, Indiana, and West Virginia,[168] front and center of SCOTUS's 2024 docket is *Chevron, USA, Inc. v. National Resource Defense Council*.[169] This past year, SCOTUS agreed to hear appeals in *Loper Bright Enterprises v. Raimondo*[170] and *Relentless, Inc. v. Department of Commerce*.[171] These two cases will allow SCOTUS to reconsider the seminal case of *Chevron*.[172] According to *Chevron*, when Congress enacted an ambiguous statute, courts were to defer to the interpretation of the agency charged with administering that statute, even if the courts disagreed, so long as the agency's interpretation was not arbitrary, capricious, or unlawful.[173] Since 1984, *Chevron* has been cited in hundreds of cases by SCOTUS and countless opinions in the district and circuit courts.[174]

The litigants in *Loper*[175] and *Relentless*[176] challenge the National Marine Fisheries Service's interpretation of a commercial fishing regulation.[177] Specifically, SCOTUS will be charged with deciding whether to reverse *Chevron* or find that the regulation at issue is not ambiguous, making the interpretation of the regulation by the agency irrelevant.[178] The

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165 *Id.*
166 *Id.* at 700.
167 *Id.* at 721-23.
168 Jackson Coates, *Supreme Court Hears Challenge to the EPA's 'Good Neighbor' Plan*, NAT'L CONF. STATE LEGISLATURES (Mar. 6, 2024), https://www.ncsl.org/state-legislatures-news/details/supreme-court-hears-challenge-to-the-epas-good-neighbor-plan#:~:text=The%20U.S.%20Supreme%20Court%20recently,reduce%20their%20downwind%20ozone%20pollution.
169 Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
170 Loper Bright Enters. v. Raimondo, No. 22-451 (U.S. argued Jan. 17, 2024).
171 Relentless, Inc. v. Dept. Com., No. 22-1219 (U.S. argued Jan. 17, 2024).
172 *Chevron*, 467 U.S. at 837.
173 *Id.* at 843-44.
174 *Id.* at 837.
175 *Loper*, No. 22-451.
176 *Relentless*, No. 22-1219.
177 *Loper*, No. 22-451; *Relentless*, No. 22-1219.
178 *Id.*

appellants argue that *Chevron*'s analysis violates the separation of powers doctrine by transferring Article I's legislative power to an Article II agency.[179]

After *West Virginia*, it seems clear that *Chevron* will be modified at least.[180] If *Chevron* is modified significantly, the impact on stare decisis will be significant.[181] As this piece was being written, SCOTUS had heard an oral argument in *Loper*[182] and *Relentless*[183] and is expected to offer an opinion as to whether it will modify or reverse *Chevron*.[184] SCOTUS is advised to tread lightly less the cure be more destructive than the perceived disease.[185]

III. OTHER NOTEWORTHY CASES

A. Spent Nuclear Waste

Spent nuclear fuel is generated at civilian nuclear reactors once the nuclear fuel is no longer capable of producing energy.[186] It is "'intensely radioactive' and 'must be carefully stored.'"[187] Interim Storage Partners, LLC, a private company, sought and obtained a license from the U.S. Nuclear Regulatory Commission (NRC) to operate a temporary spent nuclear fuel waste storage facility in western Texas.[188]

The NRC issued the license over objections from the State of Texas; a for-profit oil and gas extraction organization named Fasken Land and Minerals Ltd.; and, Permian Basin Land and Royalty Owners, an association purporting to protect the interests of the Permian Basin.[189] These three parties petitioned for judicial review of the issued permit.[190] The Fifth Circuit granted the petition and vacated the license, holding that the NRC lacked statutory authority to issue it.[191]

In the early years of civilian commercial nuclear energy production, it was assumed that spent nuclear fuel would be reprocessed; however, no such

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179 *Id.*
180 *See* W. Va. v. EPA, 597 U.S. 697 (2022).
181 *See generally* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
182 *Loper*, No. 22-451.
183 Relentless, Inc. v. Dept. Com., No. 22-1219 (U.S. argued Jan. 17, 2024).
184 *Loper*, No. 22-451; *Relentless*, No. 22-1219.
185 *See generally Chevron*, 467 U.S. at 837.
186 Texas v. Nuclear Regul. Comm'n, 78 F.4th 827, 831, 832 (5th Cir. 2023).
187 *Id.* at 832 (quoting Pac. Gas & Elec. Co. v. State Energy Conservation & Dev. Comm'n, 461 U.S. 190, 195 (1983)).
188 *Id.* at 831.
189 *Id.* at 833. The Permian Basin is a geologic formation in western Texas and eastern New Mexico rich in oil reserves. It is a top global oil producing region. *Id.*
190 *Id.* at 831.
191 *Id.* at 844.

industry has materialized.[192] Commercial energy reactors generate between an estimated 2,000 and 2,400 metric tons of spent nuclear fuel annually, with projections indicating over 200,000 metric tons could exist in the United States by 2050.[193] Following the passage of the Nuclear Waste Policy Act in 1982, the U.S. Department of Energy proposed a permanent storage solution deep underground at Yucca Mountain in Nevada.[194] Decades later, that plan has been abandoned and no permanent storage location for this nuclear waste has been identified—much less paid for and implemented.[195] Currently, it is stored onsite at reactor locations, including some that are no longer operational.[196] However, Interim Storage Partner's facility would have been a private away-from-reactor temporary storage location.[197]

The Fifth Circuit found that the plaintiffs each had individual constitutional standing to oppose the issuance of the NRC license.[198] Texas had standing because issuance of the license preempted state statute, meeting the "injury-in-fact" requirement.[199] Fasken Land and Minerals Ltd. had standing because its members owned land within four miles of, drew water from wells beneath, and drove within one mile of the facility.[200] Finally, as an association, Permian Basin Land and Royalty Owners had associational standing because (1) its members would independently meet Article III standing requirements due to where they lived, worked, and drove, (2) the interests of the association were germane to the purpose of the organization, and (3) the association was able to represent its members' interests without their individual participation.[201]

The NRC and Interim Storage Partners cited two circuit court cases to support the NRC's authority to issue a permit like the one here—*Bullcreek v. Nuclear Regulatory Commission*[202] and *Skull Valley Band of Goshute Indians v. Nielson*.[203] The court distinguished them, stating that both had merely assumed that the NRC had authority without analyzing the statute.[204]

The NRC asserted that it had the authority to issue a license to a temporary "away-from-reactor" storage facility for spent nuclear fuel

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192 *Id.* at 832.
193 *Id.* at 833.
194 *Id.* at 832-33.
195 *Id.* at 833.
196 *Id.*
197 *Id.* Andrews County, Texas, the proposed location of the spent nuclear fuel interim storage facility at issue, passed a resolution in support of such a storage facility being located there. *Id.*
198 *Id.* at 835-36.
199 *Id.* at 836 (albeit a "non-binding, declaratory" statute).
200 *Id.* at 836.
201 *Id.* at 836-37.
202 *Id.* at 841-42 (citing Bullcreek v. NRC, 359 F.3d 536 (D.C. Cir. 2004)).
203 *Id.* (citing Skull Valley Band Goshute Indians v. Nielson, 376 F.3d 1223 (10th Cir. 2004)).
204 *Id.* at 842.

pursuant to the Atomic Energy Act (AEA).[205] The AEA authorizes the NRC to issue licenses regarding "special nuclear material, source material, and byproduct material."[206] The agency asserted that it had broad authority to issue licenses to storage facilities of spent nuclear fuel because those three materials were constituents of spent nuclear fuel.[207] The court disagreed, noting that the AEA authorized the NRC to issue licenses "only for certain enumerated purposes—none of which encompass[ed] storage or disposal of material as radioactive as spent nuclear fuel."[208]

The court said that issuing the license also violated the Nuclear Waste Policy Act (NWPA), which "provides a comprehensive scheme to address the accumulation of nuclear waste."[209] The NWPA made the federal government responsible for permanently disposing of spent nuclear fuel.[210] Interim storage, meanwhile, was the responsibility of the owners and operators of commercial nuclear reactors at their sites.[211] The NWPA created "a comprehensive statutory scheme" for spent nuclear fuel, "prioritiz[ing] construction of [a] permanent repository," and until then, requiring storage "onsite at-the-reactor or in a federal facility."[212] Interim Storage Partners' proposed facility was neither.[213] Therefore, its issuance of the permit flouted Congressional policy as expressed in the NWPA.[214] The court held that the AEA and NWPA were unambiguous regarding the NRC's ability to issue such a license.[215]

The Fifth Circuit could have stopped there, having fully resolved the case on straight statutory interpretation.[216] However, it gratuitously added that, even if the statutes were ambiguous, the NRC's "interpretation wouldn't be entitled to deference."[217] In *dicta*, the court referred to SCOTUS's adoption of the major questions doctrine in *West Virginia v. Environmental Protection Agency*.[218] The court said that nuclear waste disposal's economic and political significance and its "hotly politically contested" history made it a "major subject[] of public concern" requiring either Congressional decision "or an agency acting pursuant to *clear* delegation" from Congress.[219] Such a

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205 *Id.* at 831 (citing 42 U.S.C. § 2011).
206 *Id.* at 840 (first citing 42 U.S.C. § 2073; then citing 42 U.S.C. § 2093; then citing 42 U.S.C. § 2111).
207 *Id.*
208 *Id.*
209 *Id.* at 842.
210 *Id.*
211 *Id.* at 843.
212 *Id.* at 844.
213 *Id.*
214 *Id.* at 840 (citing 42 U.S.C. § 10101).
215 *Id.* at 844.
216 *See generally id.*
217 *Id.*
218 *Id.* (citing W. Va. v. EPA, 597 U.S. 697 (2022)).
219 *Id.*

clear delegation was absent here.[220] Although the Fifth Circuit may not see it this way, some suggest that this decision creates a circuit split.[221]

Alternative energy sources are necessary with calls for decreasing the usage of petroleum-based energy sources due to climate change.[222] Nuclear energy is certainly one such source, but, while it may not contribute to climate change, it has its own problems.[223] Illinois' Public Act 103-569 is one example of legislation allowing for limited development of nuclear power generation.[224] The statute does not allow for new, large-scale power generation at facilities similar to six existing plants in Illinois.[225] This statute provides a regulatory structure for constructing Small Nuclear Reactors (SNRs), meaning those with a capacity of up to 300 megawatts.[226]

B. Individuals' Constitutional Rights and Claims to a Clean Environment & Climate Change

On August 14, 2023, following a seven-day trial, a state court in Montana issued a 103-page opinion and order in favor of sixteen plaintiffs, Montana youths who had sued the state for violating their rights to a clean and healthful environment under the Montana Constitution.[227] The plaintiffs argued that the state had violated their rights through its "fossil fuel-based state energy system," which was linked to climate change.[228] Climate change, in turn, harmed the youths through flooding, severe storms, wildfire, and drought upon family ranches;[229] wildfire smoke that made breathing difficult, inhibited the ability to hunt,[230] and caused feelings of despair and hopelessness;[231] and economic harm to one working as a ski instructor due to decreased snowpack and number of days available for work.[232]

The Montana Constitution grants all Montanans the inalienable "right to a clean and healthful environment and the rights of pursuing life's basic

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220 *Id.*

221 *See, e.g.*, Brief for Nuclear Energy Inst., Inc. as Amicus Curiae Supporting Rehearing *En Banc*, Texas v. NRC, No. 21-60743 (5th Cir. Nov. 3, 2023). At the time of this writing, Nuclear Energy Institute, Inc.has filed a Petition for Rehearing *En Banc*, citing, *inter alia*, the panel's departure from the D.C. and Tenth Circuit opinions. *Id.*

222 *See generally Nuclear Regul. Comm'n*, 78 F.4th at 827.

223 *Id.* at 844.

224 2023 Ill. Legis. Serv. 103-569 (West) (to be codified as amended 20 ILL. COMP. STAT. ANN. 3310/5).

225 *Id.*

226 *Id.*

227 Held v. Montana, No. CDV-2020-307, 2023 Mont. Dist. LEXIS 2, at *129-30 (Mont. Dist. Ct. Aug. 14, 2023).

228 *Id.*at *1.

229 *Id.*at *43.

230 *Id.*at *40, *61-62, *68, *70, *78.

231 *Id.*at *36, *60, *65, *68.

232 *Id* at *68.

necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways."[233] Specifically placing duties upon the state, it provides:

> (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
> (2) The legislature shall provide for the administration and enforcement of this duty.
> (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.[234]

Under the Montana Environmental Policy Act (MEPA), the Department of Environmental Quality (DEQ) prepares environmental review documents for permits, licenses, and leases, including for coal mines and pipelines.[235] Some permits, licenses, and leases result in Greenhouse Gas (GHG) emissions.[236] A portion of the MEPA, known as the MEPA Limitation, forbade the DEQ, in its environmental reviews, from considering "actual or potential impacts beyond Montana's borders" and "actual or potential impacts that are regional, national, or global in nature."[237] During the pendency of the case, on May 19, 2023, an amendment was made to the MEPA Limitation that specifically prohibited consideration of GHG emissions and corresponding impacts upon climate change.[238] Thus, the state "authorizes energy projects and facilities within Montana that emit substantial levels of GHG pollution . . . without considering how the additional GHG emissions will contribute to climate change or be consistent with the standards the Montana Constitution imposes on the state to protect people's rights."[239]

The youth constitutionally challenged the MEPA Limitation.[240] Over seven days of trial, the court heard live testimony from twenty-seven witnesses: twenty-four supporting the plaintiffs and three supporting the defendants.[241] It also admitted 168 plaintiffs' exhibits and four defendants' exhibits.[242] The plaintiffs called ten expert witnesses, including a Nobel

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233 MONT. CONST. art. II, § 3.
234 MONT. CONST. art. IX, § 1.
235 MONT. CODE ANN. § 75-1-201.
236 *Held*, 2023 Mont. Dist. LEXIS 2, at *95-96.
237 *Id.* at *19.
238 *Id.* at *8.
239 *Id.* at *95-96.
240 *Id.* at *2.
241 *Id.* at *11.
242 *Id.*

Prize-winning climate scientist, a renewable energy specialist, and a state environmental policy expert.[243] Among other things, these experts explained how easily Montana could move away from fossil fuels and toward more renewable resources.[244] The defendants produced one expert witness whose "testimony was not well-supported, contained errors, and was not given weight by the Court."[245] The fact that "climate change is a critical threat to public health" was not refuted by the defendants at trial,[246] nor was the fact that the plaintiffs had been, and were continuing to be, "harmed by the State's disregard of GHG pollution and climate change" because of the MEPA Limitation.[247]

The court made numerous conclusions based on the record, including that the "[s]cience [wa]s unequivocal that dangerous impacts to the climate are occurring due to human activities, primarily from the extraction and burning of fossil fuels."[248] It further concluded that there was "overwhelming scientific consensus that Earth is warming as a direct result of human GHG emissions, primarily from the burning of fossil fuels."[249] Findings such as these continued for over 60 pages, including the note that, "of the approximately 146 glaciers in Glacier National Park in 1850, only 26 remained in 2015 that were larger than 25 acres, meaning that 82% of the park's glaciers are gone and there has been a 70% loss of area of all glaciers."[250] The court found the MEPA Limitation unconstitutional.[251] "Montana's climate, environment, and natural resources [were found to be] unconstitutionally degraded and depleted due to . . . GHGs and climate change."[252] The "MEPA Limitation conflict[ed] with the very purpose of MEPA,"[253] and the court "permanently enjoined" it.[254]

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243 Blair Miller, *Judge sides with youth in Montana climate change trial, finds two laws unconstitutional*, PENN CAPITAL-STAR (Aug. 15, 2023, 2:49 PM), https://penncapital-star.com/energy-environment/judge-sides-with-youth-in-montana-climate-change-trial-finds-two-laws-unconstitutional/#:~:text=The%20plaintiffs%20called%2010%20expert,climate%20was%20warming%2C%20Montana's%20outsized.

244 *Id*.

245 *Held*, 2023 Mont. Dist. LEXIS 2, at *83.

246 *Id*. at *43.

247 *Id*. at *58.

248 *Id*. at *23.

249 *Id*. at *22-23.

250 *Id*. at *46-47.

251 *Id*. at *94.

252 *Id*. at *124.

253 *Id*. at *126.

254 *Id*. at *129.

In October 2023, the defendants filed a motion for clarification and for stay of judgment pending appeal,[255] which was denied in November.[256] On December 1, the state agencies and Governor filed a motion for stay of order pending appeal with the Montana Supreme Court.[257] That court denied the motion and ordered the appeal to proceed.[258]

It is unclear what the ultimate result in Montana will be, but it marks a first success where many similar lawsuits elsewhere have failed.[259] Only a few other state constitutions have provisions like Montana,[260] which limits the reach of the ruling. Surely more such lawsuits will follow, most likely in those states already having environmental protections in their constitutions. For example, Article XI of the Illinois Constitution provides that each person in Illinois has a "right to a healthful environment."[261] For many years, however, some communities within Illinois—particularly communities of color—have borne higher rates of pollution and its devastating effects.[262] *Held* may provide guidance to those seeking similar relief in Illinois.[263] One could easily see state constitutions becoming a similar battleground over environmental rights.

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255 *See* Defendants' Motion for Clarification and for Stay of Judgment Pending Appeal, Held v. Montana, CDV-2020-307 (Mont. Dist. Ct. filed Oct. 16, 2023).

256 Order Denying Defendants' Motion for Clarification and for Stay of Judgment Pending Appeal, Held v. Montana., CDV-2020-307 (Mont. Dist. Ct. ordered Nov. 21, 2023).

257 Appellant State Agencies' and Governor's Rule 22 Motion for Stay of Order Pending Appeal, Held v. Montana, DA 23-0575 (Mont. filed Dec. 1, 2023).

258 Order, Held v. Montana, DA 23-0575 (Mont. filed Jan. 16, 2024).

259 *See* Scott W. Stern, *Standing for Everyone: Sierra Club v. Morton, Supreme Court Deliberations, and a Solution to the Problem of Environmental Standing*, 30 Fordham Env't L. Rev. 21 (2018).

260 *See* N.Y. CONST. art 1, § 19 ("Each person shall have a right to clean air and water, and a healthful environment."); PA. CONST. art. 1, § 27 ("The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment."); ILL. CONST. art. XI, § 2 ("Each person has the right to a healthful environment."); MASS. CONST. art XLIX ("The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment."); HAW. CONST. art. XI, § 9 ("Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources.").

261 ILL. CONST. art. XI, § 2.

262 *See* Brett Chase & Patrick Judge, *Pollution Hits Chicago's West, South Sides Hardest*, ILL. ANSWERS PROJECT (Oct. 25, 2018), https://illinoisanswers.org/2018/10/25/interactive-map-pollution-hits-chicagos-west-south-sides-hardest/.

263 *See* Amber Polk, *What Montana Youths' Climate Victory Could Mean for Other States*, US NEWS (Aug. 15, 2023), https://www.usnews.com/news/best-states/articles/2023-08-15/montana-climate-lawsuit-could-set-a-precedent-for-other-states.

C. The Resource Conservation & Recovery Act: Manufacturing Process Unit Exemption

Five years after an EPA environmental scientist conducted a Resource Conservation and Recovery Act (RCRA)[264] compliance inspection at a batch chemical manufacturing facility in Massachusetts, a key ruling rejecting the EPA's limited interpretation of an important exemption became final.[265] Where the point of generation is located holds fundamental importance because RCRA's hazardous waste regulations begin at the point where hazardous waste is generated.[266] It signals the beginning of comprehensive "cradle to grave" enforceable requirements.[267]

In promulgating RCRA regulations, the EPA recognized the need for an exemption commonly known as the Manufacturing Process Unit (MPU) exemption, which provides:

> A hazardous waste which is generated in a product or raw material storage tank, a product or raw material transport vehicle or vessel, a product or raw material pipeline, or in a manufacturing process unit or an associated non-waste-treatment-manufacturing unit, is not subject to regulation under parts 262 through 265, 268, 270, 271 and 124 of this chapter or to the notification requirements of section 3010 of RCRA until it exits the unit in which it was generated, unless the unit is a surface impoundment, or unless the hazardous waste remains in the unit more than 90 days after the unit ceases to be operated for manufacturing, or for storage or transportation of product or raw materials.[268]

By its terms, hazardous waste generated in certain tanks, vessels, and units does not become regulated as hazardous waste until it is removed or ninety days after the unit ceases operation.[269] The purpose of the exemption was "to address the incidental hazardous waste generation during product or raw material storage, transport or manufacturing" where those wastes would be "adequately contained during such activities."[270] In the preamble to the rule promulgating the exemption, the EPA explained that "most of these units

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264 42 U.S.C. §§ 6901–6992.

265 *In re* ISP Freetown Fine Chemicals, Inc., RCRA-01-2018-0062, EPA ALJ (EPA filed Aug. 15, 2022) (granting respondent's motion for accelerated decision and denying complainant's motion for accelerated decision/initial decision); ISP Freetown Fine Chemicals, Inc., RCRA (3008) No. 22-01 (EAB filed Sep. 22, 2022) (declining to exercise *sua sponte* review).

266 *See, e.g.*, *Frequent Questions About Hazardous Waste Generation*, EPA, https://www.epa.gov/hwgenerators/frequent-questions-about-hazardous-waste-generation (June 24,2024).

267 City of Chicago v. Env't Def. Fund, 511 U.S. 328, 331 (1994).

268 40 C.F.R. § 261.4(c).

269 40 C.F.R. § 261.4(c).

270 Memorandum from Barnes Johnson, Director, Off. Res. Conservation & Recovery, EPA, to RCRA Division Directors, EPA Regions I-X (Oct. 3, 2016) (on file with EPA), available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://rcrapublic.epa.gov/files/14884.pdf.

are tanks or tank-like units (*e.g.*, distillation units) which are designed and operated to hold valuable products or raw materials in storage or transportation or during manufacturing."[271]

This MPU exemption, which effectively shifts the line regarding point of generation, was at issue in *In re ISP Freetown Fine Chemicals, Inc.*[272] The EPA alleged that ISP Freetown's "distillate receiver tanks" were hazardous waste tanks.[273] The company argued that the distillate receiver tanks were exempt from RCRA regulation under the MPU exemption because they were connected to and part of a distillation unit.[274]

Critically, however, none of the following are defined in the regulations: "manufacturing process unit,"[275] "manufacturing,"[276] "unit,"[277] and "distillation unit."[278] Merriam-Webster defines "distillation" as "the process of purifying a liquid by successive evaporation and condensation."[279] To separate two mixed liquids through distillation, the liquid is heated (and/or the pressure reduced) until the liquid with the lower boiling point (the more volatile one) evaporates into vapor form, leaving the other liquid in its liquid state.[280] The vaporized component is drawn off into a condenser, where it is cooled to the point that it returns to a liquid state.[281] This liquid is then directed to a distillate receiver tank.[282] ISP Freetown used a distillation process conducted in batches to make the relevant products.[283] ISP Freetown's

> Products are produced by "first dissolving raw materials in a solvent, such as alcohol, inside a reactor vessel and then allowing them to react chemically." . . . "once the reaction is complete, some or all of the solvent must be removed from the contents of the reactor to produce a final product[.]" To remove the solvent, the reactor vessel is "heated and/or subjected to reduced pressure so the liquid turns into vapor." The solvent vapor is then piped into a condenser, in which the vapor is cooled "by routing it through narrow tubes surrounded by a liquid coolant, causing it

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271 *Id.* (citing 45 C.F.R. 72025).
272 *In re* ISP Freetown Fine Chems., Inc., No. RCRA-01-2018-0062, 2022 WL 3574416 (EPA A.L.J. Aug. 15, 2022).
273 *Id*. at *7.
274 *Id*. at *10.
275 *Id*. at *18.
276 *Id*. at *16, *24.
277 *Id*. at *16, *31-32.
278 *Id*. at *13, *22.
279 *Distillation*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1994).
280 *ISP Freetown*, 2022 WL 3574416, at *2.
281 *Id*.
282 *Id*.
283 *Id*.

> to turn back into liquid distillate." The liquid distillate is then piped into a receiver tank.[284]

ISP Freetown's position was that distillation units, "as a matter of engineering and basic logic," consist of "three irreducible components'— the reactor, condenser, and one or more receiving tanks."[285] Each part is necessary, connected, and together used to make a product.[286] Therefore, ISP Freetown maintained the distillate receiver tanks were exempt under the MPU exemption.[287]

The EPA argued the distillate receiver tanks did not qualify for the MPU Exemption because, "it d[id] not apply to distillation units, in general."[288] The EPA also maintained that the distillation process was "the process that happen[ed] exclusively in the reactor tanks[,]" not the receiver tanks.[289] The receiver tanks were not part of the "production process" because products were not "produced in the Receiver Tanks," which were "part of [a] waste management system."[290]

The Administrative Law Judge (ALJ) concluded that the EPA's argument held "little merit . . . , as the preamble plainly list[ed] 'distillation units' as an example of a 'tank-like unit' that temporarily holds hazardous waste during manufacturing."[291] Further, the ALJ determined that "when distillation units [we]re operated to hold incidental wastes during the manufacturing process, such distillation units c[ould] be categorized as 'manufacturing process units.'"[292]

The ALJ then had to determine whether the distillate receiver tanks were *part of* the "distillation unit."[293] She found that under an RCRA Subpart AA definition, a "distillation operation is comprised of not just the vessel in which distillation begins, but of the components in which liquid solvents settle after . . . exiting the reactor."[294] Therefore, ISP Freetown's distillate receiver tanks were part of the distillation unit.[295]

In the final necessary step of the analysis, the ALJ had to decide whether the distillate receiver tanks were "part of the 'manufacturing process.'"[296] The EPA said that "manufacturing" required chemical or

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284 *Id.* (alteration in original) (citation omitted).
285 *Id.* at *11.
286 *Id.* at *15, *29.
287 *Id.* at *9-12, *15, *17.
288 *Id.* at *13.
289 *Id.* at *13.
290 *Id.*
291 *Id.* at *19.
292 *Id.* at *20.
293 *Id.* at *20-23.
294 *Id.* at *23.
295 *Id.*
296 *Id.* at *23-34.

physical reactions where "raw materials are being transformed into products within the exempted unit."[297] The distillate receiver tanks "clearly" did not produce a product but only served "to collect used liquid solvents that ha[d] been separated through distillation."[298] ISP Freetown countered that the receiver tanks were "integral" to the production process and that manufacturing "must be evaluated at the level of the *process*—the system—not in each individual manufacturing component."[299] The ALJ found that it was not required "that there be a 'transformation of materials' or an 'intentional physical or chemical reaction' directly within the component."[300] Here, the "distillate receiver tanks serve[d] a distinct role *during* manufacturing, not solely after the production process end[ed]," and their "primary purpose . . . [wa]s not to store hazardous waste, but rather to allow for the batch distillation process to continue."[301] Accordingly, the distillate receiver tanks were part of a closed manufacturing system and were exempt under the MPU Exemption.[302]

In conclusion, the distillate receiver tanks met the MPU exemption, but that does not mean that the distillate they contain is not waste.[303] The exemption means that the tanks are not regulated as RCRA hazardous waste tanks, and the contents are not regulated as hazardous waste until removed from the tanks.[304] However, this distinction is important to the regulated community because the RCRA regulations are substantial and noncompliance costly.[305] Each situation is fact-intensive and requires close analysis, but the EPA's overly narrow interpretation of this exemption was relaxed through this decision.[306]

D. No Insurance Coverage for Failing to Obtain a Permit

In *Continental Casualty Company v. 401 North Wabash Venture, LLC*, an Illinois appellate court held that failing to be in possession of a valid Clean Water Permit issued pursuant to the NPDES is not covered by a Commercial General Liability Insurance Policy.[307]

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297 *Id.* at *27.
298 *Id.*
299 *Id.*
300 *Id.* at *28.
301 *Id.*
302 *Id.* at *30.
303 *Id.* at *2. Some distillate is able to be reused, some is largely water and sent to a wastewater treatment plant, and approximately 39% constitutes hazardous waste. *Id.*
304 40 C.F.R. § 261.4(c) ("Until it exits the unit in which it was generated" or "more than 90 days after the unit ceases to be operated.").
305 *The Cost of Non-Compliance*, CLEANEARTH (June 15, 2016), https://www.cleanearthinc.com/news/cost-non-compliance.
306 *See generally ISP Freetown*, 2022 WL 3574416.
307 Cont'l Cas. Co. v. 401 N. Wabash Venture, LLC, 2023 IL App (1st) 221625, ¶ 34.

E. No Private Cause of Action to Enforce Illinois Environmental Protection Act, Leaking Underground Storage Tank Program Rules, or State Fire Marshal Rules

In *Rice v. Marathon Petroleum Corporation*, the plaintiff, Margaret Rice, brought suit against the defendants, Marathon Petroleum Corporation, Speedway, LLC, and certain individual defendants after she suffered burns and other injuries due to a clothes dryer exploding in her apartment building.[308] This explosion occurred because gasoline was present in the wastewater system because the defendants filled a corroded underground storage tank with nearly 10,000 gallons of fuel, allowing groundwater to displace the fuel into the surrounding environment.[309]

The plaintiff brought negligence claims and Leaking Underground Storage Tank Program (LUST) claims[310] under the Illinois Environmental Protection Act, along with some other claims under the Act alleging that the defendants had filled the tank contrary to Office of the State Fire Marshal (OSFM) regulations.[311] The defendants moved to dismiss the LUST claims, alleging that there was no private right of action under LUST or the Illinois Environmental Protection Act.[312] The circuit court agreed and found no express or private right of action under LUST or the Illinois Environmental Protection Act.[313] The plaintiff appealed to the appellate court, which reviewed the record *de novo* and held that there was no express or implied private right of action for the claims provided by LUST, the Illinois Environmental Protection Act, or OSFM regulation.[314] In reaching its holding, the appellate court noted that there was no implied right of action because, when considering the *Abassi v. Paraskevoulakos*[315] factors, there was no private right of action when there was an adequate common law remedy, a negligence action.[316]

F. Final Agency Action is Required Before an Appeal

In *Driftless Area Land Conservancy v. Rural Utilities Service*, various environmental advocacy organizations filed suit challenging actions of various federal agencies in permitting an electricity transmission line project that would cross through Driftless Area National Wildlife Refuge, allegedly

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308 Rice v. Marathon Petroleum Corp. ,2022 IL App (1st) 220155-U, ¶ 3.
309 *Id.* ¶ 4.
310 415 ILL. COMP. STAT. ANN. 5/57 *et seq*. (West 2016).
311 *Rice*, 2022 IL App (1st) 220155-U, ¶ 4.
312 *Id.*
313 *Id.*
314 *Id.*
315 Abbasi *ex rel.* Abbasi v. Paraskevoulakos, 187 Ill. 2d 386, 393 (1999).
316 *Rice*, 2022 IL App (1st) 220155-U, ¶ 1.

in violation of the National Wildlife Refuge System Improvement Act (the "Refuge Act") and the National Environmental Protection Act (NEPA).[317] Following intervention by the electricity utilities, as intervenor-defendants, the parties cross-moved for summary judgment, and the organizations moved for a permanent injunction.[318] The district court granted summary judgment in part, entering a declaratory judgment that, under the Refuge Act, the agency's compatibility determination could not support a crossing either by right of way (the rescinded decision) or land transfer (the pending proposal), and denied them in part. [319] It also denied the motion for a permanent injunction.[320]

The agencies appealed the summary judgment decision and the organizations cross-appealed the denial of permanent injunctions.[321] The appellate court upheld the denial of a permanent injunction and reversed the district court's summary judgment holdings.[322] The appellate court reasoned that, although an agency's decision to change course does not moot a lawsuit against an agency when the change is not final, jurisdiction alone is not the only factor to be considered by the court; rather, a final agency action is necessary.[323]

The court noted that the matter was not moot because, "although the Fish and Wildlife Service ha[d] revoked the original compatibility determination, it ha[d] not promised never to issue a new permit for the crossing."[324] However, this was not a final agency action under the Administrative Procedure Act (APA), a requirement for judicial review.[325] To be reviewable, the final action must consummate the agency's decision-making process and must determine rights and obligations; it must be a terminal event.[326] The court held this had not happened because the compatibility determination by the Fish and Wildlife Service was not a final decision, just a prerequisite to a permit rather than the end of the agency's process. [327] Therefore, the district court's declaratory judgment was wrong and needed reversed.[328]

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317 Driftless Area Land Conservancy v. Rural Utils. Serv., 74 F.4th 489, 492 (7th Cir. 2023).
318 *Id.*
319 *Id.*
320 *Id.*
321 *Id.*
322 *Id.*
323 *Id.*
324 *Id.* at 493.
325 *Id.* at 492 (citing 5 U.S.C § 704).
326 *Id.* at 493.
327 *Id.* at 495.
328 *Id.*

G. Chevron Analysis Followed in the Seventh Circuit Court of Appeals

In *National Wildlife Federation v. United States Army Corps of Engineers***,** *Chevron* is still good law in the Seventh Circuit Court of Appeals.[329] Various environmental organizations brought an action alleging that the 2017 final Supplemental Environmental Impact Statement (SEIS) prepared by the COE in support of its decision to continue the program of building river training structures to maintain navigable channel in Middle Mississippi River did not comply with the Water Resources Development Act (WRDA) or NEPA.[330] The district court granted summary judgment for the defendants, and the plaintiffs appealed.[331] The appellate court upheld the district court's finding that the defendants' actions were not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" based on the APA.[332]

The plaintiffs had alleged several reasons why they believed the defendants ran afoul of congressional requirements.[333] First, they contended that the defendants violated a provision in the WRDA that required reports and proposals submitted by the secretary to include detailed plans to mitigate ecological damage.[334] The appellate court agreed with the defendants' interpretation of the statute, concluding that the requirement for mitigation plans applied solely to reports submitted to Congress.[335] Consequently, because the SEIS was not submitted to Congress, it did not violate the WRDA.[336]

Second, the plaintiffs alleged that the defendants' SEIS purpose and needs statement violated NEPA because the defendants failed to explore reasonable alternatives.[337] The appellate court found there was no such violation because the defendants' SEIS purpose and need statement reflected the instructions of Congress and was not arbitrary or capricious in defining such, which tasked the defendants with maintaining the channel by using permanent structures and supplemental dredging, but no more than necessary and economical.[338] Finally, the plaintiffs alleged that the defendants did not consider reasonable alternatives not within the jurisdiction of the lead agency pursuant to 40 C.F.R § 1502.[339] Here, the court also disagreed, noting the

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329 Nat'l Wildlife Fed'n v. United States Army Corps of Eng'rs**,** 75 F.4th 743, 748 (7th Cir. 2023).
330 *Id.* at 747.
331 *Id.*
332 *Id.* at 755 (citing 5 U.S.C § 704).
333 *Id.* at 753.
334 *Id.* at 755.
335 *Id.*
336 *Id.* at 753.
337 *Id.* at 754.
338 *Id.* at 755.
339 *Id.*

defendants considered several options and selected reasonable alternatives to study further.[340]

Ultimately, the court held that the defendants' final SEIS satisfied NEPA.[341] The defendants reasonably articulated the purpose and need for the project, identified reasonable alternatives that warranted detailed study, and provided meaningful consideration of those alternatives, given the programmatic nature of the supplemental statement.[342]

IV. NOTEWORTHY REGULATORY ACTIONS

A. Federal Regulatory Actions

1. On December 21, 2022, the EPA reconsidered the Ethylene Oxide Rule.[343] In this final rule, the EPA adopted the IRIS value for risk assessments of ethylene oxide.[344]
2. On December 22, 2022, the EPA issued its guidance on *Principles for Addressing Environmental Justice in Air Permitting*.[345]
3. On February 13, 2023, the EPA issued its final rule disapproving twenty-one states' interstate transport State Implementation Plans (SIPs).[346] These plans are required by the "interstate transport" provision of the Clean Air Act, otherwise known as the "good neighbor" provision.[347]
4. On July 31, 2023, the EPA released its *Draft National Strategy to Prevent Plastic Pollution*.[348] This will likely affect the regulated

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340 *Id*.

341 *Id*. at 760.

342 *Id*.

343 Reconsideration of the 2020 National Emission Standards for Hazardous Air Pollutants: Miscellaneous Organic Chemical Manufacturing Residual Risk and Technology Review, 88 Fed. Reg. 77985 (Dec. 21, 2022) (to be codified at 40 C.F.R. 63).

344 *Id*.

345 EPA, EJ IN AIR PERMITTING: PRINCIPLES FOR ADDRESSING ENVIRONMENTAL JUSTICE CONCERNS IN AIR PERMITTING (2022), available https://www.epa.gov/system/files/documents/2022-12/Attachment%20-%20EJ%20in%20Air%20Permitting%20Principles%20.pdf; *see also* Madeleine Boyer et al., *EPA Issues Environmental Justice Guidance for Clean Air Act Permits*, NAT'L L. R. (Jan. 5, 2023), https://www.natlawreview.com/article/epa-issues-environmental-justice-guidance-clean-air-act-permits.

346 Air Plan Disapprovals; Interstate Transport of Air Pollution for the 2015 8-Hour Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 9336 (Mar. 15, 2023) (to be codified at 40 C.F.R. 52).

347 Air Plan Disapprovals; Interstate Transport of Air Pollution for the 2015 8-Hour Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 9336 (Mar. 15, 2023) (to be codified at 40 C.F.R. 52) (citing Clean Air Act, 42 U.S.C. § 7410(a)(2)(D)(i)(I)).

348 *See* EPA, DRAFT NATIONAL STRATEGY TO PREVENT PLASTIC POLLUTION (2023). This is a reaction to the micro-plastic concerns identified by the Illinois General Assembly in P.A. 103-93. 415 ILL. COMP. STAT. ANN. 5/13.10 (West 2024).

community—especially those who manufacture plastic, regularly use plastics, and handle plastic waste.[349]

5. On December 2, 2023, the EPA issued a sweeping change in methane emission control requirements for oil and gas infrastructure, which included the first-ever requirements for existing sources.[350] This final rule became effective March 8, 2024.[351]
6. On December 19, 2023, in response to a November 2, 2023, decision by the Eighth Circuit Court of Appeals vacating the EPA's 2021 final rule prohibiting the use of the pesticide chlorpyrifos on food or feed crops,[352] the EPA issued an update on its intended next steps.[353]
7. On January 17, 2024, the EPA updated the residential soil Lead (Pb) guidance for Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and RCRA Corrective Action facilities.[354] Specifically, the EPA Regions were directed to use a residential soil Pb cleanup objective of 200 Parts Per Million (PPM) unless there was another source of Pb identified.[355] According to the EPA, the Regional Screening Level (RSL) of "100 [PPM] considers aggregate [Pb] exposure and increased risk to children living in communities with multiple sources of [Pb] contamination."[356] This revised residential soil rule is clearly designed to address the concept of Environmental Justice in neighborhoods that bear a more significant burden due to environmental contaminants.[357]

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349 *See* EPA, DRAFT NATIONAL STRATEGY TO PREVENT PLASTIC POLLUTION (2023).

350 Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidlelines for Existing Sources: Oil and Natural Gas Sector Climate Review, 89 Fed. Reg. 16820 (Mar. 8, 2024) (to be codified at 40 C.F.R. pt. 60); *see also EPA's Final Rule for Oil and Natural Gas Operations Will Sharply Reduce Methane and Other Harmful Pollution,* EPA (Dec. 2, 2023), https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-operations/epas-final-rule-oil-and-natural-gas.

351 Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidlelines for Existing Sources: Oil and Natural Gas Sector Climate Review, 89 Fed. Reg. 16820 (Mar. 8, 2024) (to be codified at 40 C.F.R. pt. 60).

352 *See* Red River Valley Sugarbeet Growers Ass'n v. Regan, 85 F. 4th 881, 881 (8th Cir. 2023) (holding that a "statute governing pesticide tolerances required EPA to consider whether revoking most tolerances would make it safe to retain subset of tolerances.").

353 *EPA's Update on Next Steps for Chlorpyrifos,* EPA (Dec. 19, 2023), https://www.epa.gov/pesticides/epa-update-next-steps-chlorpyrifos.

354 Memorandum from Barry N. Breen, Principal Deputy Assistant Adm'r, Off. Land & Emergency Mgmt., EPA, to Reg'l Adm'rs, Regions 1-10, EPA (Jan. 17, 2024) (on file with EPA), available at https://semspub.epa.gov/work/HQ/100003435.pdf.

355 *Id.*

356 *Id.*

357 *See Equitable Development and Environmental Justice,* U.S. EPA, https://www.epa.gov/environmentaljustice/equitable-development-and-environmental-justice (last visited June 16, 2024).

B. Illinois Regulatory Actions

1. On May 2, 2023, OFSM adopted a series of amendments including:
   a) to the Petroleum Equipment Contractor Licensing Act.[358] The rulemaking updated the schedule of citations and fines for violations of the Act;[359]
   b) to Illinois Administrative Code title 41, section 174, updating the Underground Storage Tank Rules concerning flammable and combustible liquids but retaining the longstanding rule against smoking near fuel dispensers;[360] and
   c) to Illinois Administrative Code title 41, section 176 to streamline the submission of reporting forms and add the requirement for precision testing.[361]
2. On May 19, 2023, the Illinois Pollution Control Board adopted amendments to Radiation Hazards,[362] implementing Executive Order 2016-13 which required agencies to identify outdated, repetitive, confusing, or unnecessary rules.[363]

C. Illinois Legislature

1. Public Act 102-1123 created a statewide siting law for solar and wind energy facilities.[364] The law became effective on January 27, 2023.[365] It does not apply to municipalities—only counties in Illinois are affected.[366] Counties were required to amend their ordinances to comply within 120 days after January 2, 2023.[367] Solar projects must obtain executed Agricultural Impact Mitigation Agreements (AIMA) with the Illinois Department of Agriculture.[368] Finally, counties have a deadline to process applications and county regulations cannot conflict with or exceed state-imposed regulations.[369]
2. Public Act 103-383 created the Statewide Recycling Needs Assessment Advisory Council charged with performing a needs

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358 ILL. ADMIN. CODE tit. 41, §§ 172.40, 172.50.
359 ILL. ADMIN. CODE tit. 41, §§ 172.40, 172.50.
360 ILL. ADMIN. CODE tit. 41, § 174.
361 ILL. ADMIN. CODE tit. 41, § 176.
362 ILL. ADMIN. CODE tit. 35, § 1000.
363 *Executive Order 16-13*, ILLINOIS.GOV (Oct. 17, 2016), https://www.illinois.gov/government/executive-orders/executive-order.executive-order-number-13.2016.html.
364 *See* 55 ILL. COMP. STAT. 5/5-12020 (2023).
365 *See id.*
366 *Id.* § 5-12020(b).
367 *Id.* § 5-12020(d).
368 *Id.* § 5-12020(c).
369 *Id.* § 5-12020(d).

assessment of packaging materials.[370] This advisory council will have several producers of packaging products as voting members.[371]

3. Public Act 103-28 expanded the state's ability to authorize the creation of environmental covenants and establish land use restrictions aimed at protecting human health and the environment.[372]
4. Public Act 103-62 amended the Illinois Pesticides Act to provide that any person applying for a pesticide permit that results in human exposure to the pesticide shall be subject to a fine of $2,500, with an additional penalty of $1,000 for each individual exposed to such pesticide.[373]
5. Public Act 103-327 added the removal, hauling, and transportation of bio-solids, lime sludge, and lime residue from a water treatment plant or facility and the disposal of bio-solids, lime sludge, and lime residue removed from a water treatment plant or facility at the landfill to the definition of public works for which prevailing wage provisions would apply.[374]
6. Public Act 103-172 amended sections 58.2 and 58.7 of the Illinois Environmental Protection Act by streamlining the application and review process for the Illinois Environmental Protection Agency's (IEPA) services administered pursuant to the Site Remediation Program (SRP) by requiring $2,500 as the initial partial payment.[375]
7. Public Act 103-306 amended the Central Midwest Radioactive Waste Compact, the Radioactive Waste Compact Control Act, and the Radioactive Waste Tracking and Permitting Act, modifying the definitions of "low-level radioactive waste" or "waste" to expand the referenced definition of by-product material.[376]
8. Public Act 103-441 increased the fees for various licenses and permits under the Illinois Pesticide Act and the Lawn Care Products Application and Notice Act.[377]
9. Public Act 103-93, concerning microplastics, required the IEPA to start a public webpage with information regarding microplastics including (1) describing micro-plastics and their effects on aquatic and human health; (2) any federal or state regulatory action taken to address micro-plastics and their effects on aquatic and human health; (3) contact information for an employee of IEPA who can respond to questions from the public on micro-plastics; and (4) additional

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370 415 ILL. COMP. STAT. 5/22.15(e) (2023).
371 *Id.* § 22.15.
372 765 ILL. COMP. STAT. 122/2 (2024).
373 415 ILL. COMP. STAT. 60/24.1(3) (2023).
374 820 ILL. COMP. STAT. 130/2 (2024).
375 415 ILL. COMP. STAT. 5/58.2, 58.7 (2024).
376 45 ILL. COMP. STAT. 140/1 (2023).
377 415 ILL. COMP. STAT. 60/6, 10-13, 19 (2024).

resources.[378] The IEPA is also required to submit a report to the General Assembly and Governor regarding microplastics, including what other states are doing to address them.[379]

10. Public Act 103-230 amended the Illinois Environmental Protection Act to provide that, notwithstanding any other provision of law, the use of a refrigerant is not prohibited or otherwise limited if the refrigerant is identified as a safe alternative under federal law.[380]
11. Public Act 103-333 amended the Illinois Environmental Protection Act by creating a framework for the IEPA to approve the use of limestone residual for additional means beyond what is currently permitted and excludes limestone residual generated from the treatment of drinking water at a publicly owned drinking water treatment plant from regulation as a waste—so long as it is used for specific beneficial purposes.[381]
12. Public Act 103-380 required the Illinois Power Agency to procure renewable energy credits from hydropower dams while barring incentives for constructing new dams.[382]
13. Public Act 103-342 amended the Illinois Environmental Protection Act and provides that incidental sales of finished compost do not need to be applied to agronomic rates in determining whether a person needs a permit to conduct a landscape waste composting operation at specific sites.[383]
14. Public Act 103-346 expanded the Prevailing Wage Act to include power washing projects in which steam or pressurized water is used to remove paint or other coatings, oils or grease, corrosion, or debris from a surface or to prepare a surface for a coating.[384]
15. Public Act 103-372 created the Paint Stewardship Act to provide for an Extended Producer Responsibility (EPR) plan for the collection and recycling of post-consumer household paint.[385] The law requires each paint producer of household paint to join PaintCare and submit a plan to the IEPA to establish a program that includes the agency's oversight and an assessment of paint manufacturers to fund the program.[386] In essence, leftover paint is collected at collection sites and then recycled.[387]

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378 415 ILL. COMP. STAT. 5/13.10 (2024).
379 *Id.* § 13.10(4).
380 *Id.* § 9.19 (2023).
381 *Id.* § 3.330(a)(26) (2024).
382 20 ILL. COMP. STAT. 3855/1-75(C)(1)(c)(i) (2024).
383 415 ILL. COMP. STAT. 5/21 (2024).
384 820 ILL. COMP. STAT. 130/2 (2024).
385 415 ILL. COMP. STAT. 175/5 (2024).
386 *Id.* § 5(7).
387 *Id.* § 5(4).

16. Public Act 103-470 required that "compostable food ware containers" be used by state agencies.[388]
17. Public Act 103-351 amended the PFAS Reduction Act and required IEPA to create a take-back program for fire departments that use and store firefighting foam with PFAS.[389]
18. Public Act 103-168 amended Section 31 of the Illinois Environmental Protection Act concerning Compliance Commitment Agreements by allowing the IEPA and the respondent involved with a Violation Notice to agree to an extended time to (i) submit a written response to the allegations described in a Violation Note; and (ii) hold a requested meeting without a representative of the Office of the Attorney General or State's Attorney.[390] Also, the IEPA and the recipient of the Violation Notice can agree to an extended time, not to exceed thirty days, for the recipient to accept or reject the agency's proposed Compliance Commitment Agreement.[391]
19. Public Act 103-28 amended the Uniform Environmental Covenants Act by removing the requirement that an "environmental response project" include work performed for environmental remediation in response to contamination.[392] Rather, an "environmental response project" includes work performed to clean up, remediate, eliminate, investigate, minimize, mitigate, or prevent the release or threatened release of contamination that affects real property and is performed to protect health or the environment.[393]
20. Public Act 103-67 amended the Administrative Review Article of the Code of Civil Procedure[394] regarding actions reviewing the final decision of an administrative agency involved with historic properties or exterior design of buildings and structures.[395]
21. Public Act 103-172 provided that the IEPA may require a Remediation Applicant (RA) to provide an advance partial payment of $2,500 (rather than an advance payment not exceeding $5,000 or one-half of the total anticipated costs to be incurred by the IEPA (whichever is less).[396] Also, reviews by the IEPA or a Licensed Professional Engineer or Geologist (RELPEG) are to be completed and communicated to the RA within 90 days after the request for review or approval if two or more plans or reports are submitted

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388 415 ILL. COMP. STAT. 80/6 (2024).
389 415 ILL. COMP. STAT. 170/40 (2023).
390 415 ILL. COMP. STAT. 5/31 (2023).
391 *Id.* § 31(a)(7.5).
392 765 ILL. COMP. STAT. 122/2 (2024).
393 *Id.*
394 735 ILL. COMP. STAT. 5/3-107(b-1) (2024).
395 *Id.*
396 415 ILL. COMP. STAT. 5/58.7(b) (2024).

simultaneously.[397] The IEPA is not required to take action on any submission from the RA if the RA has failed to pay all fees due.[398] The amendment also provides that any agency deadline is tolled until all fees are paid in full.[399]

22. Public Act 102-1123 provided Solar and Wind Siting Standards**,** prohibiting counties from enacting local ordinances that disallowed commercial solar and wind generating facilities in selected districts.[400] It also recognized county authority over certain siting and zoning standards while restricting many county standards that effectively prohibit development of such facilities.[401] Finally, it provided certain procedural processes and timelines for siting and zoning review of those facilities and prohibited unreasonable fees for local review of such projects.[402]
23. Public Act 103-569 allowed for the limited development of nuclear power generation.[403] It did not allow for new, large-scale power generation at facilities similar to the six, currently existing plants in Illinois.[404] The State of Illinois has had a moratorium on new nuclear power contrition since 1987.[405] This statute provided a regulatory structure for constructing SMRs—that is, those with capacity up to 300 megawatts.[406]
24. While Public Act 97-534, the Carbon Dioxide Transportation and Sequestration Act, has been law since 2011, there has been increased activity by companies looking to store carbon emissions in Illinois Geology, there has been a lot of local resistance too.[407]
25. The Illinois Radon Awareness Act was amended to require landlords to provide a prospective tenant or current tenant of a dwelling unit with the Illinois Emergency Management Agency's pamphlet entitled *Radon Guide For Tenants*, together with any records or reports pertaining to the presence of radon within the dwelling unit that indicate a radon hazard.[408] In addition, the landlord is to provide

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397 *Id.* at § 58.7(d)(5).

398 *Id.* at § 58.7(b).

399 *Id.* at § 58.7(i).

400 20 ILL. COMP. STAT. 5/5-222 (2023).

401 *Id.*

402 *Id.*

403 20 ILL. COMP. STAT. 3310/75 (2024).

404 *See generally id.*; *see also* Jerry Nowicki & Andrew Adams, *Pritzker signs measure allowing new small-scale nuclear technology in Illinois*, ST. LOUIS BUS. J. (Dec. 11, 2023), https://www.bizjournals.com/stlouis/news/2023/12/11/pritzker-signs-measure-small-scale-nuclear-tech.html.

405 *Illinois to lift moratorium on nuclear construction*, WORLD NUCLEAR NEWS (Nov. 13, 2023), https://www.world-nuclear-news.org/Articles/Illinois-to-lift-moratorium-on-nuclear-constructio.

406 20 ILL. COMP. STAT. 3310/90 (2024).

407 220 ILL. COMP. STAT. 75/1 (2024).

408 420 ILL. COMP. STAT. 46/26(a)(1) (2024).

the tenant with the new Statutory Disclosure form on Radon Hazards to Tenants form.[409] These documents must be provided at the time of the prospective tenant's application and before a lease is entered.[410] The amendment also provided that at the commencement of the lease, a tenant shall have ninety days to conduct a radon test, and if radon mitigation is implemented by the tenant, the implementation must be approved by the landlord.[411]

In 2024, look for proposed legislation in the name of Environmental Justice. This past year, there was a proposal to amend the Illinois Environmental Protection Act requiring the IEPA to annually review communities for inclusion in a database requiring environmental justice.[412] If a new source of "pollution" is identified in one of those communities, the proposal was to charge $100,000 for an application for a permit and allowing public participation in the permit approval process.[413] The measure has not passed yet, but it is not going away, either.[414]

D. Illinois Pollution Control Board

1. Rulemakings

a. Board Adopts Dry Cleaning Facility Rules

On January 5, 2023, the Board issued a final order adopting rules that address licensing dry cleaning facilities, overseeing their environmental insurance coverage, and administering state fund reimbursement for the costs of cleaning up dry-cleaning solvent releases.[415] This rulemaking was initiated by the IEPA to address amendments to the Drycleaner Environmental Response Trust (DERT) Fund Act.[416] These statutory amendments transferred oversight and implementation of the DERT Fund from the DERT Fund Council to IEPA.[417]

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409 *Id.* § 26(f).
410 *Id.* § 26(a).
411 *Id.* § 26(b).
412 H.B. 4197, 103rd Gen. Assemb., Reg. Sess. (Ill. 2023).
413 *Id.*
414 *Id.*
415 ILL. POLLUTION CONTROL BD., BOARD ADOPTS DRYCLEANING FACILITY RULES (2023), available at https://pcb.illinois.gov/documents/dsweb/Get/Document-107516/Board%20Adopts%20Drycleaning%20Facility%20Rules.pdf.
416 *Id.*
417 *Id.*

b. Board Proposed "Identical-in-Substance" Amendments to Ambient Air Quality Standards

On July 6, 2023, the Board proposed amendments to keep Illinois' ambient air quality standards identical in substance to the National Ambient Air Quality Standards (NAAQS).[418] The amendments reflect action taken by the EPA during the second half of 2022.[419] Specifically, the EPA updated its *List of Designated Reference and Equivalent Methods* to modify existing method designations and designated a new Federal Equivalent Method (FEM) for Fine Particulate Matter (PM2.5) in ambient air.[420] In addition, although it requires no Board action, the Board noted that on October 7, 2022, the EPA re-designated the Chicago area as moderate nonattainment under the 2015 eight-hour ozone NAAQS.[421]

c. Board Agreed to Expedited Review of Alternative Standards During SSM Events

On June 12, 2023, the American Petroleum Institute (API) filed a motion requesting that the Board (1) delay, until the R23-18(A) sub-docket rulemaking concluded, the effective date of the air pollution control amendments being considered in the main docket R23-18 rulemaking for those seeking alternative standards in the sub-docket;[422] (2) clarify that the effective date of the R23-18 final amendments would be stayed for anyone filing for an adjusted standard within 20 days after their effective date;[423] (3) clarify that the effective date of the R23-18 final amendments would be stayed for anyone filing for a variance within 20 days after their effective date;[424] and (4) expeditiously review, in the sub-docket, proposed alternative standards for Startup, Shutdown, and Malfunction (SSM) events so that any sub-docket final rules would have the same effective date as the R23-18 final amendments.[425]

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418 ILL. POLLUTION CONTROL BD., BOARD ADOPTS 'IDENTICAL-IN-SUBSTANCE' AMENDMENTS TO AMBIENT AIR QUALITY STANDARDS (2023), available at https://pcb.illinois.gov/documents/dsweb/Get/Document-105897/NewsBlurbR22-8May12.2022.pdf.

419 *Id.*

420 *Id.*

421 *Id.*

422 ILL. POLLUTION CONTROL BD., BOARD AGREES TO EXPEDITED REVIEW OF ALTERNATIVE STANDARDS DURING SSM EVENTS (2023), available at https://pcb.illinois.gov/documents/dsweb/Get/Document-108693/Board%20Agrees%20to%20Expedited%20Review%20of%20Alternative%20Standards%20During%20SSM%20Events.pdf.

423 *Id.*

424 *Id.*

425 *Id.*

d. Board Adopted GCDD Recovery Facility Rules

On July 6, 2023, the Board adopted final rules for permitting, operating, and closing General Construction or Demolition Debris (GCDD) recovery facilities.[426] The rules create a new Part of the Board's waste disposal rules i.e., Part 820 of the Illinois Administrative Code.[427]

e. Board Adopts Clean Air Act "Fast-Track" Amendments

On July 20, 2023, the Board adopted final amendments to its air pollution control rules.[428] The amendments removed provisions that had allowed the IEPA to grant emission sources advance permission to continue operating during a malfunction or breakdown or violate emission standards during startup.[429] Under those provisions, compliance with the IEPA's advance permission gave the source a "prima facie" defense to an enforcement action resulting from exceeding emission limits during a startup, malfunction, or breakdown.[430] The EPA found the provisions inconsistent with the CAA.[431]

f. Board Adopts "Identical-in-Substance" Amendments to Drinking Water Rules

On October 19, 2023, the Board adopted amendments to Illinois' primary drinking water regulations.[432] The amendments were "identical in substance" to amendments adopted by the EPA under the federal Safe Drinking Water Act (SDWA) during the second half of 2020 and the first half of 2021.[433] Among its amendments, the EPA revised standards for lead in plumbing fixtures and plumbing materials, adopted the Lead and Copper Rule Revisions (PbCRR), and approved new Alternative Test Procedures

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426 ILL. POLLUTION CONTROL BD., BOARD ADOPTS GCDD RECOVERY FACILITY RULES (2023), available at https://pcb.illinois.gov/documents/dsweb/Get/Document-108694/Board%20Adopts%20GCDD%20Recovery%20Facility%20Rules.pdf.

427 *Id.*

428 ILL. POLLUTION CONTROL BD., BOARD ADOPTS CLEAN AIR ACT 'FAST-TRACK' AMENDMENTS (2023), available at https://pcb.illinois.gov/documents/dsweb/Get/Document-108692/Board%20Adopts%20Clean%20Air%20Act%20%E2%80%9CFast-Track%E2%80%9D%20Amendments.pdf.

429 *Id.*

430 *Id.*

431 *Id.*

432 ILL. POLLUTION CONTROL BD., BOARD ADOPTS 'IDENTICAL-IN-SUBSTANCE' AMENDMENTS TO DRINKING WATER RULES (2023), available at https://pcb.illinois.gov/documents/dsweb/Get/Document-109870/Board%20Proposes%20%e2%80%9cIdentical-in-Substance%e2%80%9d%20Amendments%20to%20Ambient%20Air%20Quality%20Standards372024.pdf.

433 *Id.*

(ATPs) for demonstrating compliance with the National Primary Drinking Water Regulations.[434]

2. Board Decisions

a. People v. IronHustler*, PCB 20-16.*

At the end of 2022, the Third District affirmed the Board's summary judgment ruling that IronHustler had violated the Illinois Environmental Protection Act by dumping waste along and within the Mackinaw River.[435] The court also affirmed the Board's decision to impose a civil penalty on IronHustler of $80,000.[436] In addition, the court reiterated that River City failed to timely appeal the Board's decision and held that IronHustler lacked standing to argue on River City's behalf.[437]

b. Johns Manville v. IDOT*, PCB 2014-03.*

In August of 2023, the Board issued a final order finding that the Illinois Department of Transportation had violated the Illinois Environmental Protection Act and was liable for $620,203 of Johns Manville's asbestos cleanup costs.[438] Both parties appealed and the matter is currently before the Illinois Appellate Court, 4th District.[439]

c. Protect West Chicago v. City of West Chicago, Lakeshore Recycling Systems, *PCB 23-107;* People Opposing DuPage Environmental Racism v. City of West Chicago and Lakeshore Recycling Systems, *PCB 23-109 (consolidated)*

This is a siting case involving a waste transfer station.[440] A contested hearing was held in West Chicago, Illinois, and the Board is expected to rule shortly.[441]

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434 *Id.*

435 People v. IronHustler Excavating, Inc., 2022 IL App (3d) 210518-U, ¶ 1.

436 *Id.*

437 *Id.*

438 Opinion and Order of the Board at 1, Johns Manville v. Ill. Dep't Transp., PCB 14-3 (2023).

439 *Id.*

440 Opinion And Order of the Board at 1, Protect West Chicago v. City of West Chicago, West Chicago City Council & Lakeshore Recycling Sys. LLC, PCB 23-107 (2024).

441 *Id.*

V. STATUS OF PFAS—THE EMERGING CONTAMINANT OF CONCERN IN 2023

PFAS have received much attention for several years as emerging contaminants of concern.[442] Each year more has been learned about their potential health effects and their presence in environmental media.[443] These "forever chemicals"—so-called due to their persistence and resistance to degradation—have garnered intense regulatory focus on the state and federal level.[444]

Here, we focus primarily on recent developments at the federal level, while giving some attention to state-level regulation, including in Illinois. PFAS are a large class of specialized synthetic chemicals that have been in use since the 1940s.[445] PFAS exposure may occur through the following:

> [d]rinking water from PFAS-contaminated municipal sources or private wells[;] eating fish caught from water contaminated by PFAS[;] . . . accidentally swallowing or breathing contaminated soil or dust[;] . . . eating food . . . produced near places where PFAS were used or made[;] . . . eating food packaged in material that contains PFAS[; or] . . . from consumer products containing PFAS such as stain resistant carpeting and water repellent clothing.[446]

"Due to their widespread use, physicochemical properties, and prolonged persistence, many PFAS co-occur in exposure media (*e.g.*, air, water, ice, sediment), and bio-accumulate in tissues and blood of aquatic as well as terrestrial organisms, including humans."[447] PFAS are so widespread that the Centers for Disease Control and Prevention (CDC) and the Agency for Toxic Substances and Disease Registry (ATSDR) (collectively "CDC/ATSDR"), which have been sampling Americans' blood for PFAS since 1999-2000,

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442 *See generally* Marina G. Evich *et al.*, *Per- and polyfluoroalkyl substances in the environment*, 375 SCI. 512 (2022).

443 *See generally id.*

444 *See generally id.*

445 EPA, EPA'S PER- AND POLYFLUOROALKYL SUBSTANCES (PFAS) ACTION PLAN 1 (2019).

446 *Per- and Polyfluoroalkyl Substances (PFAS) and Your Health*, CTR. DISEASE CONTROL AND PREVENTION, https://www.atsdr.cdc.gov/pfas/health-effects/exposure.html#print (last visited June 16, 2024).

447 "PFAS National Primary Drinking Water Regulation Rulemaking" (USEPA), 88 Fed. Reg. 18,638, 18,642 (March 14, 2023) (internal citations omitted). According to the IEPA, PFAS "are a group of approximately 5,000 human-made chemicals that are manufactured for their oil and water-resistant properties. Since the 1940s, PFAS have been used in a wide range of consumer products, industrial processes, and in some fire-fighting foams (called aqueous film-forming foam or AFFF). This has resulted in PFAS being released into the air, water and soil." *Per- and Polyfluoroalkyl Substances (PFAS)*, ILLINOIS.GOV, https://epa.illinois.gov/topics/water-quality/pfas.html#:~:text=The%20PFAS%20Reduction%20Act%20(Public,PFAS%20releases%20to%20the%20environment (last visited June 17, 2024).

state that most people in the United States have been exposed to PFAS and have PFAS in their blood.[448]

On October 18, 2021, the EPA revealed its formal, overall plans for approaching PFAS, utilizing what it termed as a "whole-of-agency approach," when it published its *PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024*.[449] In this document, the EPA announced its intention to, among many other things, hold polluters accountable; ensure science-based decision-making; enhance PFAS reporting; undertake nationwide monitoring for PFAS in drinking water and establish a national primary drinking water regulation for two PFAS chemicals—PFOA and PFOS; reduce PFAS discharges to waterways; propose designating certain PFAS as hazardous substances under the CERCLA; and update guidance on destroying and disposing of PFAS and PFAS-containing materials.[450] The EPA has made substantial progress on these announced intentions.

A. EPA Regulatory Actions Related to PFAS

1. CERCLA

In September 2022, the EPA proposed the designation[451] of Perfluorooctanoic Acid (PFOA) and Perfluorooctane Sulfonate (PFOS), two of the most widely used and studied chemicals amongst the thousands of PFAS in the United States,[452] as CERCLA hazardous substances.[453] Among the anticipated benefits of doing this are increased speed of response activities, increased number of response actions taken, health benefits from avoided risks, and improved ability of the EPA to transfer response costs from the public to PFAS polluters.[454] Being listed as CERCLA hazardous substances also results in a default Reportable Quantity (RQ) of one pound for each chemical.[455] The EPA expects to finalize this process in "early

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448 *PFAS in the U.S. Population*, CTR. DISEASE CONTROL & PREVENTION (June 29, 2023), https://www.atsdr.cdc.gov/pfas/docs/PFAS-and-the-US-Population-FS-H.pdf.

449 EPA, PFAS STRATEGIES ROADMAP: EPA'S COMMITMENTS TO ACTION 2021-2024 at 5 (2021), available at https://www.epa.gov/system/files/documents/2021-10/pfas-roadmap_final-508.pdf.

450 *Id*. at 5-12.

451 Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 87 Fed. Reg. 54,415 (Sept. 6, 2022).

452 *Our Current Understanding of the Human Health and Environmental Risks of PFAS*, EPA (June 7, 2023), https://www.epa.gov/pfas/our-current-understanding-human-health-and-environmental-risks-pfas#:~:text=There%20are%20thousands%20of%20different,chemicals%20in%20the%20PFAS%20group.

453 Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 87 Fed. Reg. 54,415 (Sept. 6, 2022) (to be codified at 40 C.F.R. § 302).

454 *Id*. at 54,439.

455 *Id*. at 54,419.

2024."[456] On this same timeline, the EPA is also developing a CERCLA enforcement discretion policy on PFAS,[457] proposing the designation of certain PFAS as hazardous constituents under the RCRA, issuing guidance on destruction and disposal of PFAS, and finalizing methods to monitor for PFAS in a wide range of media.[458]

Seven months later, the EPA issued an Advance Notice of Proposed Rulemaking (ANPR) seeking input on its consideration of developing regulations that would list seven more PFAS chemicals as CERCLA hazardous substances.[459] The EPA noted that:

> Fire extinguishing foam—aqueous film forming foam . . . is used for fighting certain types of fires, including burning petroleum [and] [s]ome . . . contain multiple PFAS. PFAS can be found in groundwater and surface water at airports, military bases and other facilities where PFAS containing firefighting extinguishing foam was or is used for training and incident response; . . . these seven compounds were identified based on the availability of toxicity information previously reviewed by US EPA and other Federal agencies.[460]

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456 EPA, EPA'S PFAS STRATEGIC ROADMAP: SECOND ANNUAL PROGRESS REPORT 3 (2023), https://www.epa.gov/system/files/documents/2023-12/epas-pfas-strategic-roadmap-dec-2023508v2.pdf. The EPA announced the finalization of this designation as CERCLA hazardous substances on April 19, 2024. *Biden-Harris Administration Finalizes Critical Rule to Clean up PFAS Contamination to Protect Public Health*, https://www.epa.gov/newsreleases/biden-harris-administration-finalizes-critical-rule-clean-pfas-contamination-protect.

457 EPA, *supra* note 563 at 3. Presumably this policy will reflect the statements of David Uhlmann, Assistant Administrator for Enforcement and Compliance Assurance at the EPA, who stated: "We intend to focus our enforcement efforts on companies that manufactured PFAS and companies who profited from the use of PFAS in their products. We do not intend to pursue farmers who spread bio solids on their fields, municipal airports that used aqueous film forming foam (AFFF) as a flame retardant, and municipal wastewater treatment plants and municipal landfills that handled waste containing PFAS, if their conduct does not endanger others, and they meet any regulatory requirements." David M. Uhlmann, *21st-century environmental challenges and revitalizing EPA enforcement*, ABA: TRENDS (Jan. 2, 2024), https://www.americanbar.org/groups/environment_energy_resources/resources/trends/2024-january-february/21st-century-environmental-challenges-revitalizing-epa-enforcement/. The EPA issued this policy on April 19, 2024. Memorandum from David Uhlmann, Assistant Adm'r, Off. Enforcement & Compliance Assurance, EPA, to Regional Administrators and Deputy Regional Administrators, Regional Counsels, and Deputy Regional Counsels, EPA (Apr. 19, 2024) (on file with EPA), available at https://www.epa.gov/system/files/documents/2024-04/pfas-enforcement-discretion-settlement-policy-cercla.pdf.

458 EPA, *supra* note 563 at 4.

459 Addressing PFAS in the Environment, 88 Fed. Reg. 22,399 (proposed Apr. 13, 2023) (to be codified at 40 C.F.R. § 302) (Perfluorobutanesulfonic acid (PFBS); Perfluorohexanesulfonic acid (PFHxS); Perfluorononanoic acid (PFNA); Hexafluoropropylene oxide dimer acid (HFPO–DA) (sometimes called "GenX"); Perfluorobutanoic acid (PFBA); Perfluorohexanoic acid (PFHxA); and Perfluorodecanoic acid (PFDA)).

460 *Id.* at 22,401.

The EPA requested information from published scientific literature containing data regarding environmental transport; environmental fate; other PFAS that should be designated as hazardous substances; and the possible benefits, indirect costs, and direct costs that would be associated with adding those suggested PFAS.[461]

2. Clean Water Act

In December 2022, the EPA issued guidance concerning CWA discharge permits, including specific recommendations for Industrial Direct Discharge.[462] These recommendations included: (1) monitoring for the forty PFAS parameters that are discernible by draft analytical method 1633, (2) perfmoring monitoring on at least a quarterly basis, and (3) reporting monitoring results in Discharge Monitoring Reports.[463] This would require companies to pay for laboratory tests for forty additional constituents on a routine basis.[464]

3. Safe Drinking Water Act

In a highly impactful step, the EPA has addressed PFAS in drinking water.[465] On March 29, 2023, the EPA issued its *Proposed Rule for National Drinking Water Standards* for six PFAS, including PFOA and PFOS.[466] For PFOA and PFOS, the Maximum Contaminant Level (MCL) was set at a very low 4.0 parts per trillion (PPT)—the "lowest feasible quantitation level."[467] That is to say, the EPA set the drinking water standard at the very edge of detectability. The EPA stated that "any exceedance of this limit require[d] action to protect public health."[468] As further indication of the EPA's resolve

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461 *Id.* at 22,402.

462 Memorandum from Radhika Fox, Asst. Adm'r, Office of Water, EPA, to Regional Water Div. Dirs., Regions 1-10, EPA, at 2 (Dec. 5, 2022) (on file with EPA), available at https://www.epa.gov/system/files/documents/2022-12/NPDES_PFAS_State%20Memo_December_2022.pdf.

463 *Id.* at 2 (citing 40 C.F.R. 122.21(e)(3)(ii), 122.41(l)(4)(i), 122.44(i)(1)(iv)(B)).

464 *Id.*

465 PFAS National Primary Drinking Water Regulation Rulemaking, 88 Fed. Reg. 18,638 (proposed Mar. 29, 2023) (to be codified at 40 C.F.R. §§ 141, 142); *Per- and Polyfluoroalkyl Substances (PFAS): Proposed PFAS National Primary Drinking Water Regulation*, EPA, https://www.epa.gov/sdwa/and-polyfluoroalkyl-substances-pfas (Sept. 22, 2023). The EPA issued its final rule on April 26, 2024. *See* PFAS National Primary Drinking Water Regulation, 89 Fed. Reg. 32,532 (Apr. 26, 2024) (to be codified at 40 C.F.R. §§ 141, 142).

466 *Id.*

467 *Id.*

468 PFAS National Primary Drinking Water Regulation Rulemaking, 88 Fed. Reg. 18,638, 18,639 (proposed Mar. 29, 2023) (to be codified at 40 C.F.R. § 141).

on the matter, health-based Maximum Contaminant Level Goals (MCLGs), though non-enforceable, were set at zero.[469]

For some perspective, six months earlier, in its Federal Register notice proposing designating PFOA and PFOS as CERCLA Hazardous Substances, the EPA reported that the below states were using the following active or proposed maximum drinking water PPT level standards:[470]

State	**PFOA (PPT)**	**PFOS (PPT)**
Alaska[471]	70	70
California[472]	10	40
Connecticut[473]	70	70
Hawaii[474]	40	40
Illinois[475]	2	14
Maine[476]	20	20
Massachusetts[477]	20	20
Michigan[478]	8	16
Minnesota[479]	35	15
New Hampshire[480]	12	15
New Jersey[481]	14	13
New Mexico[482]	70	70
New York[483]	10	10
Ohio[484]	70	70
Washington[485]	10	15

469 *Id.*

470 Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 87 Fed. Reg. 54,415, 54,432—54,436 (proposed Sept. 6, 2022) (to be codified at 40 C.F.R. § 302). State terminology varied. In addition to using the term "maximum contaminant level (MCL)" used by EPA and many states, states also used "health-based action level" (Alaska, Connecticut, Ohio), "response level" (California), "environmental action level" (Hawaii), "health-based guidance level" (Illinois), "guidance value" (Minnesota), "preliminary screening level" (New Mexico), and "state action levels" (Washington). *Id.*

471 *Id.* at 54,432. The standard applies to PFOA and PFOS individually or combined. *Id.*

472 *Id.* at 54,433.

473 *Id.* The standard applies to PFOA and PFOS individually or combined. *Id.*

474 *Id.*

475 *Id.* at 54,434.

476 *Id.*

477 *Id.*

478 *Id.*

479 *Id.*

480 *Id.* at 54,435.

481 *Id.*

482 *Id.* The 70 PPT standard applies to PFOA and PFOS individually or combined. *Id.*

483 *Id.*

484 *Id.* The 70 PPT standard applies to PFOA and PFOS individually or combined. *Id.*

485 *Id.* at 54,436.

For further perspective, consider that the CDC/ATSDR publication reports that the "General U.S. Population" blood levels in 2017-2018 for PFOA was 1.4 µg/l (PPB), and for PFOS was 4.3 µg/l (PPB), which equal 1,400 PPT and 4,300 PPT, respectively.[486]

What happens if levels of PFOA or PFOS exceed 4.0 ppt? The EPA stated, "Water systems with PFAS levels that exceed the proposed MCLs would need to take action to provide safe and reliable drinking water. These systems may install water treatment or consider other options such as using a new uncontaminated source water or connecting to an uncontaminated water system."[487] Each of these options is expensive, if even available.[488] The EPA has recognized that many communities "will need to install new infrastructure and treatment facilities to address PFAS in drinking water and wastewater."[489] Through the Bipartisan Infrastructure Law, the EPA is providing ten billion dollars to remove PFAS and other emerging contaminants, distributed nearly one billion dollars to States in 2023.[490] The EPA issued its final rule on April 26, 2024.[491]

4. Toxic Substances Control Act

The EPA has also made advances pursuant to the Toxic Substances Control Act (TSCA).[492] Pursuant to Section 5(a)(1) of the TSCA, the EPA is required to review all notices submitted by manufacturers of a new chemical substance for a "significant new use."[493] Under proposed amendments, new PFAS would be "categorically ineligible" for the "low volume exemption" and "low release and exposure exemption," meaning all new PFAS chemicals will be required to go through a full, robust safety review process prior to entering commerce.[494]

The EPA also finalized a TSCA reporting and recordkeeping rule for PFAS, which became effective November 13, 2023.[495] This final rule under

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486 *PFAS in the U.S. Population*, *supra* note 555.

487 PFAS National Primary Drinking Water Regulation Rulemaking, 88 Fed. Reg. 18,638, 18,639-40 (proposed Mar. 29, 2023) (to be codified at 40 C.F.R. § 141).

488 *See, e.g.*, EPA, FACT SHEET: BENEFITS AND COSTS OF REDUCING PFAS IN DRINKING WATER 1 (2024), available at https://www.epa.gov/system/files/documents/2024-04/pfas-npdwr_fact-sheet_cost-and-benefits_4.8.24.pdf.

489 EPA, *supra* note 563, at 3.

490 *Id.*

491 *See* PFAS National Primary Drinking Water Regulation, 89 Fed. Reg. 32,532 (Apr. 26, 2024) (to be codified at 40 C.F.R. §§ 141, 142).

492 Updates to New Chemicals Regulations Under the Toxic Substances Control Act (TSCA), 88 Fed. Reg. 34,100, 34,102 (proposed on May 26, 2023)(to be codified as 40 C.F.R. §§ 720, 721, 723, 725).

493 *Id.*

494 *Id.* at 34,101.

495 Toxic Substances Control Act Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances, Final Rule (USEPA), 88 Fed. Reg. 70,516 (Oct. 11, 2023).

TSCA Section 8(a)(7) requires all those who manufactured or imported PFAS or a mixture containing PFAS for a commercial purpose in any year since January 1, 2011, to electronically submit information to the EPA regarding the PFAS uses, production volumes, byproducts, disposal, exposures, and existing information on environmental or health effects.[496]

5. Community Right-to-Know Act

PFAS were already included in Toxic Release Inventory (TRI) reporting requirements at a 100-pound threshold.[497] With a new final rule, the EPA added PFAS to the list of "Lower Thresholds for Chemicals of Special Concern," which eliminated the *de minimis* reporting exemption and limited the use of range reporting for PFAS.[498] It also eliminated the *de minimis* exemption under the Supplier Notification Requirements at 40 CFR § 372.45(d)(1).[499] Previously, concentrations of < 1% of a "special concern" chemical in a mixture were not required to be reported by a supplier to a purchaser.[500] This elimination applies to all Chemicals of Special Concern, not only PFAS.[501] The rule became effective on November 30, 2023, applying to the reporting year beginning January 1, 2024.[502]

6. National Enforcement and Compliance Initiatives for 2024-2027

On August 17, 2023, the EPA released its list of National Enforcement and Compliance Initiatives (NECI) for the coming years.[503] These are areas in which the EPA intends to focus its resources.[504] There are six areas, one of which is "Addressing Exposure to PFAS."[505] The other areas are "Mitigating Climate Change," "Protecting Communities from Coal Ash

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496 *Id.*

497 Changes to Reporting Requirements for Per- and Polyfluoroalkyl Substances and to Supplier Notifications for Chemicals of Special Concern; Community Right-to-Know Toxic Chemical Release Reporting, 88 Fed. Reg. 74,360 (Oct. 31, 2023).

498 *Id.*

499 *Id.*

500 *Id.* An example EPA provided for why this rule was needed was a mixture containing 0.9% PFAS and the purchase of 100,000 pounds of the product. A supplier *not* providing notice to a customer in this example would result in 900 pounds of PFAS not being reported to the purchaser, who would not be aware of the presence of PFAS at all. *Id.*

501 *Id.*

502 *Id.*

503 Memorandum from David Uhlmann, Assistant Adm'r, Off. Enforcement & Compliance Assurance, EPA, to Regional Adm'rs, Enforcement & Compliance Assurance Div. Dirs. & Deputies, Superfund & Emergency Mgmt. Div. Dirs. & Deputies, Regional Couns. & Deputies, EPA (Aug. 17, 2023) (on file with EPA), available at https://www.epa.gov/system/files/documents/2023-08/fy2024-27necis.pdf.

504 *Id.*

505 *Id.*

Contamination," "Reducing Air Toxics in Overburdened Communities," "Increasing Compliance with Drinking Water Standards," and "Chemical Accident Risk Reduction."[506] Elevation of a topic to a NECI is a demonstration of the agency's commitment to addressing it.[507] The key announced goals regarding PFAS are to "achieve site characterization, control ongoing releases that pose a threat to human health and the environment, ensure compliance with permits and other agreements . . . to prevent and address PFAS contamination, and address endangerment issues as they arise."[508]

7. Enforcement

On April 26, 2023, the EPA took its first-ever CWA enforcement action to address PFAS discharges at the Chemours Company's Washington Works facility near Parkersburg, West Virginia.[509] The EPA determined that the company exceeded PFAS effluent limits on various dates between September 2018 and March 2023.[510] Ultimately, an agreement was reached between the EPA and Chemours Company and was embodied in an Administrative Order on Consent (AOC).[511] Pursuant to the AOC, the company was required to implement an EPA-approved sampling plan to characterize storm water runoff and effluent leaving the facility.[512] This required Chemours Company to submit and implement a plan to treat or minimize discharges of PFOA and HFPO Dimer Acid (also known as "GenX") to ensure compliance.[513] Chemours Company was also required to submit its Storm Water Pollution Prevention Plan (SWPPP) for review and comment by the EPA, and then implement an updated SWPPP within thirty days.[514]

The EPA has also issued enforcement orders under the TSCA regarding PFAS.[515] Specifically, it has prohibited Inhance Technologies, L.L.C., from

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506 *Id.*

507 *Id.*

508 *Id.*

509 *EPA takes first-ever federal Clean Water Act enforcement action to address PFAS discharges at Washington Works facility near Parkersburg, W. Va.*, EPA (Apr. 26, 2023), https://www.epa.gov/newsreleases/epa-takes-first-ever-federal-clean-water-act-enforcement-action-address-pfas.

510 *In re: The Chemours Co. FC, LLC*, Administrative Order on Consent, EPA Docket No. CWA-03-2023-0025DN, (Apr. 26, 2023).

511 *Id.*

512 *Id.* at 44.

513 *Id.* at 46.

514 *Id.* at 48.

515 *See* Inhance Technologies, LLC, v. EPA, 96 F. 4th 888 (5th Circ. 2024); *see also EPA Orders Issued to Inhance Technologies Related to Long-Chain PFAS Significant New Use Notices*, EPA, https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca/epa-orders-issued-inhance#:~:text=On%20December%201%2C%202023%2C%20EPA, density%20polyethylene%20HDPE%20plastic%20containers (last visited Mar. 24, 2024).

producing PFAS in the production of its fluorinated High-Density Polyethylene (HDPE) plastic containers.[516] These containers were used for a variety of household consumer, pesticide, fuel, automotive, and other industrial products.[517]

In December 2022, Inhance Technologies filed significant new use notices for nine long-chain PFAS.[518] The EPA's review determined that three of them (PFOA, PFNA, and PFDA) were "highly toxic and present[ed] unreasonable risks that [could not] be prevented other than through prohibition of manufacture."[519] So, the EPA prohibited Inhance Technologies from manufacturing them under section 5(f) of the TSCA.[520] The EPA determined the other six PFAS could "present an unreasonable risk of injury to health or the environment."[521] It ordered the company to cease manufacturing them under section 5(e) of the and to conduct additional testing if it wanted to restart manufacturing.[522] However, the fluorination process it used produces all nine PFAS, and thus manufacturing could not restart unless a different process was used that did not generate the first three PFAS—PFOA, PFNA, and PFDA.[523] Inhance Technologies has challenged both Orders.[524]

B. PFAS-Specific Regulatory Action in Illinois

1. IEPA

On September 14, 2020, the IEPA announced its plan to begin testing all Community Water Supplies (CWS) for PFAS.[525] On January 28, 2021, the IEPA issued a non-enforceable *Health Advisory for Perfluorooctanoic*

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516 *EPA Orders Issued to Inhance Technologies Related to Long-Chain PFAS Significant New Use Notices*, *supra* note 640.

517 *Id.*

518 *EPA Takes Action to Protect People from PFAS that Leach from Plastic Containers into Pesticides and Other Products*, EPA (Dec. 1, 2023), https://www.epa.gov/newsreleases/epa-takes-action-protect-people-pfas-leach-plastic-containers-pesticides-and-other#:~:text=Upon%20review%20of%20the%20SNUNs,be%20prevented%20other%20than%20through.

519 *Id. See also* DENISE KEEHNER, OFF. POLLUTION PREVENTION & TOXICS, EPA, TSCA SECTION 5 ORDER FOR A SIGNIFICANT NEW USE OF CERTAIN CHEMICAL SUBSTANCES (PFOA, PFDA, PFNA) (2023), available at https://www.epa.gov/system/files/documents/2023-12/sn-23-0002-0004-0005_order-signature-copy_12-01-2023_marked_redacted.pdf.

520 *Id.*

521 *Id.*

522 *Id.*

523 *EPA Takes Action to Protect People from PFAS that Leach from Plastic Containers into Pesticides and Other Products*, *supra* note 646.

524 Inhance Tech., L.L.C. v. EPA, 96 F. 4th 888 (5th Cir. 2024). On March 21, 2024, the Fifth Circuit Court of Appeals vacated the Orders, finding that the EPA had exceeded its statutory authority in issuing them. *Id.* at 895.

525 News Release, Ill. EPA, Ill. EPA to Begin Testing all Ill. Community Water Supplies for Per- and PolyFluoroalkyl Substances (PFAS) (Sept. 14, 2020).

Acid (PFOA) setting a guidance level of 2 PPT for drinking water.[526] The actual calculated health-based guidance level was 0.6 PPT, but because laboratories' Minimum Reporting Level (MRL) was 2 PPT, the higher number was used for the advisory.[527]

On the same date, the IEPA issued Health Advisories for PFHxS at 140 PPT,[528] PFHxA at 560,000 PPT (updated on April 26, 2023, to 3,500 PPT),[529] and PFBS at 140,000 PPT (updated on April 16, 2021, to 2,100 PPT).[530] On April 16, 2021, the IEPA issued its Health Advisory for PFOS with a guidance level of 14 PPT,[531] and on July 27, 2021, for PFNA at 21 PPT.[532] A Health Advisory is issued when there is a confirmed detection in a CWS well of a chemical substance for which no numeric groundwater standard exists.[533] Illinois' statewide CWS testing effort was concluded in 2021, covering 1,428 entry points to the distribution systems of 1,749 CWS.[534] Confirmed PFAS detections were found at 149 sites,[535] of which sixty-eight were higher than the health-based guidance levels discussed in this paragraph.[536] Several southern Illinois systems were included in the sixty-eight: Cairo, Collinsville,

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526 *Health Advisory for Perfluorooctanoic Acid (PFOA) Chemical Abstract Services Registry Number (CASRN) 335-67-1*, ILL. EPA, 1 (Jan. 28, 2021), https://epa.illinois.gov/content/dam/soi/en/web/epa/topics/water-quality/pfas/documents/ha-pfoa.pdf.

527 *Id.* This means that the guidance level is set higher than the "real" (calculated) safe level.

528 *Health Advisory for Perfluorohexanesulfonic Acid (PFHxS) Chemical Abstract Services Registry Number (CASRN) 335-46-4*, ILL. EPA (Jan. 28, 2021), https://epa.illinois.gov/content/dam/soi/en/web/epa/topics/water-quality/pfas/documents/ha-pfhxs.pdf.

529 *Health Advisory Update for Perfluorohexanoic Acid (PFHxA) Chemical Abstract Services Registry Number (CASRN) 307-24-4*, ILL. EPA (Apr. 26, 2023), https://epa.illinois.gov/content/dam/soi/en/web/epa/topics/water-quality/pfas/documents/2023-04-26%20FINAL%20PFHxA%20HEALTH%20ADIVSORY%20UPDATE%20FOR%20PERFLUOROHEXANOIC%20ACID.pdf.

530 *Health Advisory Update for Perfluorobutanesulfonic Acid (PFBS) Chemical Abstract Services Registry Number (CASRN) 375-73-5*, ILL. EPA (Apr. 16, 2021), https://epa.illinois.gov/content/dam/soi/en/web/epa/topics/water-quality/pfas/documents/ha-pfbs.pdf.

531 *Health Advisory for Perfluorooctanesulfonic Acid (PFOS) Chemical Abstract Services Registry Number (CASRN_ 1763-23-1*, ILL. EPA (Apr. 16, 2021), https://epa.illinois.gov/content/dam/soi/en/web/epa/topics/water-quality/pfas/documents/Health%20Advisory%20-%20Perfluorooctanesulfonic%20Acid%20(PFOS).pdf.

532 *Health Advisory for Perfluorononanoic Acid (PFNA) Chemical Abstract Services Registry Number (CASRN) 375-95-1*, ILL. EPA (July 27, 2021), https://epa.illinois.gov/content/dam/soi/en/web/epa/topics/water-quality/pfas/documents/ha-pfna.pdf.

533 Press Release, Ill. Gov., Ill. EPA Completes Statewide Sampling for Investigation into the Prevalence of PFAS in Drinking Water (Mar. 16, 2022) (on file with IEPA), available at https://www.illinois.gov/news/press-release.24635.html#:~:text=Illinois%20EPA%20began%20the%20investigation,CWS%2C%20at%201%2C428%20sample%20locations.

534 *PFAS Statewide Investigation Network: Community Water Supply Sampling*, ILL. GOV, https://epa.illinois.gov/topics/water-quality/pfas/pfas-statewide-investigation-network.html (last visited Mar. 22, 2024).

535 *Illinois EPA PFAS Sampling Network (2020-2021)*, ILL. EPA, https://illinois-epa.maps.arcgis.com/apps/dashboards/bd611162a7f74cfe88b6928c926416c3 (last visited June 17, 2024).

536 *Id.*

East Alton, Eldred, Hardin, Quincy, Rosiclare, West Union/York, and Wood River.[537]

The IEPA has published the process it intends to follow to establish formal, *enforceable* MCLs for PFAS.[538] To assist the state and communities grappling with the high potential costs of removing PFAS from drinking water or connecting to new sources, EPA Region 5, on February 13, 2023, announced the availability of over $40 million in grants from the Bipartisan Infrastructure Law for Illinois.[539]

In addition, on December 8, 2021, the IEPA proposed to the Illinois Pollution Control Board (IPCB) many changes to the state groundwater standards, including six PFAS (PFOA, PFOS, PFNA, PFBS, PFHxS, and HFPO-DA).[540]

2. Illinois Legislature

Illinois has been active on the legislative front. The PFAS Reduction Act was signed in August of 2021, effective January 1, 2022, and created new requirements specific to Class B firefighting foam.[541] The PFAS Reduction Act requires fire departments in the state to notify the Illinois Emergency Management Agency within forty-eight hours of the discharge or release of Class B firefighting foam containing intentionally added PFAS (AFFF), prevents use of AFFF for training purposes unless certain requirements are met, requires that manufacturers and distributors of AFFF notify fire departments before their purchase clearly indicating the presence of PFAS and advising of other Class B firefighting foams that may be available, and the IEPA must post information on its website about the proper methods for disposing of PFAS-containing firefighting foams.[542] An amendment, effective July 28, 2023, requires the IEPA to establish a take-back program for fire departments that use and store firefighting foam containing PFAS.[543]

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537 *Id.*

538 *Process to Establish Maximum Contaminant Levels for PFAS in Illinois*, ILL. GOV., https://epa.illinois.gov/topics/water-quality/pfas/pfas-mcl.html (last visited Mar. 2, 2024).

539 *Biden-Harris Administration Announces over $40 Million in Bipartisan Infrastructure Law Funding to Address Emerging Contaminants like PFAS in Drinking Water in Illinois*, EPA (Feb. 13, 2023), https://www.epa.gov/newsreleases/biden-harris-administration-announces-over-40-million-bipartisan-infrastructure-law.

540 *620 Groundwater Quality*, ILL. GOV, https://epa.illinois.gov/topics/water-quality/groundwater/620-groundwater-quality.html (last visited Mar. 2, 2024). These standards are located in the Illinois Adminitrative Code. *See* ILL. ADMIN. CODE tit. 35, § 620 (2024).

541 ILL. OFF. STATE FIRE MARSHAL, FACT SHEET: FIREFIGHTING FOAM AND PFAS (2022), available at https://epa.illinois.gov/content/dam/soi/en/web/epa/topics/water-quality/pfas/documents/firefightingfoamandpfas-final.pdf; *Per- and Polyfluoroalkyl Substances (PFAS)*, *supra* note 554.

542 *Id.*

543 415 ILL. COMP. STAT. ANN. 170/40 (LexisNexis 2024).

On January 10, 2024, SB 2705 was introduced that would further amend the PFAS Reduction Act and change its nature from a firefighting foam-related PFAS law to a much more broadly applicable one.[544] Under the proposed amendments, starting January 1, 2025, certain listed products (including carpets and rugs, cleaning products, cookware, cosmetics, food packaging, upholstered furniture, and juvenile products) would be prohibited from being sold, offered, or distributed for sale in Illinois if they contain intentionally-added PFAS.[545] `Manufacturers of other products sold or distributed in Illinois that contain intentionally-added PFAS must, no later than January 1, 2026, submit to the IEPA a description of the product, its purpose, the amount of each PFAS, and any additional information requested.[546] The products may not be sold or distributed in Illinois if such information has not been provided.[547] If the IPCB has reason to believe a product contains intentionally-added PFAS, it may order the manufacturer to submit testing results showing levels of PFAS in the product.[548] Finally, beginning January 1, 2032, no products containing intentionally-added PFAS may be sold or distributed for sale in Illinois unless the IPCB has determined that the use of PFAS is an unavoidable use.[549] Another law, the first in the country, was signed in 2022 that prohibits the disposal of PFAS by incineration.[550]

3. Illinois Office of the Attorney General

Meanwhile, the Illinois Office of the Attorney General (IAG) has been very active. In March of 2022, the IAG brought suit in Rock Island County against 3M Company (3M) regarding PFAS releases from the company's Cordova, Illinois, manufacturing facility.[551] This facility is located across the

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544 S.B. 2705, 103rd Gen Assemb., Reg. Sess. (Ill. 2024).

545 *Id.*

546 *Id.*

547 *Id.*

548 *Id.*

549 *Id.*

550 *Illinois Governor Signs into Law First-Ever Statewide Ban of PFAS Incineration*, SAFER STATES (June 30, 2022), https://www.saferstates.org/press-room/new-blog-entry-illinois-governor-signs-into-law-first-ever-statewide-ban-of-pfas-incineration/#:~:text=PORTLAND%2C%20OR%E2%B8%BAOn%20Wednesday,Protection%20Agency's%20Toxic%20Release%20Inventory. PFAS incineration ban: "On Wednesday, June 8, Illinois Governor JB Pritzker signed into law a first-in-the-nation policy that prohibits the disposal by incineration of PFAS (perfluoroalkyl and polyfluoroalkyl substances) that are listed in the EPA's Toxic Release Inventory. This includes, but is not strictly limited to, PFAS substances that are often found in aqueous film-forming foam, otherwise known as firefighting foam." *Id.*

551 *Attorney General Raoul Files Latest Lawsuit Over Contamination by Toxic "Forever Chemicals,"* OFF. ILL. ATT'Y GEN. KWAME RAOUL (Apr. 6, 2023), https://illinoisattorneygeneral.gov/news/story/attorney-general-raoul-files-latest-lawsuit-over-contamination-by-toxic-forever-chemicals.

Mississippi River from Iowa and has been in operation since 1970.[552] The complaint alleged that 3M has known of the dangers of PFAS for many decades, yet has downplayed those risks and continued to manufacture them, anyway.[553] The state seeks monetary damages for monitoring and remediating PFAS contamination, injunctive relief requiring 3M to take action to prevent further contamination, and to remediate contaminated areas, plus civil penalties for violations of Illinois laws and regulations.[554] The state alleged that 3M's groundwater levels in 2020 significantly surpassed the IEPA's proposed groundwater standards to the IPCB.[555] These proposed standards were: PFOA—2 PPT, PFOS—7.7 PPT, PFNA—12 PPT, PFBS—1,200 PPT, PFHxS—77 PPT, and HFPO-DA—12 PPT.[556] The state alleged that 3M's Cordova plant's groundwater in 2020 had levels as high as the following: PFOA—5,570 PPT, PFOS—80,800 PPT, and PFBS—353,000 PPT, and wastewater discharges of PFNA of 946 PPT to the Mississippi River.[557] The state further alleged that the EPA found discharges to the Mississippi River from the plant at the following levels in December 2019: PFOA—907 PPT, PFOS—24,400 PPT, PFNA—1,210 PPT, and PFHxS—1,610 PPT.[558] 3M attempted to remove the suit to federal court in the Central District of Illinois, but it was remanded to Rock Island County on September 21, 2023.[559]

3M's Cordova plant had also drawn the EPA's attention in November 2022, which announced a settlement in an AOC, finding an imminent and substantial endangerment to the health of persons.[560] The EPA said that there was a "widespread presence of a mixture of at least 19 different PFAS chemicals in drinking water within a 3-mile radius of the" facility.[561] 3M was required to offer treatment to all private well owners within that radius and to the Comanche Water Supply, sampling to private well owners out to four miles from the facility, and sampling to public water systems out to ten miles

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552 Illinois ex rel. Raoul v. 3M Co., No. 4:22-cv-04075-SLD-JEH, 2023 U.S. Dist. LEXIS 168231 (C.D. Ill. Sept. 21, 2023).

553 Complaint, Illinois ex rel. Raoul v. 3M Co., No. 4:22-cv-04075-SLD-JEH (Ill. Cir. Ct. 2022).

554 *Id.* ¶ 1.

555 *Id.* ¶¶ 72, 109-112.

556 *Id.* ¶ 72.

557 *Id.* ¶¶ 109-112.

558 *Id.* ¶ 130.

559 Illinois ex rel. Raoul v. 3M Co., No. 4:22-cv-04075-SLD-JEH, 2023 U.S. Dist. LEXIS 168231 (C.D. Ill. Sept. 21, 2023).

560 Administrative Order on Consent at ¶ 70, *In re* 3M Company, Docket No. SDWA-HQ-2023—0001-EO (Nov. 2, 2022).

561 *3M Cordova*, EPA, https://www.epa.gov/il/3m-cordova#nextsteps (Aug. 4, 2023).

and to the Quad Cities public water system.[562] 3M was also required to submit annual Progress Reports.[563]

The IAG's next PFAS lawsuit was brought in January 2023 in Cook County against fifteen companies.[564] This lawsuit specifically excluded any claims against PFAS that were AFFFs.[565] The complaint alleged that the companies knew of the hazards associated with PFAS, yet continued to use them, including in consumer goods and products.[566] The IAG sought compensatory damages from PFAS contamination; remedial action; injunctive relief to address past, present, and future PFAS contamination; as well as, penalties and fines under the Illinois Consumer Fraud and Deceptive Business Practices Act.[567]

The IAG sued again in April 2023, this time against over thirty companies, specifically manufacturers of AFFF PFAS used in fire-suppressing foam.[568] The claims again alleged that, despite knowledge of the toxicity of the products, the manufacturers continued to produce them, and misled their customers, the government, and the public.[569] The IAG sought compensation for natural resource damages; past and future response activity costs; costs of installing and maintaining approved drinking water systems; and injunctive relief to implement ongoing public outreach information-sharing and instituting protective measures to prevent endangerment to human health and the environment.[570]

Without admitting liability, and subject to court approval, 3M announced in June 2023 that it had agreed to commit up to $10.3 billion over thirteen years to provide funding for public water suppliers nationwide that had detected PFAS in drinking water or that may do so in the future.[571] 3M

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562 *EPA Settlement Reached for 3M to Sample and Treat Drinking Water*, EPA (Nov. 2022), https://www.epa.gov/system/files/documents/2022-11/3M%20Cordova%20Settlement%20Fact%20Sheet.pdf.

563 Administrative Order on Consent at ¶ 72, *In re* 3M Company, Docket No. SDWA-HQ-2023—0001-EO (Nov. 2, 2022).

564 *Attorney General Raoul Files Lawsuit Against Multiple Manufacturers Over Contamination by Toxic "Forever Chemicals,"* OFF. ILL. ATT'Y GEN. KWAME RAOUL (Feb. 1, 2023), https://www.illinoisattorneygeneral.gov/news/story/attorney-general-raoul-files-lawsuit-against-multiple-manufacturers-over-contamination-by-toxic-forever-chemicals.

565 Complaint at ¶ 17, Illinois ex rel. Raoul v. 3M Co., No. 2023L000996 (Ill. Cir. Ct. filed Jan. 31, 2023).

566 *Id.* ¶ 21.

567 *Id.* ¶¶ 114-117.

568 *Attorney General Raoul Files Latest Lawsuit Over Contamination by Toxic "Forever Chemicals," supra* note 683.

569 *Attorney General Raoul Files Latest Lawsuit Over Contamination by Toxic "Forever Chemicals," supra* note 683.

570 Complaint at ¶¶ 114-17, Illinois ex rel. Raoul v. 3M Co., No. 2023L000996 (Ill. Cir. Ct. filed Jan. 31, 2023).

571 *3M Resolves Claims by Public Water Suppliers, Supports Drinking Water Solutions for Vast Majority of Americans*, 3M (June 22, 2023), https://news.3m.com/2023-06-22-3M-Resolves-

also announced that it will exit all PFAS manufacturing by the end of 2025.[572] Similarly, earlier the same month, the Chemours Company, DuPont de Nemours, Inc., and Corteva, Inc., announced a $1.2 billion settlement in principle over PFAS-related drinking water claims.[573] In addition, the same three companies settled in November 2023 with the State of Ohio for $110 million to benefit the state's natural resources and citizens.[574]

C. PFAS Litigation, Defenses, and Insurance Coverage

It is not surprising that PFAS have attracted recent attention. Since Wilbur Tennant sued DuPont in 1999 alleging that Du Pont had poisoned Mr. Tennant's family and cattle with PFAS laden effluent from a neighboring factory,[575] there have been thousands of PFAS-related lawsuits.[576] The following are examples of such litigation.

Like discussed above in Illinois, other Attorneys General have sued PFAS chemical manufacturers alleging their products contaminated municipal water supplies with PFAS.[577] All claims have alleged that the defendants knew the health hazards associated with PFAS and failed to warn the plaintiffs.[578] These plaintiffs sought damages related to obtaining alternative water supplies, investigating and remediating PFAS contamination, sampling and monitoring water for PFAS, and updating municipal water treatment facilities to adequately pre-treat existing PFAS contaminated water supplies.[579] Thus far, more than two dozen Attorneys

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Claims-by-Public-Water-Suppliers,-Supports-Drinking-Water-Solutions-for-Vast-Majority-of-Americans.

572 *Id.*

573 Press Release, DuPont, Chemours, DuPont, and Corteva Reach Comprehensive PFAS Settlement with U.S. Water Systems (June 2, 2023) (on file with author), available at https://www.dupont.com/news/chemours-dupont-and-corteva-reach-comprehensive-pfas-settlement-with-us-water-systems.html.

574 *Id.*; *State Secures $110 Million Settlement with DuPont for Environmental Restoration Along Ohio River*, GOVERNOR OHIO (Nov. 29, 2023), https://governor.ohio.gov/media/news-and-media/state-secures-111-million-settlement-with-dupont-for-environmental-restoration-along-ohio-river.

575 Tennant v. E.I. DuPont de Nemours & Co., Inc., No. CA-6:99-048 (S.D.W.Va. 1998).

576 *See e.g.*, *More than half of US State Attorneys General have taken action against PFAS manufacturers and key users*, SAFER STATES (Aug. 24, 2023), https://www.saferstates.org/press-room/more-than-half-of-us-state-attorneys-general-have-taken-action-against-pfas-manufacturers-and-key-users/#:~:text=This%20year%20alone%2C%20a%20bipartisan,%2C%20South%20Carolina%2C%20Tennessee%2C%20and.

577 *See Attorney General Raoul Files Latest Lawsuit Over Contamination by Toxic "Forever Chemicals," supra* note 683.

578 *See Attorney General Raoul Files Latest Lawsuit Over Contamination by Toxic "Forever Chemicals," supra* note 683.

579 *See Attorney General Raoul Files Latest Lawsuit Over Contamination by Toxic "Forever Chemicals," supra* note 683.

General have filed PFAS lawsuits, including 14 in 2023.[580] Two states have reached settlements—New Jersey for $393 million and Ohio for $110 million.[581] More litigation and settlements are expected in 2024—from Attorneys General and individual plaintiffs.[582]

Attorneys General from numerous states have also sued manufacturers, distributors, and suppliers of commercial firefighting foam known as AFFF for contamination of public waterways.[583] Individuals have brought traditional environmental claims against companies that manufactured products with PFAS, claiming the processes contaminate those products and, in turn, the surface and groundwater.[584] Individuals continue to file products liability, negligence and failure to warn claims for alleged injuries due to PFAS exposure, mostly in drinking water.[585] PFAS contamination in humans has been linked to various cancers, thyroid disease, pregnancy complications, and damage to the liver and immune system.[586] These cases seek to link an individual's exposure to a particular set of ailments with numerous alternative potential causes.[587]

Specifically, Firefighters claim injuries due to exposure to PFAS from AFFF products used during firefighting response and training exercises.[588] The suits allege that the defendants manufactured, designed, marketed, and sold AFFF with knowledge that the foam contained PFAS and failed to warn end users of the danger.[589] Not surprisingly, DuPont, its spinoffs Chemours and Corteva, and 3M have borne the brunt of the PFAS litigation to date.[590] Those entities have been labeled the manufacturers of these "forever chemicals," and the lawsuits have followed.[591] The damages claimed and awarded have been substantial and more is expected.[592]

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580 *More than half of US State Attorneys General have taken action against PFAS manufacturers and key users*, *supra* note 723. Maine and Illinois filed lawsuits early in 2023. Tennessee, Arkansas, Pennsylvania, New Mexico, Oregon, Washington, Maryland, Arizona and Rhode Island filed lawsuits between May 25 and June 5, 2023. Other states that have filed suits since 2019 include Alaska, California, Florida, Massachusetts, Michigan, Mississippi, New Jersey, New York, New Hampshire, North Carolina, Ohio and Wisconsin. *Id.*

581 *More than half of US State Attorneys General have taken action against PFAS manufacturers and key users*, *supra* note 723.

582 *Id*.

583 *Id*.

584 *Id*.

585 *Id*.

586 *PFAS Explained*, EPA, https://www.epa.gov/pfas/pfas-explained (Oct. 25, 2023).

587 *Id*.

588 ILL. OFF. STATE FIRE MARSHAL, *supra* note 673.

589 *State Secures $110 Million Settlement with DuPont for Environmental Restoration Along Ohio River*, *supra* note 713.

590 *3M Resolves Claims by Public Water Suppliers, Supports Drinking Water Solutions for Vast Majority of Americans*, *supra* note 708.

591 *Id*.

592 *State Secures $110 Million Settlement with DuPont for Environmental Restoration Along Ohio River*, *supra* note 713.

Courts have sought to manage the wave of PFAS claims by facilitating mediations, encouraging settlements, and forming Multidistrict Litigation (MDL) for claims filed throughout the country—AFFF in particular.[593] The MDL consolidates suits alleging similar damages and identical defendants before a single judge in a single courtroom.[594]

In early June 2023, DuPont, Chemours, and Corteva, in a MDL, reached a $1.185 billion settlement with 300 local water systems that had sued the companies for the costs of cleaning and filtering their wells and aquifers.[595] Three weeks later, 3M reached a $10.3 billion settlement with 300 different water providers.[596] Most of the plaintiffs in both settlements were part of the MDL.[597] The 600 settled cases represent only a small portion of the reported 15,000 claims in the MDL pending in the United States District Court for South Carolina.[598]

DuPont and 3M are not the only defendants.[599] Suits are reportedly pending against local businesses, inlcuding class actions filed against companies that produce clothing,[600] personal hygiene products such as dental floss, and food wrappers that contain PFAS.[601] Consumer brands whose products contain PFAS, and distributors, sellers and shippers of those products are all targets in 2024.[602] Who pays for all this? Can we expect DuPont, 3M or the insurance industry to pay? At this point, deep pockets beyond DuPont's and 3M's are being targeted, and insurers are raising common defenses.[603]

Forum selection is a fairly well-developed area of law in the context of toxic tort and mass tort claims (including historic asbestos litigation) and remains a threshold issue in PFAS related claims.[604] Insurers and policyholder representatives continue to have preferences concerning the forums in which to litigate and in the states whose laws are perceived to be

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593 Miles Scully & Brian Ledger, *PFAS settlements: Future of PFAS litigation landscape to be determined by upcoming decision*, REUTERS (Aug. 31, 2023, 8:50 AM), https://www.reuters.com/legal/legalindustry/pfas-settlements-future-pfas-litigation-landscape-be-determined-by-upcoming-2023-08-31/.

594 *Id.*

595 DuPont, *supra* note 712.

596 Jeffrey Kluger, *3M's Historic $10 Billion 'Forever Chemical' Payout Is Just The Tip of the PFAS* Iceberg, TIME (June 23, 2023, 4:06 PM), https://time.com/6289893/3m-forever-chemical-pfas-settlement/.

597 *Id.*

598 DuPont, *supra* note 712.

599 *See* Admiral Ins. Co. v. Fire-Dex, LLC, No. 22-3992, 2023 U.S. App. LEXIS 14822 (6th Cir. June 13, 2023).

600 *Id.*

601 *Id.*

602 *Id.*

603 *Id.*

604 *Id.*

most favorable.[605] Since PFAS have been produced and used since the 1930s, many claims have and will likely implicate both current and legacy insurance policies, with varying exclusionary language and varying success.[606] Not only do challenges persist in locating those legacy policies, but if found, they may be deemed settled, released, exhausted, or impaired.[607]

Once insurance has been identified, insurers have argued in some PFAS-related coverage cases coverage has not been triggered.[608] In *Crum & Forster Specialty Insurance Co. v. Chemicals, Inc.*, the insurer sought a declaration of coverage with respect to the duty to defend in connection with several hundred personal injury lawsuits consolidated in the multidistrict litigation case.[609] In *In Re Aqueous Fire-fighting Foams Products Liability Litigation*, pending in South Carolina's MDL, the district court denied the insurer's motion for summary judgment, noting the insurer had the burden to demonstrate that the dates of injury could not be determined or that the claims were outside the scope of coverage provided by the policies.[610] If the date of injury "could" potentially be determined in future proceedings and "could" fall within the terms of the policies' coverage, the insurer was obligated to defend.[611] As the plaintiffs in the underlying cases alleged dates of employment during the periods of the insurance policies at issue, the district court ruled that a defense was owed.[612]

Depending on the types of policies involved in a coverage action and the alleged facts, several allocation-related issues may be presented.[613] There may be issues concerning which, if any, lines of coverage respond to a claim, thereby making necessary the coordination and prioritization of coverage issues.[614] Allocation of loss may be significant. In addition to allocation methodology, other issues may be presented and limit (or increase) the insurance contracts impacted and the extent of potential coverage, including

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605 *Id.*

606 *Insurers Face Large PFAS-Related Losses: A Primer on Forever Chemical Regulation, Liabilities, and Insurance Coverage Issues*, HINSHAW (Aug. 30, 2023), https://www.hinshawlaw.com/newsroom-updates-insights-for-insurers-insurers-face-large-pfas-related-losses.html#:~:text=As%20PFAS%20have%20been%20produced,policies%20and%20engaging%20insurance%20archeologists.

607 *Id.*

608 *See generally* Crum & Forster Specialty Ins. Co. v. Chem., Inc., No. H-20-3493, 2021 U.S. Dist. Lexis 146702 (S.D. Tex., Aug 5, 2021).

609 *Id*.

610 In re Aqueous Film-Forming Foams Prods. Liab. Litig., No. 2873, 2021 U.S. Dist. LEXIS 21511 (J.P.M.L., Dec. 7, 2018).

611 *Id.*

612 Crum & Forster Specialty Ins. Co., No. H-20-3493, 2021 U.S. Dist. Lexis 146702 (S.D. Tex., Aug 5, 2021).

613 *Insurers Face Large PFAS-Related Losses: A Primer on Forever Chemical Regulation, Liabilities, and Insurance Coverage Issues*, *supra* note 756.

614 *Id.*

treatment of multi-year policies, stub policies, policy extensions, exhaustion, impact of insurance unavailability, and number of occurrence(s) issues.[615]

Pollution exclusion clauses have been an effective defense to insurance coverage.[616] Various forms of pollution exclusion clauses have been included in insurance policies since the 1970s.[617] The "absolute" pollution exclusion, the "total" pollution exclusion, the "sudden and accidental" pollution exclusion, and other pollution exclusions may serve as a bar in whole or in part to many PFAS-related claims seeking insurance coverage.[618] The application of these exclusions involve familiar issues: Are PFAS "pollutants" as that term is defined in the policy?[619] Was there an insured "discharge or release?"[620] Was the discharge "sudden and accidental" as covered under the policy?[621] Are PFAS a defined "traditional" environmental pollution?[622] And, whether a "hostile fire" exception applies.[623]

Other "occupational disease," "intentional acts," or "owned property" exclusions may bar or limit coverage for particular claims as well, not to mention PFAS-related claims that seek damages or other relief not covered under the particular policy at issue.[624] For example, claims involving matters such as regulatory compliance costs, punitive damages, costs of doing business, or medical monitoring may not be covered under liability policies.[625]

PFAS claims seeking damages will continue in 2024 and are expected to mimic toxic tort and historic asbestos litigation.[626] In addition, environmental coverage litigators can expect PFAS-related insurance claims and are expected to draw from their past experiences in defending insurers.[627]

VI. WHAT TO EXPECT IN 2024

A. Environmental, Social and Governance

Expect a more defined focus on Environmental Justice and ESG by federal and state authorities. ESG refers to a collection of corporate performance evaluation criteria that assess the robustness of a company's

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615 *Id.*
616 *Id.*
617 *Id.*
618 *Id.*
619 *Id.*
620 *Id.*
621 *Id.*
622 *Id.*
623 *Id.*
624 *Id.*
625 *Id.*
626 *Id.*
627 *Id.*

governance mechanisms and its ability to effectively manage its environmental and social impacts.[628] At this point, ESG is better defined and applied in Europe, and is still largely a work in progress in the States, including Illinois.[629] ESG involves environmental considerations, but is largely a concern over corporate representations about its products, and the desire to make accurate— and provable—claims about being "green," in order to avoid "greenwashing" litigation.[630] We can expect much more on the topic this year.

B. Environmental Justice

Environmental Justice (EJ) is a remarkably ambitious concept that is generally being addressed from the top down with regulation rather than from the bottom up through enforcement of current environmental laws.[631] According to the IEPA, EJ is based on the principle that all people should be protected from environmental pollution and have the right to a clean and healthy environment.[632] Remember the constitutional case brought by the young people in Montana discussed above?[633] Those same principles may apply in Illinois. According to the IEPA, EJ is: "protecting the environment of Illinois and the health of its residents;

> equity in the administration of the State's environmental programs; and opportunities for meaningful involvement of all people with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[634]

Illinois has a statute known as the Environmental Justice Act, which directs the state government to study the matter,[635] but various state agencies and Non-Governmental Organizations (NGOs) have been actively pursuing EJ with good intentions. Because EJ is being addressed in the regulatory process,[636] expect challenges and related litigation.

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628 *Environmental, Social and Governance (ESG)*, GARTNER, https://www.gartner.com/en/finance/glossary/environmental-social-and-governance-esg- (last visited June 17, 2024).

629 Leah Malone et al., *ESG Battlegrounds: How the States Are Shaping the Regulatory Landscape in the U.S.*, HARVARD L. SCH. F. ON CORP. GOVERNANCE (Mar. 11, 2023), https://corpgov.law.harvard.edu/2023/03/11/esg-battlegrounds-how-the-states-are-shaping-the-regulatory-landscape-in-the-u-s/.

630 *Id.*

631 *Environmental Justice (EJ) Policy*, ILL. EPA, https://epa.illinois.gov/topics/environmental-justice/ej-policy.html (last visited June 17, 2024).

632 *Id.*

633 *Id.*

634 *Id.*

635 Environmental Justice Act, 415 ILL. COMP. STAT. 155/1 (2011).

636 *Environmental Justice (EJ) Policy*, *supra* note 783.

C. Chevron and Deference to the Administrative Agency

Expect a noteworthy decision from SCOTUS on the 40-year-old precedent articulated in *Chevron* concerning statutory interpretation and deference accorded to the agency charged with administering the statute under review.[637] The administrative state is squarely in SCOTUS's sights.[638] A significant deviation from that rule of statutory construction and a lot more litigation following SCOTUS's decision is expected.[639]

D. PFAS—Drinking Water and Cleanup Standards

Expect more on cleanup and drinking water standards for PFAS compounds and other emerging contaminants of concern,[640] as well as continued PFAS tort and insurance litigation.

E. Microplastics

As noted above, Illinois has enacted a new statutory program focused on micro-plastics.[641] Like the material itself, it is not going away.

F. Clean Energy—Permitting and Siting

In Illinois, we can anticipate more siting activity associated with wind and solar, and Illinois' geology is rumored to be ideal for carbon storage and sequestration. [642]

G. Enforcement—Always Enforcement

Finally, we can anticipate a great deal more enforcement action in the coming year, tempered slightly, but not significantly, by 2024 being an election year.

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637 Jeevna Sheth & Devon Ombres, *Supreme Court Appears Poised To Overrule Chevron Deference in Judicial Power Grab*, CAP 20 (Jan. 17, 2024), https://www.americanprogress.org/article/supreme-court-appears-poised-to-overrule-chevron-deference-in-judicial-power-grab/.

638 *Id.*

639 *Id.*

640 *Key EPA Actions to Address PFAS*, EPA, https://www.epa.gov/pfas/key-epa-actions-address-pfas (May 7, 2024).

641 *Microplastics*, ILLINOIS.GOV, https://epa.illinois.gov/topics/water-quality/microplastics.html (last visited June 17, 2024).

642 *Carbon Management*, PRAIRIE RSCH. INST., https://prairie.illinois.edu/research/carbon-management/ (last visited June 17, 2024).