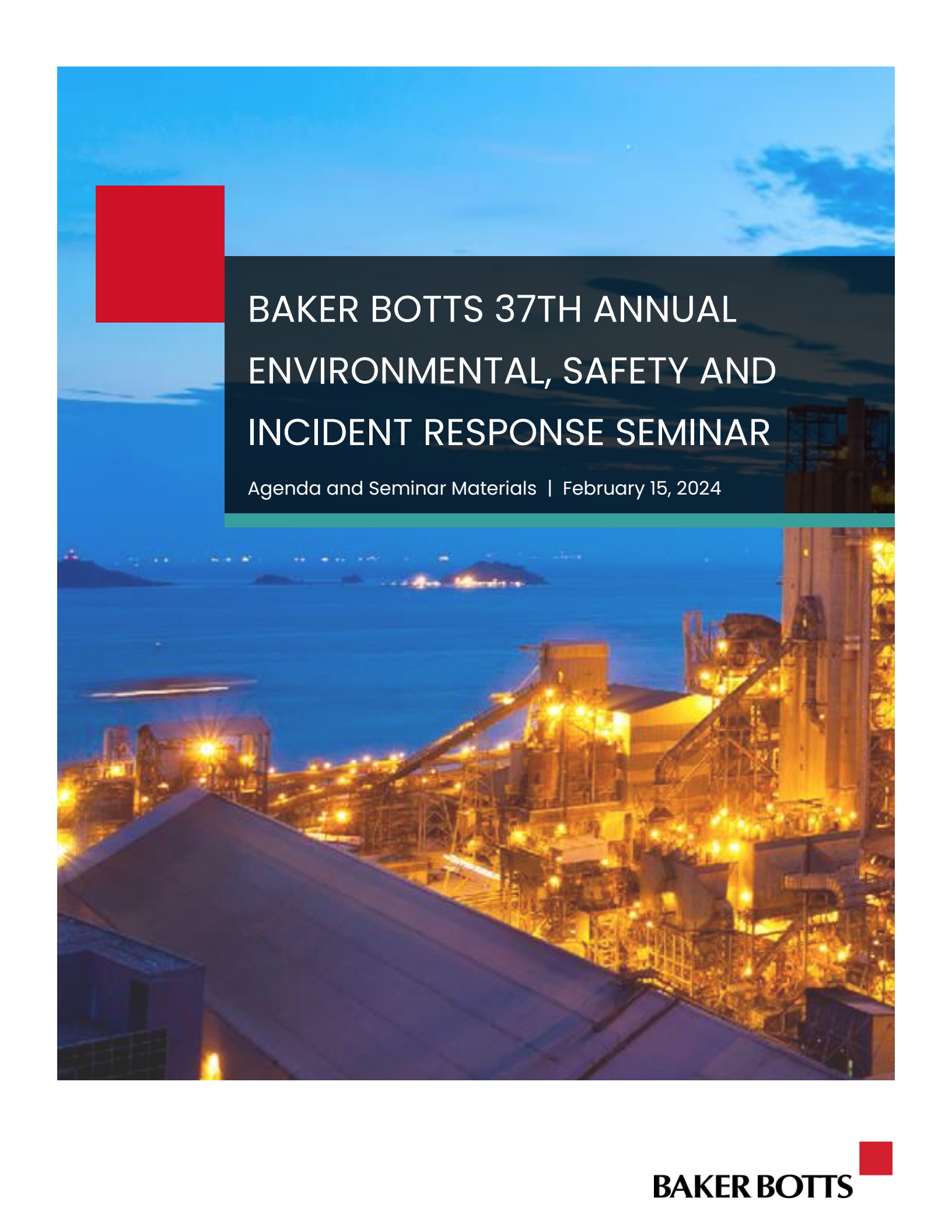




BAKER BOTTS 37TH ANNUAL ENVIRONMENTAL, SAFETY AND INCIDENT RESPONSE SEMINAR

Agenda and Seminar Materials | February 15, 2024

TABLE OF CONTENTS

01

Agenda

02

Enforcement Dialogue

03

Fireside Chat on Challenging & Emerging Safety Issues

04

Major Energy Project Outlook

05

Energy Transitions and Sustainability: From the Inside Looking Out

06

Ballooning Challenges: 2024 Rulemaking Developments Under the CAA

07

Fireside Chat with TCEQ's Executive Director

08

Breakout Session 1: Environmental Litigation Trends

09

Breakout Session 2: California...Knows How To Regulate.

10

Breakout Session 3: What You Need to Know: Environmental and Energy Justice

11

Breakout Session 4: Ethics – Dos and Don'ts: Negotiations with Government officials

12

Breakout Session 5: Sustainability Disclosure Updates

13

Breakout Session 6: Energy Transition and Renewable Fuels

14

Speaker Bios



01 AGENDA

The banner features a night-time photograph of an industrial facility with smokestacks and lights, set against a dark sky. A red square is positioned in the upper left corner of the banner.

Baker Botts' 37th Annual Environmental, Safety and Incident Response Seminar Agenda

February 15, 2024 | Marriott Marquis | Houston, TX

8:00 – 8:30 a.m.	Registration	Networking Breakfast
8:30 – 8:40 a.m.	Welcoming Remarks Scott Janoe, Chair, Baker Botts' Environmental, Safety and Incident Response Section	
8:40 – 9:40 a.m.	Enforcement Dialogue Speaker: David Uhlmann, Assistant Administrator, EPA Office of Enforcement and Compliance Assurance Moderator: Steve Solow, Senior Counsel, Baker Botts L.L.P.	
9:40 – 10:25 a.m.	Fireside Chat on Challenging & Emerging Safety Issues Panelists: Trey Morrison, Principal Engineer, Exponent Greg Dillard, Partner, Baker Botts L.L.P. Scott Elliott, Partner, Baker Botts L.L.P. <i>*CLE credit will not be offered for this session.</i>	
10:25 – 10:35 a.m.	Break	
10:35 – 11:20 a.m.	Major Energy Project Outlook Speaker: James Danly, Former Chairman, Federal Energy Regulatory Commission (FERC) Moderator: Jeff Wood, Partner, Baker Botts L.L.P.	
11:20 a.m. – 11:40 a.m.	Energy Transitions and Sustainability: From the Inside Looking Out Speaker: Rachel Meidl, Fellow in Energy and Sustainability, Baker Institute <i>*CLE credit will not be offered for this session.</i>	
11:40 a.m. – 12:30 p.m.	Lunch Break	

12:30 – 1:15 p.m.	Ballooning Challenges: 2024 Rulemaking Developments Under the CAA Speaker: Tomás Carbonell, Deputy Assistant Administrator for Stationary Sources, EPA Office of Air and Radiation Moderators: Debra Jezouit, Partner, Baker Botts L.L.P. Matthew Kuryla, Partner, Baker Botts L.L.P.
1:15 – 1:25p.m.	Break
1:25 – 1:55 p.m.	Fireside Chat with TCEQ’s Executive Director Kelly Keel, Executive Director, Texas Commission on Environmental Quality Moderator: Stephanie Bergeron Perdue, Partner, Baker Botts L.L.P. <i>*CLE credit will not be offered for this session.</i>
1:55 – 2:10 p.m.	Break (transition to Breakouts)
Breakout Session One	
2:10 – 3:10 p.m.	Breakout 1: Environmental Litigation Trends Baker Botts Speakers: Josh Frank, Martha Thomsen, Kent Mayo, Chris Danley, Jeff Wettengel, Tiffany Cheung Breakout 2: California...Knows How to Regulate. Baker Botts Speakers: Allison Watkins Mallick, Megan Berge, Julie Cress, Day Robins Breakout 3: What You Need to Know: Environmental and Energy Justice Baker Botts Speakers: Stephanie Bergeron Perdue, Alex Dunn, Teresa Jones
3:10 – 3:20 p.m.	Break (Breakout Transition)
Breakout Session Two	
3:20 – 4:20 p.m.	Breakout 4: Ethics – Dos and Don’ts: Negotiations with Government Officials Baker Botts Speakers: Sterling Marchand, Paulina Williams, Katie Jeffress, Chloe Graham Breakout 5: Sustainability Disclosures Baker Botts Speakers: Ginny King, Carina Antweil, Aaron Ramcharan Breakout 6: Energy Transition and Renewable Fuels Baker Botts Speakers: Shai Sahay, Julie Cress, Scott Novak, Janie Kilgore
4:20 – 5:30 p.m.	Reception



02 ENFORCEMENT DIALOGUE

Enforcement Priorities: David Uhlmann, Assistant Administrator, EPA Office of Enforcement and Compliance Assurance

Moderated by Steve Solow

CONFIDENTIAL
© Copyright Baker Botts 2024. All Rights Reserved.



1

Discussion Overview

- Enforcement Priorities and Resources
 - National Enforcement and Compliance Initiatives (NECI) for Fiscal Year 2024-2027
 - Enforcement and Compliance Annual Results for Fiscal Year 2023
 - Environmental Justice Priorities
 - Climate Enforcement and Compliance Strategy Memorandum
 - Supplemental Environmental Project (SEP) Idea Announcement
- Enforcement Resources/Capacity and Discretion
 - Capacity and Enforcement Discretion
 - Increasing Coordination with Other Agencies (e.g., FBI, Customs, DOJ)
- Q&A

2

Introduction to David Uhlmann

- 1990-2007: DOJ Trial Attorney; Assistant Chief; Chief of Environmental Crimes 2000-2007.
- 2007-2022: Professor and Director of the Environmental Law and Policy Program, University of Michigan Law School.
- 2022-2023: Senior Advisor to the EPA Administrator and Deputy Assistant Administrator for EPA's Office of Enforcement and Compliance (OECA).
- July 2023: Assistant Administrator of OECA.



ENFORCEMENT PRIORITIES AND RESOURCES

Enforcement Priorities and Resources

- National Enforcement and Compliance Initiatives (NECI) for Fiscal Year 2024-2027
- Enforcement and Compliance Annual Results for Fiscal Year 2023
- Environmental Justice Priorities
- Climate Enforcement and Compliance Strategy Memorandum
- Supplemental Environmental Project (SEP) Idea Announcement

5

FY 2024-2027 NECI¹

- Issues listed as NECI priorities for the first time:
 - Climate Change
 - Coal Ash
 - Per- and Polyfluorinated Substances (PFAS)
- Issues continued and modified priorities carried over from last administration:
 - Air Toxics in Overburdened Communities
 - Drinking Water Standard Compliance
 - Chemical Accident Risk Reduction

¹ EPA, *FY 2024-2027 National Enforcement and Compliance Initiatives* (Aug. 2023), <https://www.epa.gov/enforcement/national-enforcement-and-compliance-initiatives>

6

Enforcement and Compliance Annual Results for Fiscal Year 2023

- Published on December 18, 2023, EPA's FY 2023 annual results capture data from all of EPA's civil and criminal enforcement actions and compliance monitoring.¹
 - The results were driven by the strategies directed in EPA's FY 2022-2026 EPA Strategic Plan (March 2022) and the Climate Enforcement and Compliance Strategy Memorandum (September 2023, discussed below).
- Key results include:
 - Conducting over 60% of its on-site inspection at facilities affecting EJ communities.
 - Concluding a total of 1,791 civil settlements, where 55% of the cases in FY 2023 address facilities in EJ communities, the highest percentage since 2014.
 - Opening 199 criminal investigations, marking a 70% increase over FY 2022.
 - Obtaining approximately \$1.1 billion from Superfund cleanup and cost recovery settlement agreements and recovery of past and future costs.

¹ EPA, *Enforcement and Compliance Annual Results for Fiscal Year 2023* (Dec. 2023).
<https://www.epa.gov/enforcement/enforcement-and-compliance-annual-results-fiscal-year-2023>

7

Environmental Justice Priorities

- In 2021, then Acting Assistant Administrator Larry Starfield issued four memoranda directing enforcement staff to strengthen EJ considerations in the civil, criminal, and cleanup enforcement programs.
 - [Memorandum from Acting Assistant Administrator for Enforcement and Compliance Assurance Larry Starfield, "Strengthening \[Civil Regulatory\] Enforcement in Communities with Environmental Justice Concerns"](#) (April 30, 2021)
 - [Memorandum from Acting Assistant Administrator for Enforcement and Compliance Assurance Larry Starfield, "Strengthening Environmental Justice Through Criminal Enforcement"](#) (June 21, 2021)
 - [Memorandum from Acting Assistant Administrator for Enforcement and Compliance Assurance Larry Starfield, "Strengthening Environmental Justice Through Cleanup Enforcement Actions"](#) (July 1, 2021)
 - [Memorandum from Acting Assistant Administrator Larry Starfield, Using All Appropriate Injunctive Relief Tools in Civil Enforcement Settlements](#) (April 26, 2021)
- On October 13, 2023, DOJ released its first Annual Report addressing implementation of DOJ's Comprehensive Environmental Justice Enforcement Strategy¹.
 - The Report noted that "EPA's Office of Environmental Justice has worked to develop resources and best practices for identifying environmental justice impacts during investigations, and identified several updates related to tribal environmental justice considerations, participation in environmental justice taskforces, and efforts to build interagency relationships to provide 'timely and effective remedies for environmental violations, contamination, and injury to natural resources in overburdened communities.'"

¹ DOJ, *Comprehensive Environmental Justice Enforcement Strategy Annual Report* (Oct. 2023).
<https://www.justice.gov/d9/2023-10/comprehensive-environmental-justice-enforcement-strategy-annual-report.pdf>

8

Climate Enforcement and Compliance Memorandum

- Signed September 28, 2023, the Memorandum¹ directs all EPA enforcement and compliance offices to undertake climate-related solutions “wherever appropriate” and “in every matter within their jurisdiction.”
- Specifically, the Memorandum directs all EPA criminal, civil, cleanup, and federal facilities activities to:
 - Prioritize enforcement and compliance actions to mitigate climate change;
 - Include climate adaptation and resilience requirements in case conclusions whenever appropriate; and
 - Provide technical assistance to achieve climate-related solutions and build climate change capacity among EPA staff and its state and local partners.

¹ EPA, *EPA’s Climate Enforcement and Compliance Strategy* (Sep. 2023).
<https://www.epa.gov/system/files/documents/2023-09/epasclimateenforcementandcompliancestrategy.pdf>

SEP Idea Announcement

- On December 7, 2023, EPA announced a new initiative to invite the public to submit ideas for Supplemental Environmental Projects (SEPs), which EPA suggested may be used in enforcement settlements.¹ According to EPA’s press release, this initiative involves setting up an email inbox for the public to submit potential SEP ideas, which is intended to be a pilot method for making public SEP input more consistent and centralized, recognizing that the public cannot participate in confidential settlement discussions. EPA has stated that these project ideas “could be discussed during settlement negotiations.”

¹ EPA, *EPA Enforcement Program Seeks Public Ideas for Supplemental Environmental Projects*, (Dec. 2023)
<https://www.epa.gov/newsreleases/epa-enforcement-program-seeks-public-ideas-supplemental-environmental-projects>

ENFORCEMENT RESOURCES 02

CAPACITY AND DISCRETION



11

Capacity and Enforcement Discretion Policy (PFAS)

- Workforce Capacity
 - Per the Enforcement and Compliance Annual Results for Fiscal Year 2023,¹ from 2011 to 2022, there was a thirty percent decline in enforcement positions, losing about 950 positions in the last decade. EPA is now in the process of hiring 300 new employees.
- Enforcement Discretion
 - CERCLA PFAS Enforcement Discretion Listening Sessions
 - On March 14, and 23, 2023, EPA held listening sessions requesting input on concerns under CERCLA for PFAS contamination. EPA accepted comments up to March 31, 2023, and noted that “[t]he input received will be reviewed and considered by EPA in drafting a CERCLA PFAS enforcement discretion policy.”²
 - Upcoming enforcement-related policies or guidance?

¹ EPA, *Enforcement and Compliance Annual Results for Fiscal Year 2023* (Dec. 2023), <https://www.epa.gov/enforcement/enforcement-and-compliance-annual-results-fiscal-year-2023>

² EPA, *CERCLA PFAS Enforcement Listening Sessions* (Mar. 2023), <https://www.epa.gov/enforcement/cercla-pfas-enforcement-listening-sessions>

12

Coordination with Other Agencies

- Training
 - EPA “[t]rained over 200 personnel from [] Customs, Homeland Security, US Attorney’s offices, and other enforcement agencies which directly led to Custom and Border Patrol officers identifying violative shipments and subsequently contacting EPA, who initiated criminal investigations.” (Dec. 2023) ¹
- Guidance
 - Cybersecurity and Infrastructure Security Agency (CISA), Federal Bureau of Investigation (FBI), and EPA published a guide to assist owners and operators in the Water and Wastewater Systems (WWS) Sector with best practices for cyber incident response (Jan. 2024) ²

¹ Enforcement and Compliance Annual Results for Fiscal Year 2023 (Dec. 2023). <https://www.epa.gov/enforcement/enforcement-and-compliance-annual-results-fiscal-year-2023>

² CISA, Water and Wastewater Sector Cyber Incident Response Guide (Jan 2024). <https://www.cisa.gov/resources-tools/resources/water-and-wastewater-sector-incident-response-guide-0>

13

Coordination with Other Agencies (continued)

- Policy Overlap
 - DOJ announces broader version of the existing DOJ policy on transactions and disclosures, *Policy Designed to Encourage Disclosure of Misconduct and Hold Individual Wrongdoers Accountable* (Oct. 2023) ¹
 - DOJ announces new guidance for Evaluation of Corporate Compliance Programs ²
 - New ENRD ECS voluntary disclosure policy ³
 - Existing EPA Voluntary Disclosure Audit Policy? ⁴

¹ DOJ, Policy Designed to Encourage Disclosure of Misconduct and Hold Individual Wrongdoers Accountable <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-announces-new-safe-harbor-policy-voluntary-self>

² DOJ, Evaluation of Corporate Compliance Programs. <https://www.justice.gov/opa/speech/file/1571911/download>

³ DOJ, ECS Voluntary Disclosure Policy https://www.justice.gov/d9/pages/attachments/2023/03/02/ecs_voluntary_self_disclosure_policy_2023_5.pdf

⁴ EPA, Incentives for Self Policing: Discovery, Disclosure, Correction and Prevention. <https://www.epa.gov/compliance/epas-audit-policy>

14



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

September 28, 2023

MEMORANDUM

SUBJECT: EPA's Climate Enforcement and Compliance Strategy

FROM: David M. Uhlmann

A handwritten signature in blue ink, appearing to read "D. Uhlmann", is placed next to the name "David M. Uhlmann".

TO: OECA Office Directors and Deputies
Enforcement and Compliance Assurance Directors and Deputies
Superfund and Emergency Management Division Directors and Deputies
Land, Chemicals, and Redevelopment Division Directors and Deputies
Regional Counsel and Deputies

During his first week in office, President Biden issued Executive Order (EO) 14008 calling on all federal agencies to implement a whole of government approach to tackling the climate crisis.¹ EPA Administrator Regan subsequently made addressing the climate crisis the top cross-cutting goal in EPA's Strategic Plan.² With this memorandum, I am directing all EPA enforcement and compliance offices to address climate change, whenever appropriate, in every matter within their jurisdiction.

The climate crisis continues to accelerate: this year will be the warmest on record, with more billion-dollar weather events during the first eight months of the year than in any prior calendar year in the United States.³ Wildfires are no longer geographically limited, bringing death, catastrophic property damage, and unhealthy air to greater proportions of the country.⁴ Sea levels and ocean temperatures are rising dramatically.⁵ If we fail to take decisive action by the end of this decade, searing heat, widespread drought, destructive storms, and coastal flooding will become even more commonplace.

To meet the urgency of this moment, I am requiring that EPA's enforcement and compliance program: (1) prioritize enforcement and compliance actions to mitigate climate change; (2) include climate adaptation and resilience in case conclusions whenever appropriate; and (3) provide technical assistance to achieve climate-related solutions and build climate change capacity among EPA staff and our state and local partners. These requirements apply across all EPA enforcement and compliance activities, including criminal, civil, federal facilities, and cleanup enforcement.

¹ [Executive Order 14008](#), Tackling the Climate Crisis at Home and Abroad, Jan. 27, 2021.

² [FY 2022-2026 EPA Strategic Plan](#) (Mar. 2022).

³ See NOAA, National Centers for Environmental Information, [U.S. Billion-Dollar Weather and Climate Disasters](#) (2023); NASA, Global Climate Change, [NASA Announces Summer 2023 Hottest on Record](#), Sept. 14, 2023.

⁴ See NOAA, National Centers for Environmental Information, [Summary Stats](#); EPA, [Why Wildfire Smoke is a Health Concern](#).

⁵ See NASA, Global Climate Change, [NASA Study: Rising Sea Level Could Exceed Estimate for U.S. Coasts](#), Nov. 15, 2022; NOAA, Understanding Climate, [Climate Change: Ocean Heat Content](#), Sept. 6, 2023.

EPA's Climate Enforcement and Compliance Strategy builds on the announcement last month of EPA's first-ever climate enforcement initiative.⁶ The climate enforcement initiative targets methane emissions from oil and gas facilities and landfills as well as illegal importation of hydrofluorocarbons (HFCs). The strategy announced today goes further and requires EPA's enforcement and compliance program to fairly and vigorously enforce the full array of EPA's climate rules, including, but not limited to, greenhouse gas (GHG) reporting requirements and limits on other climate pollutants such as carbon dioxide and nitrous oxide. As new climate rules are developed, they will be prioritized as well.

This strategy fulfills a commitment made last year in the Climate Adaptation Implementation Plan⁷ developed by the Office of Compliance and Enforcement Assurance (OECA). In that document, OECA promised to "issue a policy statement requiring consideration of climate change in all civil enforcement case resolutions and adoption of climate-related solutions where appropriate."⁸ The strategy announced today requires that all EPA enforcement and compliance staff embrace climate-related solutions, whenever appropriate, including at federal facilities and cleanup sites, so that entities in both criminal and civil enforcement matters factor climate mitigation, adaptation, and resilience into their operations.

In addition to calling for federal agencies to tackle the climate crisis, EO 14008 required federal agencies to deliver environmental justice. While climate change is a global problem, the impacts of climate change disproportionately affect communities already overburdened by pollution and with less access to the resources needed to adapt to and recover from climate change. Our charge is to protect human health and the environment for all Americans; it is therefore imperative that we consider climate justice as we factor climate change considerations into our enforcement and compliance activities.⁹

EPA's climate rules promise meaningful reductions in GHG emissions to stave off the worst effects of climate change. Whether EPA achieves those GHG reductions will depend upon the strength of the climate rules, the efforts of the regulated community to comply with those rules, and the willingness of the Agency to take swift enforcement action against violators. To protect communities from climate change that already is occurring, EPA also will need to include climate adaptation and resilience whenever possible in criminal, civil, and administrative settlements. Each of these requirements, as well as the capacity-building efforts that will make them possible, are discussed in greater detail below.

1. Prioritize Enforcement and Compliance Activities to Reduce Emissions of Greenhouse Gases

In August 2023, EPA included Mitigating Climate Change as one of six National Enforcement and Compliance Initiatives (NECIs) for FY 2024-2027. As part of this NECI, which fits within the broader climate enforcement and compliance strategy announced today, EPA will focus resources on reducing emissions of the highest impact climate super-pollutants (methane and HFCs).

First, EPA will seek greater compliance with new source performance standards at oil and gas facilities and landfills, the second and third largest sources of methane emissions.¹⁰ By addressing large, unlawful emissions events from oil and gas facilities, known as super-emitter events, EPA can significantly reduce nationwide methane emissions. Second, EPA will use criminal and civil enforcement authorities to ensure compliance with the American Innovation and Manufacturing Act (AIM) Act,¹¹ which phases

⁶ [OECA FY 2024 – 2027 National Enforcement and Compliance Initiatives](#), Aug. 17, 2023.

⁷ [OECA Climate Adaptation Implementation Plan](#), Oct. 2022.

⁸ *Id.* at 22.

⁹ See EPA, [Environmental Justice in Enforcement and Compliance Assurance](#).

¹⁰ See EPA, [Inventory of U.S. Greenhouse Gas Emissions and Sinks](#), Apr. 13, 2023.

¹¹ See EPA, [Enforcement of the American Innovation and Manufacturing Act of 2020](#).

down production and consumption of HFCs by 85% by 2036, consistent with the Kigali Amendment to the Montreal Protocol. A global HFC phasedown is expected to avoid up to 0.5 °C of global warming by 2100. Third, as EPA adopts new climate rules, enforcement of those requirements also may be included in this initiative.

In addition to the Mitigating Climate Change initiative, EPA's enforcement and compliance program will prioritize enforcement actions to reduce emissions of other GHGs by addressing illegal activity related to carbon dioxide, nitrous oxide, and volatile organic compound (VOC) emissions. This could include actions in a broad array of sectors where both civil and criminal investigations can assess, for example, gas flaring, emissions from storage tanks and wastewater treatment systems, incineration/combustion operations, and compliance with the Greenhouse Gas Reporting Rule. EPA also will continue pursuing civil and criminal violations of the Clean Air Act's Renewable Fuel Standards to protect the integrity and climate objectives of the program.¹²

Enforcement staff should ensure consistent consideration of climate change during the case development process and incorporate relevant climate mitigation considerations in administrative actions, civil referrals, consent decree approval requests, and referrals for criminal prosecution sent to the Department of Justice. Enforcement staff should consider clean renewable energy solutions, green infrastructure cleanup responses, and other climate mitigation remedies throughout all case resolution efforts, including through Supplemental Environmental Projects (SEPs)¹³ in civil cases and Community Service Projects in criminal cases. Clean and renewable energy opportunities, including but not limited to, wind, solar, and vehicle electrification, may be incorporated as mitigation or SEPs in civil cases or as restitution in criminal cases or through other settlement tools.

2. Incorporate Climate Adaptation and Resilience Principles into All Enforcement and Compliance Activities

Consistent with EPA's legal authorities, we must take concrete steps to enhance adaptation and resilience within the regulated community by considering climate change adaptation and resilience concepts in all enforcement and compliance activities. The dramatic impacts of changing climate patterns and extreme weather events should be considered across all aspects of our work.

EPA's enforcement and compliance program will build climate resilience into our agreed upon case resolutions; for example, by considering relevant climate risks in enforcement matters, raising these climate risks to regulated entities early in negotiations, and including, where appropriate, injunctive relief that will be resilient to projected impacts of climate change. OECA will be releasing guidance shortly about these and other sustainability efforts.

Enforcement and compliance teams should consider targeting investigations at facilities presenting the highest risks from climate change impacts, which may include considering how frequently the geographic area is impacted by catastrophic weather events each year. For example, the Safe Drinking Water Act requires certain community water systems to develop risk and resilience assessments and emergency response plans that assess the risks posed to systems by natural hazards and ensure systems

¹² See EPA, [Civil Enforcement of the Renewable Fuel Standards](#).

¹³ [Issuance of the 2015 Update to the 1998 U.S. Environmental Protection Agency Supplemental Environmental Projects Policy](#) (Mar. 10, 2015).

are resilient and can detect and lessen the impacts of such risks.¹⁴ These requirements are essential for preserving the critical infrastructure needed to supply safe drinking water that can withstand climate change. Violations of requirements under other laws may also provide opportunities for injunctive relief that results in increased resilience to future impacts from climate change, thereby reducing risk of future harm to the environment or a community.

Enforcement staff should ensure consistent consideration of climate change in the case development process and incorporate relevant climate adaptation and resilience considerations in administrative actions, civil referrals, consent decree approval requests, and criminal cases referred to the Department of Justice. Enforcement staff should appropriately anticipate and prepare for future extreme weather events when developing case resolutions by including injunctive relief in regulatory settlements that will be resilient to the projected impacts of climate change. Case teams may incorporate greener cleanup¹⁵ provisions in Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Resource Conservation and Recovery Act (RCRA) settlements, as well as green infrastructure provisions in Clean Water Act settlements to help with flood control and mitigating climate change via creation of carbon sinks.

3. Provide Technical Assistance and Build Climate Change Capacity Among EPA Staff and State and Local Partners

OECA will provide technical assistance and training to EPA staff and state and local partners as we continue to develop the necessary capacity and tools to support integrating climate change considerations into enforcement and compliance activities. In addition, OECA will continue to provide technical assistance to drinking water and wastewater systems to help them return systems to compliance, build operator capacity, and ensure ongoing sustainable, clean, and safe water that can withstand climate change. We will promote the use of tools for incorporating climate risk into infrastructure planning, such as the Climate Resilience Evaluation and Awareness Tool.¹⁶

In addition to providing external assistance, EPA will continue to develop and provide tools and training to enable enforcement and compliance staff to address climate change in all aspects of their work. Specifically, OECA's Climate Adaptation Network will expand the community of practice to help (i) build staff capacity and (ii) establish an electronic repository of climate mitigation, adaptation, and resilience approaches to serve as examples for consideration in future activities.

In the Clean Air Act 112(r) program, and, as appropriate, when using RCRA and CERCLA authorities, EPA enforcement and compliance staff shall, when appropriate, consider risks from natural hazards and climate change in inspection targeting and civil and criminal case investigations. EPA enforcement and compliance staff also will identify vulnerable facilities and situations and develop compliance assistance materials in cooperation with the Office of Land and Emergency Management to help the regulated community better plan for extreme weather events.

¹⁴ Safe Drinking Water Act § 1433, 42 U.S.C § 300i-2; *see also* [America's Water Infrastructure Act Section 2013: Risk and Resilience Assessments and Emergency Response Plans](#).

¹⁵ *See* EPA, [Greener Cleanups](#).

¹⁶ *See* EPA, [Climate Resilience Evaluation and Awareness Tool \(CREAT\)](#).



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

August 17, 2023

MEMORANDUM

SUBJECT: FY 2024 – 2027 National Enforcement and Compliance Initiatives

FROM: David M. Uhlmann

A blue ink signature of David M. Uhlmann, written in a cursive style, is positioned to the right of the "FROM:" line.

TO: Regional Administrators
Enforcement and Compliance Assurance Division Directors and Deputies
Superfund and Emergency Management Division Directors and Deputies
Regional Counsel and Deputies

For over 25 years, EPA has established national enforcement and compliance initiatives to address the most serious and widespread environmental problems facing the United States. These national initiatives, developed in a non-partisan way across administrations, have allowed EPA and its state partners to meet many of the goals of our environmental laws: healthier air, cleaner water, and reduced exposure to hazardous waste and toxic chemicals.

As the current initiative cycle draws to a close, during another summer of record heat, deadly wildfires, and catastrophic flooding, the United States faces new environmental challenges that demand an enforcement response: the existential threat of climate change, the scourge of PFAS contamination, and the reality that, for too long, the worst effects of pollution have plagued overburdened communities.

To meet these 21st century environmental challenges, the Office of Enforcement and Compliance Assurance (OECA) has selected six priority areas as National Enforcement and Compliance Initiatives (NECIs) for Fiscal Years 2024-2027. For the first time, we will focus enforcement and compliance resources on mitigating climate change, addressing exposure to PFAS, and protecting communities from carcinogenic coal ash contamination. We will strengthen our efforts to address hazardous air pollution in overburdened communities and continue existing initiatives focused on providing safe drinking water and reducing the risk of deadly chemical accidents.

Each of these initiatives addresses urgent environmental and public health challenges that would be difficult for EPA and its state partners to tackle without additional resources and concerted effort. All of the initiatives incorporate environmental justice considerations to ensure that the benefits of our Nation's environmental laws can be shared by everyone living in the United States. Taken together, these initiatives focus on significant noncompliance with environmental laws across all media—air, water, and land—so that law-abiding companies are not at a competitive disadvantage with polluters.

In selecting initiatives for the FY 2024-2027 cycle, OECA relied upon three criteria: (1) the need to address serious and widespread environmental issues and significant violations impacting human health and the environment, particularly in overburdened and vulnerable communities; (2) a focus on areas

CONCLUSION

Climate change is an existential threat that creates substantial risks for public health and safety, infrastructure, and ecosystems. As we do with all EPA programs, we will emphasize transparency and accurate reporting of the environmental and human health benefits derived from our climate actions, including the GHG equivalent emission reductions achieved in each enforcement matter. Our efforts to reduce GHG emissions over the next decade and our climate resiliency programs will determine what kind of world we leave for future generations. The climate strategy announced today reflects that reality.

cc: Assistant Administrators
Regional Administrators

where federal enforcement authorities, resources, and/or expertise are needed to hold polluters accountable and promote a level playing field; and (3) alignment with EPA’s Strategic Plan.¹

The initiatives selected by OECA advance all goals of EPA’s Strategic Plan with a particular focus on three cross-cutting goals: Goal 1: *Tackle the Climate Crisis*; Goal 2: *Take Decisive Action to Advance Environmental Justice*; and Goal 3: *Enforce Environmental Laws and Ensure Compliance*.² To address Goal 1, OECA selected a new initiative that would focus on mitigating climate change by reducing noncompliance with the Clean Air Act and the American Innovation and Manufacturing Act. To advance Goal 2, OECA incorporated environmental justice considerations, a core principle of our work, into each initiative. To meet Goal 3, OECA will strategically deploy its criminal and civil enforcement resources in each initiative, in ways that OECA has not done before, to hold polluters accountable, reduce noncompliance with the environmental laws, and protect communities from environmental harm.

To select the FY 2024-2027 NECIs, OECA solicited public comment via a Federal Register notice to provide opportunity for stakeholder engagement.³ In response, OECA received input from states, territories, and tribes, as well as from environmental groups, regulated entities, and the public, which informed the selection of the NECIs. The NECIs were developed in collaboration with the EPA regional offices, who will play a key role in the implementation of each initiative. OECA will provide updates on the results achieved by each NECI in our annual enforcement reports.

Each of the FY 2024-2027 NECIs, described in greater detail below, seek to bring meaningful public health and environmental protection to communities across the country; prevent and address unlawful activities; and uphold the rule of law so that all people living in the United States can breathe clean air, drink safe water, and live free from harmful pollution and the worst effects of climate change.

FY 2024 – 2027 NATIONAL ENFORCEMENT AND COMPLIANCE INITIATIVES

1. Mitigating Climate Change (new)

OECA selected *Mitigating Climate Change* as a new NECI because tackling the climate crisis is EPA’s top priority, and enforcement and compliance efforts that reduce greenhouse gas emissions will help limit the worst effects of climate change. Climate change poses a substantial threat to public health and safety, water resources, agriculture, infrastructure, and ecosystems. EPA’s FY 2022-2026 Strategic Plan prioritizes actions to reduce precursors to climate change. Addressing climate change using OECA’s enforcement and compliance tools is critical to EPA’s mission of protecting human health and the environment, including overburdened communities that will be most vulnerable to climate change.

The *Mitigating Climate Change* NECI will use OECA’s criminal and civil enforcement authorities to address three separate and significant contributors to climate change: (1) methane emissions from oil and gas facilities; (2) methane emissions from landfills; and (3) the use, importation, and production of hydrofluorocarbons (HFCs). Oil and gas systems and landfills are the second and third largest sources of methane emissions in the United States. Methane is a climate super-pollutant that is more than 25 times as potent as carbon dioxide at trapping heat in the atmosphere. By focusing on enforcement of long-standing air pollution requirements, such as New Source Performance Standards at oil and gas facilities

¹ Memorandum from Lawrence E. Starfield, Acting Assistant Administrator for OECA, [Updated Policy for EPA’s Enforcement and Compliance Initiatives](#) (Dec. 20, 2022).

² [FY 2022 – 2026 EPA Strategic Plan](#) (Mar. 2022).

³ [88 Fed. Reg. 2093](#) (Jan. 12, 2023).

and landfills, OECA can achieve the ancillary benefit of reducing methane emissions. If EPA promulgates new rules to reduce methane emissions in the future, enforcement of those requirements could be included in this initiative as well.

OECA also can help mitigate climate change by ensuring that the phasedown of HFCs, another climate super-pollutant, occurs under the schedule required by the American Innovation and Manufacturing Act (AIM Act) and the Kigali Amendments to the Montreal Protocol. HFCs are another potent greenhouse gas with a global warming potential hundreds to thousands of times greater than carbon dioxide. Prior phaseouts of ozone-depleting substances under the Montreal Protocol resulted in significant unlawful activity that required a strong enforcement response, especially at our borders. OECA will reduce harmful HFC emissions through criminal and civil enforcement of the AIM Act.

OECA has documented widespread noncompliance in all three of these areas, resulting in potentially tens of thousands of tons of unlawful emissions of greenhouse gases and other pollutants. This NECI will help achieve EPA's goals to combat climate change while also addressing significant noncompliance in specific industry sectors that are sources of harmful pollution.

2. Addressing Exposure to PFAS (new)

Due to the toxicity and persistence of per- and polyfluoroalkyl substances (PFAS) chemicals, and the breadth and scope of PFAS contamination throughout the country, OECA selected *Addressing Exposure to PFAS* as a new NECI. PFAS contamination is a significant priority for EPA and, while the regulatory framework for PFAS continues to develop across multiple statutes, OECA has already taken a number of enforcement actions to ensure compliance with existing statutes, including action to address an imminent and substantial endangerment to communities. OECA will increase those efforts, particularly where necessary to protect drinking water supplies, as part of this new initiative.

In addition, if EPA designates PFOA and PFOS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund), this NECI would focus on implementing EPA's PFAS Strategic Roadmap and holding responsible those who significantly contribute to the release of PFAS into the environment, such as major manufacturers and users of manufactured PFAS, federal facilities that are significant sources of PFAS, and other industrial parties. If PFOA and PFOS are listed as hazardous substances, OECA does not intend to pursue entities where equitable factors do not support CERCLA responsibility, such as farmers, water utilities, airports, or local fire departments, much as OECA exercises CERCLA enforcement discretion in other areas.

The key goals of the PFAS NECI 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 (e.g., Federal Facility Agreements) to prevent and address PFAS contamination, and address endangerment issues as they arise. Initial goals include:

- identifying and characterizing the extent of PFAS contamination near PFAS manufacturing/use facilities in the country, using authorities such as CERCLA, the Resource Conservation and Recovery Act, the Clean Water Act, and the Safe Drinking Water Act;
- performing oversight of PFAS characterization and control activities at federal facilities to ensure these facilities meet all environmental obligations and serve as a model for the regulated community; and

- continuing to address violations and imminent and substantial endangerment situations by major PFAS manufacturers, federal facilities, and other industrial parties who significantly contributed to the release of PFAS contamination into the environment.

Beginning in FY 2025, the Agency will build upon these initial goals by taking additional enforcement actions where appropriate. Activities under this NECI may expand if additional regulations are finalized.

3. Protecting Communities from Coal Ash Contamination (new)

OECA has selected *Protecting Communities from Coal Ash Contamination* as a new NECI for the next cycle. In 2021, coal-fired electric utilities generated almost 80 million tons of coal combustion residuals (CCR), more commonly known as coal ash. Coal ash contains contaminants such as mercury, cadmium, chromium, and arsenic, which are associated with cancer and other serious health effects. There are approximately 300 regulated CCR facilities nationwide, comprised of approximately 775 coal ash units (240 landfills and 535 surface impoundments).

Neighborhoods located near coal ash facilities are often communities with environmental justice concerns. These communities are likely to face existing environmental burdens that put them at greater cumulative risk from the environmental impacts associated with proximity to coal ash landfills or impoundments, including harmful air pollution and threats to drinking water sources.

Noncompliance with the CCR requirements under the Resource Conservation and Recovery Act appears to be widespread. Many utilities are not complying with the current performance standards and monitoring and testing requirements. In addition to serious and widespread noncompliance, the CCR regulatory program is mainly a federally implemented program, with only three states currently approved to implement a regulatory program. This NECI focuses on conducting investigations, particularly at coal ash facilities impacting vulnerable or overburdened communities; taking enforcement action at coal ash facilities that are violating the law; and protecting and cleaning up contaminated groundwater, surface water, and drinking water resources.

4. Reducing Air Toxics in Overburdened Communities (modified from prior cycle)

OECA has selected *Reducing Air Toxics in Overburdened Communities* as a modification to its existing initiative started in FY 2020 as *Creating Cleaner Air for Communities*. The original initiative addressed the adverse health and environmental effects from exceedances of the National Ambient Air Quality Standards for ozone to which sources of volatile organic compounds contribute, as well as health impacts on communities from emissions of hazardous air pollutants (HAPs). In the Federal Register notice seeking public comment on the selection of NECIs, OECA stated its plan to continue this initiative because OECA is committed to reducing air pollution in communities across the country.

Recognizing the need to address communities that suffer impacts from higher levels or multiple sources of toxic air pollution, OECA has decided to focus the FY 2024-2027 air enforcement initiative on overburdened communities selected by each Region that are facing high levels of toxic air pollution from HAPs. Each Region will make those selections in partnership with states based on fence-line monitoring and other sophisticated tools that allow detection of the worst forms of toxic air pollution. Reducing air toxics will result in corollary benefits of reducing concentrations of criteria air pollutants such as ozone and particulate matter because HAPs can be comprised of criteria pollutant precursor

emissions. Core air enforcement program activities will also contribute to reducing criteria air pollutant concentrations.

Many communities overburdened by air pollution are impacted by HAPs, such as benzene, ethylene oxide, and formaldehyde. These pollutants are known or suspected to cause cancer or other serious neurological, reproductive, developmental, and respiratory health effects when breathed or ingested through the food chain, including harm to children. This initiative will seek to target, investigate, and address noncompliance with HAP regulations with a focus on sources of HAPs in communities already highly burdened with pollution impacts. Where noncompliance is found and enforcement is appropriate, Regions will engage with community groups on appropriate relief to address the community's concerns.

5. Increasing Compliance with Drinking Water Standards (continued from prior cycle)

OECA has selected *Increasing Compliance with Drinking Water Standards* as an initiative to continue into the next cycle.⁴ This initiative, which began in FY 2020, seeks to ensure that the approximately 50,000 regulated drinking water systems that provide water to residents year-round (referred to as Community Water Systems or CWSs) comply with the Safe Drinking Water Act (SDWA). In FY 2022, 18,282 CWSs had at least one SDWA violation, and 2,854 of those systems had a health-based violation. Many overburdened communities, including those in Indian country, often face challenges meeting their obligations under SDWA.

OECA is continuing this initiative for the FY 2024-2027 cycle. While OECA, working with the states, has made considerable progress in improving SDWA compliance, further improvement in compliance is needed. Each year thousands of CWSs continue to violate one or more drinking water standards, exposing millions of people to potential health risks. In the next cycle of this NECI, OECA will ramp up its field presence, pursue strategic enforcement to reduce noncompliance, and offer more compliance assistance to prevent and address public health risks. OECA will continue to promote communication and understanding of the NECI goals with the Association of State Drinking Water Administrators and its members. OECA will continue to support and work with states, tribes, territories, local governments, and the regulated community to ensure delivery of safe water to communities.

6. Chemical Accident Risk Reduction (continued from prior cycle)

OECA has selected *Chemical Accident Risk Reduction* as an initiative to continue into the next cycle. This initiative seeks to reduce risks to human health and the environment by decreasing the likelihood of chemical accidents. Thousands of facilities nationwide make, use, and store extremely hazardous substances. OECA has found that many facilities regulated under the risk management program of Section 112(r) of the Clean Air Act are neither adequately managing the risks they pose nor ensuring the safety of their facilities to protect workers, first responders, and surrounding communities (nearly half of which are communities with environmental justice concerns).

The failure to implement required risk management programs at facilities handling extremely hazardous substances can result in catastrophic accidents that cause fatalities and serious injuries, evacuations, and shelter-in-place orders. In addition to addressing widespread violations, the 112(r) regulatory program is primarily a federally implemented program, with only a few state-delegated enforcement programs.

⁴ This initiative was previously named *Reducing Noncompliance with Drinking Water Standards at Community Water Systems*.

Work under this NECI will focus on inspecting and addressing noncompliance at facilities using two extremely hazardous substances that pose high risk to communities: anhydrous ammonia and hydrogen fluoride. Anhydrous ammonia, predominantly used as an agriculture fertilizer or a refrigerant, poses an inhalation risk due to its toxicity, and is the most frequently released hazardous chemical from facilities regulated under Section 112(r). In addition, recent incidents involving the release or potential release of highly toxic hydrogen fluoride, used in the petrochemical manufacturing, and concerns about the potentially catastrophic consequences of a hydrogen fluoride release support a focus on these facilities using these hazardous chemicals in their processes.

Facilities using anhydrous ammonia and hydrogen fluoride have had dangerous releases, some of which nearly caused catastrophic impacts on surrounding communities, while many others required medical response and evacuations and caused serious injury and fatalities. OECA will use all available enforcement tools to address violations of risk management requirements, including holding entities criminally responsible.

RETURN TO CORE ENFORCEMENT PROGRAM

In addition to selecting the six initiatives described above, OECA will return the following three current initiatives to the standard “core” enforcement program at the end of FY 2023. Initiatives returned to the core enforcement program remain important areas for enforcement and compliance efforts, even though they are no longer national initiatives. As part of the core program, in collaboration with authorized state programs, OECA and the Regions will continue to conduct inspections and pursue enforcement actions.

1. Reducing Toxic Air Emissions from Hazardous Waste Facilities

OECA began this initiative in FY 2017 and significantly raised visibility and awareness of the RCRA organic air emissions standards among regulators and the regulated community. Since the start of this NECI, EPA concluded over 100 enforcement cases and prevented the release of over 120 million pounds of total air pollutants to the environment. Nearly all pollutant reductions were from facilities located in overburdened communities. In addition to taking enforcement actions to compel compliance and create deterrence, EPA also worked with states and industry to provide training, with the goal of improving compliance within the regulated community. Substantial training resources and opportunities now exist, including web-based trainings available to regulators, and private training companies now include coverage of these RCRA organic emissions regulations in their curricula. Along with compliance monitoring and enforcement actions where appropriate, OECA will continue efforts to develop training materials for both industry and regulators as well as build state capacity in this program.

2. Stopping Aftermarket Defeat Devices for Vehicles and Engines

OECA met the goals of this NECI by developing a national enforcement program in all ten EPA Regions, addressing serious violations through both civil and criminal enforcement actions, reducing pollution and improving air quality, and achieving general deterrence through robust enforcement. Since the inception of this initiative in FY 2020, EPA resolved over 130 cases, which addressed over 539,000 violations. Accordingly, OECA is returning work in this area to the core program at the end of FY 2023. OECA and the Regions will continue to investigate and pursue enforcement against upstream manufacturers and distributors of defeat devices to leverage the greatest benefits for human health and the environment, as well as continue to provide training and coordinate with states and maintain outreach and compliance assistance to industry groups.

3. Reducing Significant Noncompliance with NPDES

OECA began this national initiative to improve compliance in the Clean Water Act permitting program (the “NPDES” program). For decades, the level of significant noncompliance (SNC) in the NPDES program had been over 20% – meaning that approximately one out of every five permittees had significant violations of their permit every quarter, every year. Under this initiative, in partnership with the states, EPA exceeded the NECI goal and achieved over a 50% reduction in SNC. Much of the success of the initiative involved vastly improving the completeness and accuracy of NPDES compliance data. This means that EPA and states can now clearly see which facilities are in violation of their permit and can prioritize these facilities for enforcement or technical assistance. EPA and states will continue to work toward reducing the SNC rate further, assuring the progress gained is not lost, and will also continue to work with the Association of Clean Water Administrators to support collaborative state and EPA efforts in the NPDES compliance and enforcement program.

NOT SELECTED

In the Federal Register notice on the NECIs, OECA sought input on a potential NECI focused on reducing exposure to lead. Ongoing exposures to lead via lead-based paint, drinking water, soil, and air emissions present a health risk to many people nationwide, especially in vulnerable or overburdened communities. Reducing lead exposure is a top EPA priority. Rather than develop a separate, enforcement program-led NECI, however, OECA believes the better approach is to participate in the established Agency-wide lead initiative to tackle lead contamination in all environmental media. EPA’s Lead Strategy⁵ sets forth a comprehensive strategy to implement a wide range of authorities to address noncompliance, obtain cleanups, deter future violations, and mitigate harm. The enforcement and compliance assurance program will contribute to the Agency’s overall efforts to address lead exposure as outlined in the Lead Strategy.

CONCLUSION

These national enforcement and compliance initiatives will help EPA address the most significant public health and environmental challenges, protect vulnerable and overburdened communities, and promote greater compliance with our environmental laws. EPA recognizes that companies throughout the United States invest significant resources to meet and often exceed their obligations under the environmental laws. The Agency values those efforts since, as Administrator Regan has said, we cannot regulate our way out of every environmental problem—a maxim that holds true for enforcement.

But those who break the law, who put the environment and the health of our communities at risk, and who seek an unfair competitive advantage must be held accountable based on the law and the facts. EPA will utilize its criminal and civil enforcement tools fairly and strategically to protect communities in the United States from the harmful effects of illegal pollution, to deliver on the full promise of America’s environmental laws, and to provide a sustainable future for our children and grandchildren.

cc: Assistant Administrators
OECA Office Directors and Deputies
OECA Division Directors

⁵ [*EPA Strategy to Reduce Lead Exposures and Disparities in U.S. Communities*](#) (Oct. 2022).

QUESTIONS? 03



15

AUSTIN
BRUSSELS
DALLAS
DUBAI
HOUSTON
LONDON
NEW YORK
PALO ALTO
RIYADH
SAN FRANCISCO
SINGAPORE
WASHINGTON

bakerbotts.com

©Baker Botts LLP, 2024. Unauthorized use and/or duplication of this material without express and written permission from Baker Botts LLP, is strictly prohibited. Excerpts and links may be used, provided that full and clear credit is given with appropriate and specific direction to the original content.

16



03 **FIRESIDE CHAT ON CHALLENGING & EMERGING SAFETY ISSUES**

NO MATERIALS FOR THIS SESSION



04 MAJOR ENERGY PROJECT OUTLOOK



FEDERAL ENERGY REGULATORY COMMISSION

December 20, 2023

Hon. Michael S. Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20004

RE: Docket No. EPA-HQ-OAR-2023-0072

Dear Administrator Regan:

In my August 8, 2023, letter to you,¹ I explained my concern that the Environmental Protection Agency had not consulted the Federal Energy Regulatory Commission (FERC or Commission) about the implications of the EPA's proposed *New Source Performance Standards*² for the reliability of the bulk electric system. In a letter to Ranking Members Barrasso and Capito, I explained additional concerns that I have that, by its own terms, the Proposed Rule lacks a comprehensive analysis of reliability.³ Though the EPA has taken several positive steps, it has not remedied this fundamental shortcoming.

On November 9, the Commission held its annual reliability technical conference. Though Mr. Joseph Goffman, the principal deputy assistant administrator of the Office of Air and Radiation, was only afforded an hour to discuss the intricacies of the proposed rule with the Commission, I was heartened by Mr. Goffman's enthusiasm to learn more about the complex interactions between the EPA's proposed regulation and issues within FERC's jurisdiction, such as the operation of the RTOs/ISOs that operate much of the country's electric system. I was further heartened when I saw

¹ Comment of Commissioner James P. Danly on the EPA's proposed New Source Performance Standards for Greenhouse Gas Emissions, at 2 (Aug. 8, 2023), <https://www.ferc.gov/news-events/news/comment-commissioner-james-p-danly-epas-proposed-new-source-performance-standards>.

² *New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; & Repeal of the Affordable Clean Energy Rule*, 88 Fed. Reg. 33,240 (proposed May 23, 2023) (Proposed Rule).

³ Commissioner Danly's November 8, 2023 Initial Response to November 2, 2023 Letter of Ranking Member Barrasso and Ranking Member Capito, <https://www.ferc.gov/news-events/news/commissioner-danlys-initial-response-ranking-member-barrasso-and-ranking-member> (November 8 Letter).



the issuance of the supplemental notice of proposed rulemaking, seeking comment on “reliability mechanisms.”⁴ This shows the EPA’s recognition of its obligation ensure that its rules are based upon the review of a complete record.

I remain concerned, however, that the EPA Supplemental Notice misses the mark with respect to the additional information that it solicits. The EPA is seeking comment on “reliability mechanisms,” that is, steps that balancing authorities and others can take when reliability challenges *arise*.⁵ It does not seek comment on the impact on reliability that the EPA’s rule could *cause*. Comments on such mechanisms will not remedy a failure to conduct a comprehensive reliability analysis on the record.

Part of the problem with EPA’s inquiry into the reliability consequences of its rulemaking comes down to the EPA’s muddling of two separate, but related concepts, perhaps due to FERC’s somewhat late inclusion in EPA’s deliberations.⁶ Reliability, put simply, is the bulk power system’s ability to operate continuously within ordinary parameters without interruption. Resource adequacy is something different. It is the system’s ability to meet electric demand with sufficient generation to satisfy load requirements at all times. It is possible to have a system that is resource adequate but which is unreliable. Imagine a scenario in which you have more generation than necessary to meet load requirements, but because of continuous faults in the transmission lines, the power cannot get to where it is needed. Conversely, you can have a reliable system that is not resource adequate. Think of a system in which all mandatory reliability standards are fully implemented and the transmission system is capable of transmitting available power, but because the system has failed to build sufficient generation to meet peak demand, insufficient power is available regardless of transmission capacity.

As I discussed with Mr. Goffman during the course of the 8 minutes I had during his appearance at the annual reliability technical conference: EPA appears not to have considered a critical aspect of the proposed rule, one that sounds in *both* reliability *and* resource adequacy: the effects of the proposed rule on FERC-jurisdictional markets, the ISOs and RTOs, which are the mechanisms by which power is procured for nearly two thirds of Americans.

In the old model of utility regulation, as was alluded to in my colloquy with Mr. Goffman during the technical conference, vertically integrated utilities, under the watchful eye of their state regulatory commissions, ensured resource adequacy and reliability through the development of

⁴ Environmental Protection Agency, Supplemental Notice of Proposed Rulemaking, New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule, 88 Fed. Reg. 80682, 80683 (Nov. 20, 2023) (EPA Supplemental Notice), <https://www.regulations.gov/document/EPA-HQ-OAR-2023-0072-8106>.

⁵ “The EPA is soliciting detailed comment on whether the Agency should include a specific mechanism or mechanisms to address grid reliability needs that may arise during implementation of its final rules....” *Id.* at 80684.

⁶ This is the same confusion that the anonymous commenter on EPA Resource Adequacy Technical Support Document during the interagency process that I reference in my November 8 Letter. *See* November 8 Letter at 2.



integrated resource plans developed by the utilities and approved by their state commissions. The utilities had every incentive to develop plans that would ensure both reliability and resource adequacy because they operated under a legal obligation to serve their customers at all times and were liable for failure. Times have changed. Now, the majority of Americans are served by distributors who procure electric power from one or another of FERC's wholesale markets. Generally speaking,⁷ in the regions that are served by the markets, the generators participating in those markets do not have the same duty to serve. The markets were designed to obtain the requisite quantity of generation through procurement auctions with price signals and incentives designed to do the work that the utilities' planning processes had once done. Indeed, one might say that this was in part the very reason for developing the markets—to take generation choices out of the hands of central planners and let market forces deliver the most efficient power possible.

Because the markets are the *sole means* by which to procure sufficient generation to provide power to millions of Americans, it is simply impossible to arrive at an informed understanding of the consequences of the proposed rule without a searching exploration of the rule's effects on the markets, particularly the consequences the rule will have on price formation, which is the means by which the markets create incentives for needed new entry and the retention of existing, needed generation. Merely declaring the assumption that the markets will ensure “orderly” retirements is insufficient. Reasonable and reasoned predictions as to the final rule's effects on the markets, based on actual market data, are absolutely essential. To finalize the rule absent this analysis will be to push the electric system off a cliff without knowing whether it will hit feathers or asphalt.

Similarly, it cannot be rational or responsible to pin the hopes for a reliable and adequate electric system on establishing “reliability off-ramps.” Conducting the market analysis that I describe above is a necessary precondition to determining just how much or how often the reliability off-ramps may have to be relied upon and the degree to which their expected employment will both undermine the purpose of the rule and further skew the prices upon which the markets rely to procure sufficient capacity to meet demand.

⁷ In some of the market regions, such as MISO, utilities remain vertically integrated.



Should EPA find itself unable to conduct this analysis based on the evidence so far adduced in this proceeding, I respectfully submit that it must open yet another comment period, one that specifically solicits comments on the proposed rules effects on markets and price formation, rather than focusing solely on the fixes to a problem which, while implicitly acknowledged, is of unknown scope and consequence. A robust and searching analysis into the proposed rule's effects on the market mechanisms through which power is procured for the majority of Americans is critical to understanding the reliability (and resource adequacy) effects of the rule. To promulgate a final rule in the absence of such analysis would be irresponsible and unreasoned.

Sincerely,

A handwritten signature in black ink that reads "James Danly". The signature is written in a cursive, flowing style.

James P. Danly
Commissioner



FEDERAL ENERGY REGULATORY COMMISSION

September 28, 2023

The Honorable Charles E. Schumer
United States Senate
Washington, D.C. 20510

Dear Majority Leader Schumer,

Thank you for your July 20, 2023 letter¹ in which you urge FERC to “strengthen and finalize”² its proposed rulemakings on transmission planning and cost allocation (Transmission Planning NOPR)³ and interstate transmission backstop siting authority (Transmission Siting NOPR).⁴ Specifically, you express concern that the Transmission Planning NOPR is “not strong enough to ‘remedy deficiencies in the Commission’s existing regional transmission planning and cost allocation requirements’” in order to achieve “our electric reliability, affordability, and clean energy goals.”⁵ Among other suggestions, you recommend that FERC “[d]efin[e] a set of benefits and requir[e] the consideration of that defined list from the outset,” establish a “clear cost allocation

¹ Senator Schumer July 20, 2023 Letter, Docket Nos. RM22-14-000, et al. (Accession No. 20230724-4001) (Letter).

² *Id.* at 3.

³ *Building for the Future Through Elec. Reg’l Transmission Planning & Cost Allocation & Generator Interconnection*, 179 FERC ¶ 61,028 (2022) (Transmission Planning NOPR).

⁴ *Applications for Permits to Site Interstate Elec. Transmission Facilities*, 181 FERC ¶ 61,205 (2022) (Transmission Siting NOPR).

⁵ Letter at 1.



mechanism,” and require public utilities to conduct a long-term planning scenario that considers the “high penetration of variable energy resources.”⁶

I, too, believe that long-term transmission planning and permitting reform is needed.⁷ It is troubling that project timelines for transmission projects developed to improve reliability and lower electricity costs often take over ten years. Even more concerning is the fact that, by the time such projects are actually placed into service, yet more transmission is often needed to address declining reliability margins which have tightened during the project’s pendency and construction. For instance, in January 2023, the New York Independent System Operator, Inc. (NYISO) stated that “[e]ven with [the Champlain Hudson Power Express Transmission Line] scheduled to begin operation in 2026, the [reliability] margin . . . narrows again to about 100 MW by 2032 due to increased demand” and without the project “in only a few years margins would be such that there will be more electricity demand on peak days than what the grid can provide.”⁸ Reliability concerns in New York may be likely to arise even sooner. NYISO recently announced that “[it] issued its second quarter 2023 STAR report” which “identified a reliability need in 2025 of up to 446 MW in New York City to address a deficiency in transmission security.”⁹

While I completely agree that reform is needed, strengthening and finalizing the Transmission Planning NOPR and Transmission Siting NOPR will *not* lead to the development of the new transmission necessary to reliably deliver electricity at an affordable price. Both rulemakings advance bad policy and are inconsistent with the

⁶ *Id.* at 1-2.

⁷ See Transmission Planning NOPR, 179 FERC ¶ 61,028 (Danly, Comm’r, dissenting at P 1) (“I welcome long term transmission planning reform.”).

⁸ *Timing of CHPE Transmission Project Vital to Future Grid Reliability*, NEW YORK ISO (Jan. 9, 2023), <https://www.nyiso.com/-/timing-of-chpe-transmission-project-vital-to-future-grid-reliability#:~:text=The%20two%2C%20five%2Dinch%2D,come%20online%20in%20mid%2D2026>.

⁹ NEW YORK ISO, *2023 Power Trends: A Balanced Approach to a Clean and Reliable Grid*, at 16 (Aug. 14, 2023), <https://www.nyiso.com/documents/20142/2223020/2023-Power-Trends.pdf/7f7111e6-8883-7b10-f313-d11418f12fbf?t=1686132123808>.



authority conferred upon FERC by Congress.¹⁰ The Transmission Planning NOPR attempts to use the Federal Power Act (FPA),¹¹ a statute that sounds in rate regulation and reliability, to achieve the particular (and inapposite) policy goal of encouraging massive transmission build-out to facilitate a transition to an aspirational renewable future.¹² The Transmission Siting NOPR, though designed by Congress to provide FERC with the power to ensure that the obstacles presented by state-level permitting processes can be overcome, has advanced a process so burdened by unnecessary NEPA analysis that it threatens to slow down, rather than accelerate, transmission siting.¹³

Without significant revision or Congressional amendment to the FPA, should the proposed rules be finalized, they are likely to be the subject of protracted litigation.

Transmission Planning Reform

To understand the options for reforming transmission planning, a general overview of the relevant provisions in the FPA may be helpful. Under FPA section 205,¹⁴ public utilities (including Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs)) can propose their own transmission planning

¹⁰ “FERC is a ‘creature of statute,’ having ‘no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress.’” *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)) (emphasis in *Atl. City Elec. Co.*).

¹¹ Transmission Planning NOPR, 179 FERC ¶ 61,028 (Danly, Comm’r, dissenting at P 3) (“[the majority] seek to use the FPA, a statute that sounds in rate regulation and reliability, as a tool to achieve a particular (and inapposite) policy goal”).

¹² *Id.*, (Danly, Comm’r, dissenting at P 2) (“The NOPR’s primary purpose is to achieve narrow environmental policy objectives, not to address legitimate requirements under the Federal Power Act like ensuring just and reasonable rates or reliability. After all, as the NOPR itself repeatedly admits, it is ‘driven by changes in resource mix and demand,’ notwithstanding its references to genuine problems with existing transmission planning.”) (footnotes omitted).

¹³ Transmission Siting NOPR, 181 FERC ¶ 61,205 (Danly, Comm’r, concurring at PP 1-2, 9).

¹⁴ 16 U.S.C. § 824d.



regimes. All FERC decides is whether the proposal is “just and reasonable.”¹⁵ FERC has not been empowered to determine “whether [one] method is more appropriate than a [another] method, but rather whether the [proposed] method is reasonable and adequate.”¹⁶ Courts have described FERC’s role as “essentially passive and reactive.”¹⁷

Under FPA section 206, FERC can investigate whether an existing transmission planning process is just and reasonable.¹⁸ After conducting a hearing, FERC can then impose a new transmission planning regime but only after making two findings: (1) that the existing rate is unjust and unreasonable and (2) that the replacement rate is just and reasonable.¹⁹ The courts have described FERC’s burden as “proving that the existing rate is *unlawful*.”²⁰

Whether acting under FPA section 205 or 206, FERC must support the facts it finds with substantial evidence²¹—that is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”²² In addition, FERC must “articulate

¹⁵ *Id.* § 824d(a), (e).

¹⁶ *Neb. Pub. Power Dist. v. FERC*, 957 F.3d 932, 943 (8th Cir. 2020) (quoting *Cities of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984)).

¹⁷ *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656, 662 (D.C. Cir. 2017) (quoting *City of Winnfield v. FERC*, 744 F.2d 871, 875-76 (D.C. Cir. 1984)).

¹⁸ 16 U.S.C. § 824e; *see also* 18 C.F.R. § 385.309 (regulations on notice of orders to show cause).

¹⁹ *Id.*

²⁰ *Emera Me. v. FERC*, 854 F.3d 9, 24 (D.C. Cir. 2017) (quoting *Ala. Power Co. v. FERC*, 993 F.2d 1557, 1571 (D.C. Cir. 1993)) (emphasis in *Emera Me.*).

²¹ 16 U.S.C. § 825l(b) (“The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.”). The Administrative Procedure Act (APA) requires similarly. 5 U.S.C. § 706 (“The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence.”).

²² *Consol. Edison Co. of N.Y., Inc. v. NLRB*, 305 U.S. 197, 229 (1938).



a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”²³

The Transmission Planning NOPR seeks to unilaterally impose transmission planning requirements on all public utility transmission providers under FPA section 206 “to meet transmission needs driven by changes in the resource mix and demand.”²⁴ This means that in order to satisfy the two prongs of FPA section 206, FERC must prove (1) that transmission planning across the nation—amongst all FERC’s varied regions, with different state regulatory regimes, utilities, and markets, each with their own tariff—is unjust and unreasonable and (2) that replacing all of the extant transmission planning processes with what many have described as FERC’s “highly prescriptive”²⁵—but also highly ambiguous—proposed reforms is just and reasonable.

Such a plan seems, at best, unwise. At worst, it will prove to be unlawful, either as a regulatory exercise in excess of our jurisdiction, or as a uniform, nation-wide mechanism imposed absent the requisite evidentiary showing. Several comments call into question whether existing transmission planning processes, which vary widely across

²³ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *see also id.* at 56 (“failed to offer the rational connection between facts and judgment required to pass muster under the arbitrary and capricious standard”); 5 U.S.C. § 706(2)(A) (“The reviewing call shall—hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.”).

²⁴ Transmission Planning NOPR, 179 FERC ¶ 61,028 at P 3 (citation omitted).

²⁵ *See, e.g.*, NYISO August 17, 2022 Comments, Docket No. RM21-17-000, at 3 (Accession No. 20220817-5198) (NYISO Comments); *see also* Midcontinent Independent System Operator, Inc. September 19, 2022 Reply Comments, Docket No. RM21-17-000, at 2 (Accession No. 20220919-5217) (describing the Transmission NOPR as proposing “overly-prescriptive requirements”); California Independent System Operator Corp. August 17, 2022 Comments, Docket No. RM21-17-000, at 3 (Accession No. 20220817-5290) (similar); Organization of PJM States, Inc. August 17, 2022 Comments, RM 21-17-000, at 10 (Accession No. 20220817-5296) (similar).



the country, are unlawful.²⁶ Indeed, comments jointly filed by the New York State Public Service Commission and New York State Energy Research and Development Authority (collectively, New York State Agencies) argue that NYISO’s “Public Policy Transmission Planning Process [(PPTPP)], along with other, State-led efforts *are working*.”²⁷ Similarly, New York Transmission Operators, including New York Public Power Authority (NYPA) and Long Island Power Authority, argue that “substantial reform . . . is not required. New York *has been doing very well* planning and developing both regional and local transmission facilities.”²⁸ State regulators and market monitors in other regions argue similarly.²⁹

²⁶ See, e.g., National Rural Electric Cooperative Association August 18, 2022 Initial Comments, Docket No. RM21-17-000, at 14 (Accession No. 20220817-5316) (“[National Rural Electric Cooperative Association (NRECA)] . . . is not aware of evidence to support a finding that Commission-jurisdictional transmission rates are unjust, unreasonable, unduly discriminatory or preferential *because of the deficiencies in the Commission’s existing regional transmission planning and cost allocation requirements identified in the NOPR*.”) (emphasis in original) (citation omitted); *id.* at 15 (“existing regional transmission planning appear to be working reasonably well for many of NRECA’s members in many other areas of the country”).

²⁷ New York State Public Service Commission, et al. August 17, 2022 Comments, Docket No. RM21-17-000, at 5 (Accession No. 20220817-5263) (New York State Agencies Comments) (emphasis added).

²⁸ New York Transmission Owners August 17, 2022 Initial Comments, Docket No. RM21-7-000, at 4 (Accession No. 20220817-5212) (emphasis added) (New York TOs Comments); *id.* at 7 (“New York’s existing, *successful*, and ongoing planning processes”) (emphasis added).

²⁹ North Carolina Utilities Commission, et al. August 17, 2022 Comments, at 5 (Accession No. 20220817-5286) (“Up to this point, we have found the current regional transmission planning in [Southeast Regional Transmission Planning (SERTP)] to have been adequate, in which most transmission has been constructed to meet reliability requirements. In particular, as it relates specifically to North Carolina, we do not agree with the Commission’s conclusion that the growth in interconnection-related network upgrades demonstrates a failure of regional transmission planning. As the SERTP Sponsors informed the Commission . . . , they have collectively added 3,158 miles of new transmission and 6,989 miles of uprates in the period of 2015–2020, such that



It is also questionable whether the Transmission Planning NOPR can show that that top-down replacement transmission planning process that would apply to every public utility, in every state, and in every market, would be just and reasonable.³⁰ Respectfully, FERC’s ability to impose such changes (and defend them on appeal) would be even more difficult if it were to adopt your recommendations to prescribe a defined set of benefits and a long-term scenario, which some have cautioned could “lead[] to more conflict”³¹ and “increase reliability risks on the grid.”³²

Any top-down process unilaterally imposed by FERC is virtually certain to be vigorously opposed in many regions. Indeed, New York State Agencies urged that FERC “should confirm in its final rule that . . . the state should be afforded a central role in

approximately 12% of all transmission in the region consists of new or uprated lines.”) (NCUC Comments); *see also* Independent Market Monitor for PJM August 18, 2022 Comments, Docket No. RM21-7-000, at 2 (Accession No. 20220818-5017) (“Many of the design flaws that motivated this NOPR are not present in PJM. As one example . . . it is not true in PJM that investments associated with interconnections have been disproportionately large.”) (PJM IMM Comments).

³⁰ *See, e.g.*, NYISO Comments at 3 (“[T]he NOPR also proposes certain highly prescriptive requirements that do not account for the differences among the planning regions that have resulted in unique and varying transmission planning and interconnection approaches. These requirements could create needless administrative burdens on the planning region and impede its effective and timely performance of transmission planning.”); Chair Dwight D. Keen of Kansas Corporation Commission August 18, 2022 Comments in Opposition, Docket No. RM21-17-000, at 2 (Accession No. 20220818-5008) (“[T]here is no evidence that adopting the NOPR will improve interregional cooperation or will inure to the benefit of ratepayers or accomplish the FERC core missions of ensuring just and reasonable rates and ensuring reliability.”). One commenter suggested that top-down replacement would be inconsistent with section 217(b)(4) of the FPA, 16 U.S.C. § 824q(b)(4), which authorizes FERC to “facilitate[] the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy the service obligations of the load-serving entities” *See* NRECA Comments at 17.

³¹ The ISO/RTO Council August 17, 2023 Initial Comments, Docket No. RM21-17-000, at 5 (Accession No. 20220817-5150) (emphasis omitted).

³² NRECA Comments at 19.



determining the scenarios to be studied, the specific project benefits to be evaluated, and the quantifiable metrics used to assess the benefits that may be achieved through transmission development.”³³ NYPA together with several other New York Transmission Owners reiterated the same point stating, “active state involvement . . . is critically important for New York.”³⁴ New York State Agencies, along with many others, urged FERC to adopt a bottom-up approach that accommodates regional differences.³⁵

³³ New York State Agencies Comments at 8.

³⁴ New York TOs Comments at 6.

³⁵ New York State Agencies Comments at 7 (“We urge the Commission to ensure that any final rule in this proceeding is sufficiently flexible to accommodate regional differences and avoid disrupting the processes already in place and otherwise underway in New York that are working well for the region.”); Southwest Power Pool, Inc. August 17, 2022 Comments, Docket No. RM21-17-000, at 18 (Accession No. 20220817-5141) (“How and when transmission benefits are calculated and incorporated in any regional transmission planning assessment should be at the discretion of each public utility transmission provider and its stakeholders. This would allow for agility in process decisions to balance the value the analysis provides with the burden of the effort.”); ISO New England Inc. August 17, 2022 Comments, Docket No. RM21-17-000, at 5 (Accession No. 20220817-5091) (“Individual regions should be permitted to determine the benefits that will lead to transmission in the region.”); NYISO Comments at 39 (“The final rule should confirm that each planning region is not required to use the specific benefits described in the NOPR While, in practice, the NYISO already uses most of the 12 illustrative benefits identified in the NOPR, the NYISO should be permitted to retain its flexibility to identify, with input from state entities and stakeholders, the benefits used in its processes and how such benefits are calculated.”); *id.* at 11 (“The final rule should not mandate strict requirements concerning how long-term transmission planning must be conducted.”); New York TOs Comments at 15 (“While the NOPR’s list of benefits is largely in line with those the NYISO already uses in the PPTPP process, each planning region should be allowed to identify the types of benefits that are relevant and may be considered to discipline benefit/cost analysis of proposed high-voltage transmission solutions.”); American Public Power Association August 17, 2022 Initial Comments, Docket No. RM21-17-000, at 46 (Accession No. 20220817-5214) (“[American Public Power Association] reiterates its comments above that the



Without satisfying the two-prong test in FPA section 206, and basing those findings upon substantial evidence, FERC will be unable to finalize—let alone strengthen—the Transmission Planning NOPR. Given the legal risk presented by such a rule, the likely opposition it will face if implemented in its current form, and the protracted litigation that is nearly certain to follow, FERC would be well-advised to close this proceeding and seek to reform transmission planning either by encouraging public utilities to file their own transmission planning reforms under FPA section 205 or issue section 206 orders requiring the RTOs—which is where we find most of the problems in transmission planning—to show cause why their existing processes are just and reasonable.

I also caution you as to the consequences of implementing your recommendation that FERC revise the Transmission Planning NOPR to require a cost allocation method when “any state withholds support on a cost allocation method.”³⁶ The result of such a rule would be that ratepayers in states with different public policy goals would be forced to pay for another’s state’s policy objectives.³⁷ Absent legislation, under longstanding case law,³⁸ such a cost allocation mechanism could not be found to be just and reasonable under the FPA. Ratepayers can only be required to pay rates that are roughly commensurate with the benefits they receive from transmission projects.³⁹ If a state receives no benefits from a transmission project, it cannot be said, under the law, to be “act[ing] as [a] free rider[] and avoid[ing] any costs.”⁴⁰

Commission should not prescribe any particular definition of benefits or beneficiaries, and should instead allow regional flexibility.”).

³⁶ Letter at 2.

³⁷ See Transmission Planning NOPR, 179 FERC ¶ 61,028 (Danyl, Comm’r, dissenting at P 9).

³⁸ See *Ill. Com. Comm’n v. FERC*, 576 F.3d 470 (7th Cir. 2009); see also *Ill. Com. Comm’n v. FERC*, 721 F.3d 764 (7th Cir. 2013).

³⁹ *Ill. Com. Comm’n v. FERC*, 576 F.3d at 476 (“FERC is not authorized to approve a pricing scheme that requires a group of utilities to pay for facilities from which its members derive no benefits, or benefits that are trivial in relation to the costs sought to be shifted to its members.”).

⁴⁰ Letter at 2.



I am not alone in my concern that the socialization of transmission costs will lead to inequitable and unlawful ratepayer burdens. New York State Agencies have jointly “urge[d] that any final rule . . . make clear that cost allocation for public policy-driven projects should be subject to state review and approval.”⁴¹ The Public Service Commission for West Virginia stated that it “opposes any changes in transmission cost allocation that would require West Virginia customers, or customers of any State, to involuntarily pay for new transmission facilities that are needed to support the public policy generation choices of other States.”⁴² Several other state agencies have made similar arguments.⁴³

⁴¹ New York State Agencies Comments at 14.

⁴² Public Service Commission of West Virginia October 17, 2022 Reply Comments, Docket No. RM21-17-000, at 2-3 (Accession No. 20221017-5016).

⁴³ *See, e.g.*, Mississippi Public Service Commission September 19, 2022 Reply Comments, Docket No. RM21-17-000, at 2-3 (Accession No. 20220919-5080) (“Involving state regulators in cost allocation issues makes certain that one state’s policy choices are not imposed on another state’s consumers without their affirmative consent. . . . If a state cannot agree on cost allocation, that state is signaling that the project is not subjectively beneficial. Where states do not agree that a proposed State Policy Project is beneficial, the project should not be built.”) (citation omitted); Office of the Ohio Consumers’ Counsel August 17, 2022 Comments, Docket No. RM21-17-000, at 17-18 (Accession No. 20220817-5260) (“Such a policy may encourage investment in such transmission facilities, but it will come at the expense of mandated subsidization of such facilities by all consumers in a region regardless of whether they receive any of the electrons from these generating facilities. Ohio consumers should not be forced to pay for other states’ public policy decisions to build renewable resources.”) (citation omitted); Alabama Public Service Commission, August 16, 2022 Comments, Docket No. RM21-7-000, at 9 (Accession No. 20220816-5042) (“In other words, states may not force their preferences on their neighbors, or compel them to subsidize their achievement. Thus, it goes without saying that Alabama ratepayers should not be required to pay for transmission projects that are designed to promote or facilitate the public goals of other states, localities, or entities.”); NCUC Comments at 6 (“the [North Carolina Utilities Commission] and Public Staff urge the Commission to more clearly and directly require transmission providers to seek agreement from states at every stage of the Long-Term Regional Transmission Planning process”).



Forcing states to pay for the public policy goals of another state will only cause the “risk of . . . projects being stalled due to deadlock,”⁴⁴ to be replaced with the risk of protracted proceedings and litigation. I am doubtful that many people will be eager to fund the development of transmission projects in such an environment, one in which they face the perpetual risk that projects may have their costs reallocated and in which all projects, regardless of their merits, must be developed under a continual cloud of uncertainty driven by legal risk and regulatory unpredictability.

Transmission Siting NOPR

As for the Transmission Siting NOPR, in my view, finalizing the proposed rulemaking will not help expedite the permitting of transmission facilities or “decrease the risk of further delays of project approval.”⁴⁵ The NOPR imposes unnecessary and unintelligible requirements that will prolong the time that developers must take to prepare applications. And because developer’s initial attempts to decipher the rule’s compliance requirements will likely be unsuccessful, one should expect the issuance of numerous data requests which will further prolong review.⁴⁶ Ambiguity empowers the Commission to act arbitrarily as it announces vague standards by which it will be able to impose inconsistent requirements on an application-by-application basis. Uncertainty and inconsistency will chill investment and make the rational allocation of capital more difficult. This will slow the very development that Congress sought to encourage when passing the statute. Further, transmission projects sited using this authority will be subject to the paralysis and uncertainty that NEPA creates—years’-long environmental reviews followed by years of litigation in which a determined court can nevertheless identify a shortcoming in the review and vacate the Commission’s action. Any effort to grant additional authorities to the Commission to site transmission must ultimately confront this reality.

⁴⁴ Letter at 2.

⁴⁵ *Id.* at 3.

⁴⁶ See Commissioner Danly April 6, 2023 Response to March 2023 McMorris Rodgers Transmission Letter, at 9-10, <https://www.ferc.gov/news-events/news/commissioner-danly-response-march-2023-mcmorris-rodgers-transmission-letter> (responding to Chairs McMorris Rodgers and Duncan’s question regarding the timely issuance of permits under FPA section 216).



* * *

Thank you for the opportunity to share my thoughts. If I can be of any further assistance with these issues or any other Commission matter, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "James Danly". The signature is written in a cursive, flowing style.

James P. Danly
Commissioner



FEDERAL ENERGY REGULATORY COMMISSION

August 8, 2023

Hon. Michael S. Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20004

RE: Docket No. EPA-HQ-OAR-2023-0072

Dear Administrator Regan:

I submit this comment to provide a necessary correction, and to make a request in this docket concerning the Environmental Protection Agency's (EPA) proposed rulemaking on *New Source Performance Standards for Greenhouse Gas Emissions*.¹

In the Proposed Rule, the EPA states that it "evaluated the reliability implications of the proposal . . . and consulted with the [Department of Energy] and the Federal Energy Regulatory Commission (FERC) in the development of these proposals."² The EPA did not consult *the Commission*. I understand that consultation with Commission staff on limited subjects did indeed occur. I also understand that, in the course of that consultation, Commission staff did not provide either modeling or a substantive review of the Proposed Rule's potential reliability effects. Such limited consultation is not unusual. Communication between FERC and other federal agencies typically occurs at the staff level, subject to the supervision of the Chairman.³ The opinion of Commission staff, however, does not and cannot constitute the opinion of the Commission. The Commission is a multimember body requiring a quorum of three voting commissioners to act⁴ and only speaks

¹ *New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; & Repeal of the Affordable Clean Energy Rule*, 88 Fed. Reg. 33,240 (proposed May 23, 2023) (Proposed Rule).

² *Id.* at 33,246-247 (emphasis added).

³ See 42 U.S.C. § 7171(c) ("The Chairman shall be responsible on behalf of the Commission for the executive and administrative operation of the Commission, including . . . the supervision of personnel employed by or assigned to the Commission. . . .").

⁴ See *id.* § 7171(b)(1) ("The Commission shall be composed of five members appointed by the President, by and with the advice and consent of the Senate."); *id.* § 7171(e) ("Each member of the Commission, including the Chairman, shall have one vote. Actions of the Commission shall be determined by a majority vote of the members present.").



through its orders.⁵ I was not asked what I thought of Proposed Rule's effects on electric reliability, and I am not aware of my fellow commissioners having had their feedback solicited.

FERC is the agency Congress has charged with overseeing the promulgation of the mandatory standards that ensure the reliable operation of the bulk-power system.⁶ The Commission also has jurisdiction over the tariffs for wholesale power sales, among which are the tariffs that govern the capacity markets.⁷ Those markets play a vital role in providing the economic incentives necessary to ensure resource adequacy in many of the organized markets. In a word, FERC is the agency with the jurisdiction and knowledge necessary to ensure that the bulk electric system functions and that it has sufficient generation to meet demand. The bulk electric system is complicated—even the smallest addition or loss of generation or transmission can have a profound effect on the system's stability. Every change to the bulk electric system requires an engineering study, a lengthy and complex process. The EPA is contemplating policies that promise to alter the makeup of the bulk electric system drastically and on an abbreviated timeline. When proposing a rule with such profound consequences, responsible decision-making requires hard data. Absent input from the Commission, based on detailed analyses by Commission staff, it is nearly impossible

⁵ See *Californians for Renewable Energy v. Cal. Indep. Sys. Operator Corp.*, 175 FERC ¶ 61,213, at P 13 (2021) (citations omitted).

⁶ See 16 U.S.C. § 824a(b)(1) ("The Commission shall have jurisdiction, within the United States, over the [Electric Reliability Organization, *i.e.*, the North American Electric Reliability Corporation (NERC)] certified by the Commission under subsection (c), any regional entities, and all users, owners and operators of the bulk-power system, including but not limited to the entities described in section 824(f) of this title, for purposes of approving reliability standards established under this section and enforcing compliance with this section. All users, owners and operators of the bulk-power system shall comply with reliability standards that take effect under this section."). NERC Reliability Standards apply to the bulk electric system, as defined by NERC and approved by the Commission, that affects bulk-power system reliability.

⁷ See *id.* § 824(b)(1) ("The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter."); *id.* § 824d(a) ("All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.").



to imagine that the EPA could be in a position to reach an informed conclusion regarding the reliability consequences of its Proposed Rule.

Which brings me to my request. On August 3, 2023, the Secretary of the Commission issued a notice announcing the Commission's annual Reliability Technical Conference for Thursday, November 9, 2023.⁸ The Notice states that "[t]he purpose of this conference is to discuss policy issues related to the reliability and security of the Bulk-Power System" and that "[t]he conference will also discuss the impact of the Environmental Protection Agency's proposed rule under section 111 of the Clean Air Act on electric reliability."⁹ The Commission is convening this technical conference, and discussing this specific subject matter, because we must consider the substantial consequences of the EPA's Proposed Rule. While the Proposed Rule could, by itself, significantly impair reliability, the Commission must also consider the Proposed Rule amidst the numerous other public policies that increasingly jeopardize the reliable operation of the bulk electric system.¹⁰

Given FERC's unmatched experience in overseeing the development of mandatory reliability standards, and its role in promoting resource adequacy in the organized markets, I urge the EPA to extend the comment period in this docket in order to afford FERC the opportunity to lodge the record of its upcoming technical conference, including the comments FERC receives from the public, in the administrative record for this proceeding. The conference's testimony and written submissions will provide necessary information, received from a wide variety of sources, regarding the likely effect of the Proposed Rule on bulk electric system reliability. This would provide both the EPA and the public an opportunity to consider the Proposed Rule with a fuller understanding of its probable consequences. Until the record of FERC's technical conference is submitted in the docket, the EPA will lack the record evidence necessary to make an informed decision.

Very respectfully,

A large, stylized handwritten signature in black ink, which appears to read 'James P. Danly', is written over the typed name and title.

James P. Danly
Commissioner
Federal Energy Regulatory Commission

⁸ 2023 *Annual Reliability Technical Conference*, FERC, Docket No. AD23-9-000 (Aug. 3, 2023), <https://www.ferc.gov/news-events/events/2023-annual-reliability-technical-conference-11092023> (Notice).

⁹ *Id.* (citing EPA's Proposed Rule).

¹⁰ See, e.g., *Fed. "Good Neighbor Plan" for the 2015 Ozone Nat'l Ambient Air Quality Standards*, 88 Fed. Reg. 36,654 (June 5, 2023).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Port Arthur LNG Phase II, LLC
PALNG Common Facilities Company, LLC

Docket No. CP20-55-000

(Issued September 21, 2023)

DANLY, Commissioner, *concurring in part and dissenting in part*:

1. I write separately to identify the specific aspects of today's order with which I concur and those elements from which I dissent.
2. I concur in the decision to grant the requested authorization because I agree that "Port Arthur LNG Phase II's proposal is not inconsistent with the public interest."¹
3. I also concur in the explanations and findings in paragraphs 61 and 62: the social cost of greenhouse gases (GHG) is neither useful nor part of the Commission's decision making and the Commission has no means to determine the significance of GHG emissions.² Specifically, paragraphs 61 and 62 explain: (1) the disclosure of the social cost of GHG emissions is "for informational purposes"; (2) for the social cost of GHGs, "there are no criteria to identify what monetized values are significant for [National Environmental Policy Act (NEPA)] purposes"; the Commission is not "aware of any . . . method," including the social cost of GHGs, "that would enable the Commission to determine the significance of reasonably foreseeable GHG emissions"; and (3) therefore, there are "no accepted tools or methods for the Commission to use to determine significance."³ This language made its first appearance in orders on the April 20, 2023 open meeting.⁴ I voted for this language, as did two of my colleagues, Chairman Phillips and Commissioner Christie.

¹ *Port Arthur LNG Phase II, LLC*, 184 FERC ¶ 61,184, at PP 14, 131 (2023).

² *See id.* PP 61, 62.

³ *Id.* (citations omitted).

⁴ *See Driftwood Pipeline LLC*, 183 FERC ¶ 61,049, at PP 61, 63 (2023); *Tex. LNG Brownsville LLC*, 183 FERC ¶ 61,047, at PP 20-21, 25 (2023); *Rio Grande LNG, LLC*, 183 FERC ¶ 61,046, at PP 92-94, 101 (2023); *see also Tex. LNG Brownsville LLC*, 183 FERC ¶ 61,047 at P 20 ("although we are including the social cost of GHG figures for informational purposes, we find that because the social cost of GHGs tool was not

4. Finally, I concur in the Commission's explanation that it is the Commission's order that controls and therefore any language in the Environmental Assessment (EA) or Supplemental EA that is in tension with the Commission's order is not relied on or adopted by the Commission.⁵ We have had to resort to this language due to inconsistencies between the environmental documents issued by staff and the contents of the Commission's orders.⁶

developed for project level review and, as discussed below, does not enable the Commission to credibly determine whether the GHG emissions are significant, section 1502.21 of the [the Council on Environmental Quality (CEQ)] regulations does not require its use in this proceeding"); *Rio Grande LNG, LLC*, 183 FERC ¶ 61,046 at P 92 (same) (collectively, "April Orders").

⁵ See *Port Arthur LNG Phase II, LLC*, 184 FERC ¶ 61,184 at P 130 ("Based on the analysis in the 2021 EA and Supplemental EA, as supplemented or clarified herein, we conclude that if constructed and operated in accordance with the Applicant's application and supplements, and in compliance with the environmental conditions in the appendix to this Order, our approval of this proposal would not constitute a major federal action significantly affecting the quality of the human environment. We note that the analysis in the 2021 EA and the Supplemental EA provide substantial evidence for our conclusions in this order, but that it is the order itself that serves as the record of decision, consistent with the Commission's obligations under NEPA and the Administrative Procedure Act. For that reason, to the extent that any of the analysis in the 2021 EA or Supplemental EA is inconsistent with or modified by the Commission's analysis and findings in the order, it is the order that controls and we do not rely on or adopt any contrary analysis in the 2021 EA or Supplemental EA.") (footnote omitted).

⁶ See *Transcon. Gas Pipe Line Co., LLC*, 184 FERC ¶ 61,066 (2023) (Danly, Comm'r, dissenting in part at P 14) ("We have witnessed environmental documents including language that runs contrary to Commission orders.") (citations omitted). Compare *WBI Energy Transmission, Inc. Wahpeton Expansion Project Final Environmental Impact Statement (EIS)*, Docket No. CP22-466-000, at 4-118 (Apr. 7, 2023) ("The Commission stated in a recent Order that a project's share of contribution to GHG emissions at the national level provides a reasoned basis to consider the significance of the Project's GHG emissions and their potential impact on climate change; and when states have GHG emissions reduction targets, the Commission will endeavor to consider the GHG emissions of a project on those state goals (or state inventories if the state does not have emissions targets.)") (citing *N. Nat. Gas Co.*, 174 FERC ¶ 61,189, at P 29 (2021) (*Northern Natural*)), with *Tenn. Gas Pipeline Co., L.L.C.*, 178 FERC ¶ 61,199 (2022) (Danly, Comm'r, concurring in the judgment at PP 2-3) (disagreeing with *Northern Natural* and explaining that "there is no standard by which

5. Although I support the foregoing, I do not agree with the order in its entirety and would have addressed several parts of it differently. There are a number of statements⁷ in

the Commission could, consistent with our obligations under the law, ascribe significance to a particular rate or volume of GHG emissions”) (citation omitted), *and with Tenn. Gas Pipeline Co., L.L.C.*, 178 FERC ¶ 61,199 (Phillips & Christie, Comm’rs, concurring at P 2) (“depart[ing] from *Northern Natural*, where the Commission stated that emissions for a project were not significant,” explaining that “[i]n *Northern Natural*, the Commission disclosed the yearly emissions volumes and the estimated contribution to national and state emissions estimates, and then stated that, based on this record, that the emissions were not significant,” and stating that “[i]t is not clear how this determination was made or how a finding of ‘significance’ would have affected our duties and authority under the Natural Gas Act”) (citations omitted). *Compare* Boardwalk Storage Co. LLC BSC Compression Replacement Project Environmental Assessment, Docket No. CP22-494-000, at 48 (Mar. 13, 2023) (“We include a disclosure of the social cost of GHGs (also referred to as the [‘]social cost of carbon’ [SCC]) to assess climate impacts generated by each additional metric ton of GHGs emitted by the Project.”), *with Golden Pass LNG Terminal LLC*, 180 FERC ¶ 61,058, at P 24 (2022) (rejecting an argument raised in a comment that “the EA should use the social cost of GHGs (also referred to as the ‘social cost of carbon’ [SCC]) to assess climate impacts generated by each additional ton of GHGs that would be emitted or saved as a result of authorizing the proposed amendment, and that all GHG emissions are significant” by explaining that “we are not relying on or using the social cost of GHGs estimates to make any finding or determination regarding either the impact of the project’s GHG emissions or whether the project is in the public convenience and necessity”) (citations omitted). Notably, the Commission does not review or approve the contents of the EAs and EISs issued by staff. Staff, for those documents, act under the supervision of the Chairman. But great care must be exercised to ensure that environmental documents adhere to Commission precedent. *Cf. Great River Hydropower, LLC*, 135 FERC ¶ 61,151, at P 44 (2011) (explaining that if a delegated order “is inconsistent with [Commission] precedent . . . , it was wrongly decided”). *See also* 42 U.S.C. § 7171(c) (explaining that “[t]he Chairman shall be responsible *on behalf of the Commission* for the executive and administrative operation of the Commission, including functions of the Commission with respect to . . . the supervision of personnel employed by or assigned to the Commission, except that each member of the Commission may select and supervise personnel for his personal staff”) (emphasis added).

⁷ For example, there are several sentences that were dropped into the order, that were pulled directly from Commission staff’s environmental document, which I would have preferred were not included. As I explain below, the Commission is not given the opportunity to review or weigh in on staff’s environmental documents whatsoever and recently we have seen inconsistencies within those staff issuances with the Commission’s

this order with which I disagree. There are a number of statements⁸ in this order with which I disagree. For example, I object to what appears to be the Commission's blending of our public interest inquiry under section 3 of the Natural Gas Act (NGA)⁹ with the analysis we are obligated to conduct under NEPA, and therefore I dissent to the extent that this order muddles the two. Our obligations under NEPA and the NGA are distinct.¹⁰

6. Although I agree that the Commission must act "in accordance with our . . . statutory duties,"¹¹ we must first examine the scope of our inquiry under the "not . . . [in]consistent with the public interest"¹² standard. The Supreme Court has explained that the inclusion of the term "public interest" in our statute is not "a broad license to promote the general public welfare"—instead, it "take[s] meaning from the purposes of the regulatory legislation."¹³ The purpose of the NGA, as the Supreme Court has instructed us is "to encourage the orderly development of plentiful supplies of . . . natural

orders, a matter of which is concerning.

⁸ For example, there are several sentences that were dropped into the order, that were pulled directly from Commission staff's environmental document, which I would have preferred were not included. As I explain below, the Commission is not given the opportunity to review or weigh in on staff's environmental documents whatsoever and recently we have seen inconsistencies within those staff issuances with the Commission's orders, a matter of which is concerning.

⁹ 15 U.S.C. § 717b.

¹⁰ See *Commonwealth LNG, LLC*, 183 FERC ¶ 61,173, at P 37 (2023); *Transcon. Gas Pipe Line Co., LLC*, 182 FERC ¶ 61,148, at P 101 (2023).

¹¹ *Port Arthur LNG Phase II, LLC*, 184 FERC ¶ 61,184 at P 64 n.134 ("While the Commission is not one of the specified agencies in Executive Order 12,898, the Commission nonetheless addresses environmental justice in its analysis, in accordance with our governing regulations and guidance, and statutory duties.") (citing 15 U.S.C. § 717b; 18 C.F.R. § 380.12(g) (requiring applicants for projects involving significant aboveground facilities to submit information about the socioeconomic impact area of a project for the Commission's consideration during NEPA review); FERC *Guidance Manual for Environmental Report Preparation* at 4-76 to 4-80 (Feb. 2017), <https://www.ferc.gov/sites/default/files/2020-04/guidance-manual-volume-1.pdf>).

¹² 15 U.S.C. § 717b(a).

¹³ *NAACP v. FPC*, 425 U.S. 662, 669 (1976) (*NAACP*).

gas at reasonable prices.”¹⁴ To the extent to which any Commission issuances attempt to expand the subjects we consider in our inquiry under NGA section 3, any regime we institute must “take meaning” from the purpose of the NGA.

7. I also would not have included the calculations of the social cost of GHGs in the Commission’s order.¹⁵ As I explained in my separate statement in *Boardwalk Storage Co., LLC*, that issuance marked a change in the Commission’s approach to the social cost of GHGs in its orders.¹⁶ In a break with this recent practice, *Boardwalk* and the orders issued on the September 21, 2023 Commission meeting, while including language from the April Orders, *also* includes calculations for the social cost of GHGs.¹⁷ I do not

¹⁴ *Id.* at 669-70; *accord Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1307 (D.C. Cir. 2015) (*Myersville Citizens for a Rural Cmty.*) (quoting *NAACP*, 425 U.S. at 669-70). I note that the Supreme Court has also recognized the Commission has authority to consider “other subsidiary purposes,” such as “conservation, environmental, and antitrust questions.” *NAACP*, 425 U.S. at 670 & n.6 (citations omitted). But all subsidiary purposes are, necessarily, subordinate to the statute’s primary purpose.

¹⁵ *See Port Arthur LNG Phase II, LLC*, 184 FERC ¶ 61,184 at P 56.

¹⁶ *See generally Boardwalk Storage Co., LLC*, 184 FERC ¶ 61,062 (2023) (*Boardwalk*) (Danly, Comm’r, concurring at PP 1-7).

¹⁷ *Boardwalk*, 184 FERC ¶ 61,062 at P 24. Following the Commission’s adoption at the April open meeting of our new social cost of GHGs language, our orders have not included those calculations when they have appeared in the Commission staff’s environmental documents. *See Equitrans, L.P.*, 183 FERC ¶ 61,200, at P 47 (2023) (explaining that “[f]or informational purposes, Commission staff estimated the social cost of GHGs associated with reasonably foreseeable emissions from the project.”) (*Equitrans*). Even before the April 20, 2023 Commission meeting, the calculations were not included in several orders where the environmental document already contained the calculations. *See, e.g., Cameron LNG, LLC*, 182 FERC ¶ 61,173, at P 37 (2023) (“Further, the EA, for informational purposes, disclosed the social cost of GHGs associated with the project’s reasonably foreseeable GHG emissions.”) (footnote omitted); *Commonwealth LNG, LLC*, 181 FERC ¶ 61,143, at P 75 (2022) (stating that “the final EIS disclosed the social cost of GHGs associated with the project’s reasonably foreseeable GHG emissions” and not including the calculations in the order) (citation omitted). I note that there are some inconsistencies in this prior to the issuance of the orders voted on at the April open meeting, with occasional orders including the calculations. In every circumstance, though, I have objected to the inclusion of the social cost of GHGs calculations in our orders and will continue to do so. Instead, the

support their inclusion in this order both because their inclusion breaks with recent practice and because the calculations are meaningless in light of the very finding, stated explicitly in the text of the Commission's order, that the social cost of GHGs cannot be used for any meaningful purpose to inform project-level analysis, including the assessment of significance. That is why, to state it again, those calculations are being disclosed solely "for informational purposes." Though I object to their inclusion, surplusage, even when *specifically declared* to be irrelevant to the reasoning of an order, is not, in itself, unlawful. The Commission has acknowledged, time and again, that the inclusion of these calculations in an environmental document is "for informational purposes" only and has not included the calculations in several orders when they already appear in the NEPA document.¹⁸ The Commission should not have changed course.

8. As today's order notes, Congress recently made the first revisions to the text of NEPA since the statute's enactment in the portion of the Fiscal Responsibility Act of 2023 known as the "Builder Act."¹⁹ Though I appreciate that the Commission is finally acknowledging these revisions in its order, the Commission should not be so reticent to pursue substantial changes to the process by which it discharges its duties under NEPA. The Builder Act does not include any sort of implementation period, so its provisions became effective when the President signed the Fiscal Responsibility Act into law. The order hints that the Commission will wait for CEQ to offer its interpretation of this text, but there is certainly no legal reason that it must (or can) do so. Whether CEQ's

Commission has included the disclosure of the social cost of GHGs in its orders "for informational purposes" when those calculations were not included as part of the EAs or EISs or when the calculation in the staff's environmental document included (improperly) downstream emissions that are *not* reasonably foreseeable, *e.g.*, the downstream emissions from exports. *See Tex. LNG Brownsville LLC*, 183 FERC ¶ 61,047 at P 24 (including the calculations in the remand order because they were not in the environmental document); *Rio Grande LNG, LLC*, 183 FERC ¶ 61,046 at PP 98-99 (same); *Driftwood Pipeline LLC*, 183 FERC ¶ 61,049 at PP 57 nn.109 & 112, 61-62 (disclosing a "revised estimate of the social cost of GHGs associated with the reasonably foreseeable emissions" in the Commission's order because the calculation in the final EIS included in the calculation downstream GHG emissions from exports, which are not reasonably foreseeable).

¹⁸ *Equitrans, L.P.*, 183 FERC ¶ 61,200 at P 47.

¹⁹ *See* FISCAL RESPONSIBILITY ACT OF 2023, Pub. L. 118-5, 137 Stat 10, at § 321 (June 3, 2023) (providing the "Builder Act") (Fiscal Responsibility Act).

interpretations of NEPA in guidance documents or regulations bind independent agencies is a “thorny question,”²⁰ but there is reason to doubt that they do.

9. Among other revisions, the Builder Act changed the requirement that agencies include in environmental documents an analysis of the “environmental impact of the proposed action”²¹ to an analysis of the “reasonably foreseeable environmental effects of the proposed *agency* action.”²² In my view, Congress’ amendments reaffirm *Public Citizen*²³ which held that under NEPA, agencies are only obligated to consider environmental effects for which the *agency action itself* is the legal proximate cause.²⁴

10. Given this new statutory language, FERC has an opportunity to clarify the appropriate metes and bounds of its obligations under NEPA in light of the jurisdictional limitations of the NGA. Such clarification is particularly called for given the U.S. Court of Appeals for the District of Columbia Circuit’s (D.C. Circuit) mischaracterization of the scope of FERC’s authority in *Sabal Trail* and its progeny. *Sabal Trail* miscasts FERC’s analysis of the public convenience and necessity under section 7 of the NGA²⁵ to hold that the Commission has an obligation to consider the GHG emissions from the end use of the gas transported by certificated pipelines.²⁶ The NGA, however, confers no

²⁰ *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm’n*, 45 F.4th 291, 300 (D.C. Cir. 2022) (citing *Food & Water Watch v. U.S. Dep’t of Agric.*, 1 F.4th 1112, 1119 (D.C. Cir. 2021) (Randolph, J., concurring) (questioning CEQ’s authority to promulgate binding regulations)).

²¹ 42 U.S.C. § 4332(c)(i) (1970).

²² 42 U.S.C. § 4332(c)(i) (2023) (emphasis added).

²³ *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752 (2004) (*Public Citizen*).

²⁴ *See* 541 U.S. at 767.

²⁵ 15 U.S.C. § 717f.

²⁶ *See Sierra Club v. FERC*, 867 F.3d 1357, 1373 (*Sabal Trail*) (“Because FERC could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment, the agency is a ‘legally relevant cause’ of the direct and indirect environmental effects of pipelines it approves. *Public Citizen* thus did not excuse FERC from considering these indirect effects.”) (citation & footnote omitted). I note, however, that *National Cable & Telecommunications Association v. Brand X Internet Services* holds that even following a binding judicial issuance, agencies remain free in subsequent proceedings to offer reasonable interpretations of the jurisdiction conferred upon them by their organic statutes. 545 U.S. 967, 982-83 (2005) (*Brand X*). This proposition, for

authority upon FERC to regulate the end use or local distribution of natural gas.²⁷ Rather, when deciding whether to approve a pipeline, the Commission determines whether there is a demonstrated need for interstate natural gas transportation capacity. Based on this misunderstanding of FERC's authority, the *Sabal Trail* court concludes that FERC must include estimates of the emissions from the end use of the gas and goes even further, in *dicta*, to assert, without any explanation, that FERC has "legal authority to mitigate" the environmental effects that result from that end use.²⁸

11. This mistake provided one (albeit insufficient) rationale for the Commission's now-draft Updated Certificate Policy Statement²⁹ and Interim GHG Policy Statement,³⁰ which envisioned a mitigation scheme for the GHG emissions from the end use of gas transported on the interstate natural gas system.³¹ The Builder Act offers the

better or for worse, is now black letter administrative law. Far from flouting the authority of the courts, I suggest no more than that the Commission act within the remit confirmed in *Brand X* by offering a reasonable interpretation of our statute which would limit our jurisdiction consistent with the NGA's purpose and its plain text. See 15 U.S.C. § 717(b) (listing the exemptions from the Commission's jurisdiction). And we can do so secure in the knowledge that such an interpretation—again, for better or for worse—will be accorded the deference guaranteed by *Chevron*. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (*Chevron*) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

²⁷ See 15 U.S.C. § 717(b) ("The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, *but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.*") (emphasis added).

²⁸ *Sabal Trail*, 867 F.3d at 1374.

²⁹ *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,107 (2022) (Updated Certificate Policy Statement).

³⁰ *Consideration of Greenhouse Gas Emissions in Nat. Gas Infrastructure Project Revs.*, 178 FERC ¶ 61,108 (2022) (Interim GHG Policy Statement).

³¹ See *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,197, at

Docket No. CP20-55-000

- 2 -

Commission a rare opportunity to clarify the limits of its authority and move beyond the shadow that the now “draft” policy statements continue to cast over the development of critically needed natural gas infrastructure.

For these reasons, I respectfully concur in part and dissent in part.

James P. Danly
Commissioner

P 2 (2022) (converting the two policy statements issued on February 18, 2022, Updated Certificate Policy Statement, 178 FERC ¶ 61,107 and Interim GHG Policy Statement, 178 FERC ¶ 61,108 to “draft” policy statements).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Port Arthur LNG Phase II, LLC
PALNG Common Facilities Company, LLC

Docket No. CP20-55-000

(Issued September 21, 2023)

CLEMENTS, Commissioner, *dissenting in part*:

1. I concur with the result of today's Order, but dissent from its discussion regarding the Commission's inability to assess the significance of the impacts of greenhouse gas (GHG) emissions.¹ The majority's insistence that there are no acceptable tools for determining the significance of GHG emissions remains unsupported and gains nothing through reflexive repetition in virtually every recent Commission order issued under sections 3 and 7 of the Natural Gas Act.

2. In my recent concurrence in *Transco*, I explained the history of the language in Paragraphs 61 and 62 of the Order,² which is known in the Commission's esoteric parlance as the "*Driftwood* compromise."³ In *Driftwood*, the majority adopted unheralded new language declaring that there are no methods for assessing the significance of GHG emissions, and particularly criticizing the Social Cost of GHGs protocol.⁴ I have dissented from this language in *Driftwood* and subsequent orders for two reasons: (1) it reflects a final Commission decision that it cannot determine the significance of GHG emissions, despite the fact the Commission has never responded to comments in the GHG Policy Statement docket⁵ addressing methods for doing so; and (2) the language departs from previous Commission precedent without reasoned explanation,

¹ *Port Arthur LNG Phase II, LLC and PALNG Common Facilities Co., LLC*, 184 FERC ¶ 61,184, at PP 61-62 (2023) (Order).

² See *Transcon. Gas Pipe Line Co.*, 184 FERC ¶ 61,066 (2023) (Clements, Comm'r, concurring at PP 2-3) (*Transco*).

³ See *id.* (Phillips, Chairman, and Christie, Comm'r, concurring at PP 1-2).

⁴ See *Driftwood Pipeline LLC*, 183 FERC ¶ 61,049, at PP 61, 63 (2023) (*Driftwood*).

⁵ Docket No. PL21-3.

thereby violating the Administrative Procedure Act.⁶ I dissent from Paragraphs 61 and 62 of this Order for the same reasons.

3. As I have said before, I do not know whether the Social Cost of GHGs protocol or another tool can or should be used to determine significance. That is because the Commission has not seriously studied the answer to that question. Rather, the majority simply decided there is no acceptable method, with no explanation of why the Commission departed from the approach taken in earlier certificate orders.⁷ I reiterate that the Commission should decide the important unresolved issues relating to our assessment of GHG emissions through careful deliberation in a generic proceeding with full transparency.

For these reasons, I respectfully dissent in part.

Allison Clements
Commissioner

⁶ See *Driftwood*, 183 FERC ¶ 61,049 (Clements, Comm'r, dissenting at PP 2-3 & n.161); see also *Equitrans, L.P.*, 183 FERC ¶ 61,200 (2023) (Clements, Comm'r dissenting at PP 2-3); *Commonwealth LNG, LLC*, 183 FERC ¶ 61,173 (2023) (Clements, Comm'r, dissenting at PP 5-8); *Rio Grande LNG, LLC and Rio Bravo Pipeline Co., LLC*, 183 FERC ¶ 61,046 (2023) (Clements, Comm'r, dissenting at PP 14-15); *Texas LNG Brownsville LLC*, 183 FERC ¶ 61,047 (2023) (Clements, Comm'r, dissenting at PP 14-15).

⁷ Before its decision in *Driftwood*, the Commission had explained that it was not determining the significance of GHG emissions because the issue of how to do so was under consideration in the GHG Policy Statement docket. See, e.g., *Transcon. Gas Pipe Line Co.*, 182 FERC ¶ 61,006, at P 73 & n.174 (2023); *Columbia Gas Transmission, LLC*, 182 FERC ¶ 61,171, at P 46 & n.93 (2023). To depart from prior precedent without explanation violates the Administrative Procedure Act. See, e.g., *West Deptford Energy, LLC v. FERC*, 766 F.3d 10, 17 (D.C. Cir. 2014) (“[T]he Commission cannot depart from [prior] rulings without providing a reasoned analysis. . . .”) (citations omitted).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Port Arthur LNG Phase II, LLC PALNG Common Facilities Company, LLC	Docket No.	CP20-55-000
---	------------	-------------

(Issued September 21, 2023)

CHRISTIE, Commissioner, *concurring*:

1. Today’s order makes a finding of fact that the upstream GHG emissions are not reasonably foreseeable.¹ I would add, however, that, unlike downstream emissions, the Commission has no legal obligation to estimate emissions from upstream, non-jurisdictional activities anyway, so this finding fulfills no legal obligation, and amounts to a “finding” of no legal consequence. Further, the Commission has no legal authority whatsoever to order mitigation of such non-jurisdictional upstream activities, much less to consider such non-jurisdictional upstream emissions in our merits review under the Natural Gas Act. For these reasons, I respectfully concur.

For these reasons, I respectfully concur.

Mark C. Christie
Commissioner

¹ Order at P 59. The Supplemental EA reached the same conclusion. Supplemental EIS at 119-120.



05 ENERGY TRANSITIONS AND SUSTAINABILITY: FROM THE INSIDE LOOKING OUT



Energy Transitions and Sustainability: From the Inside Looking Out

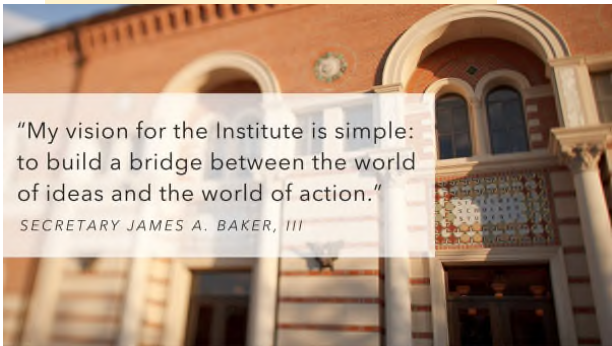
Rachel A. Meidl, LP.D., MEPM, M.Ed, CHMM
 Rice University's Baker Institute for Public Policy, Center for Energy Studies



1



About the Baker Institute



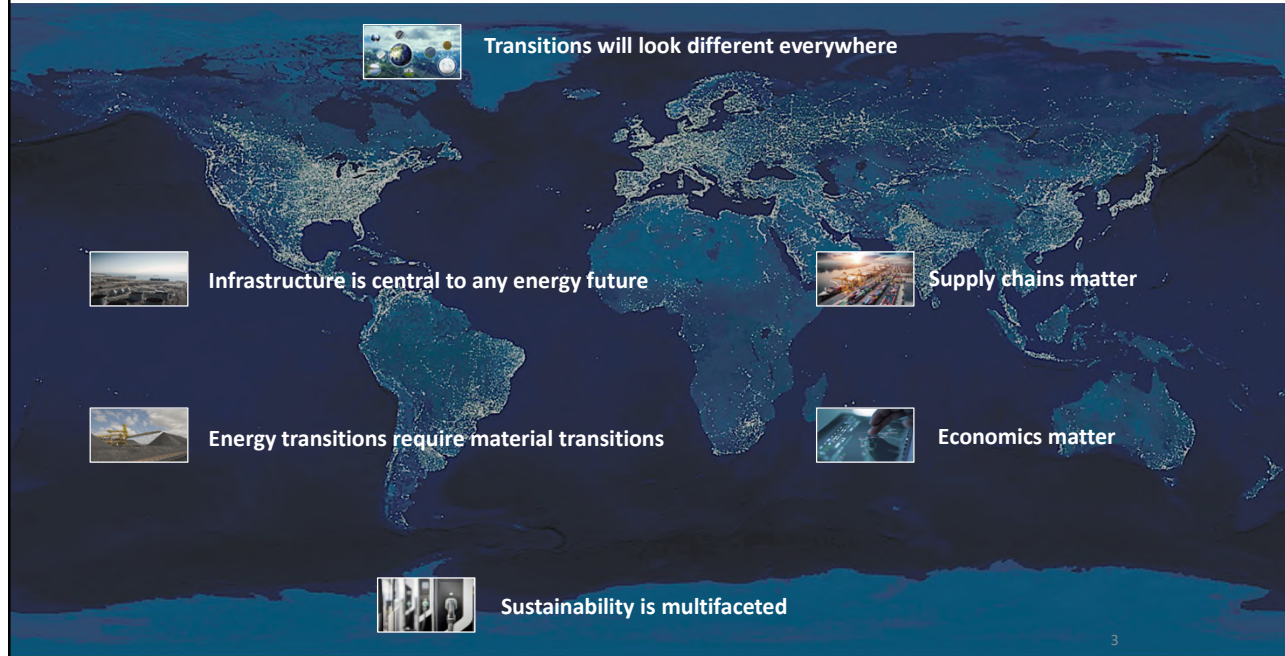
"My vision for the Institute is simple: to build a bridge between the world of ideas and the world of action."

SECRETARY JAMES A. BAKER, III

- Rice University's Baker Institute for Public Policy, founded 1993
 - Nonprofit, **nonpartisan** think tank
 - Rank 1st among university-affiliated think tanks worldwide
 - 1st among U.S. energy- and resource-based think tanks worldwide
 - Independent research on domestic and foreign policy issues
- Bridges gap between policy and practice
- **Promote actionable policy changes**

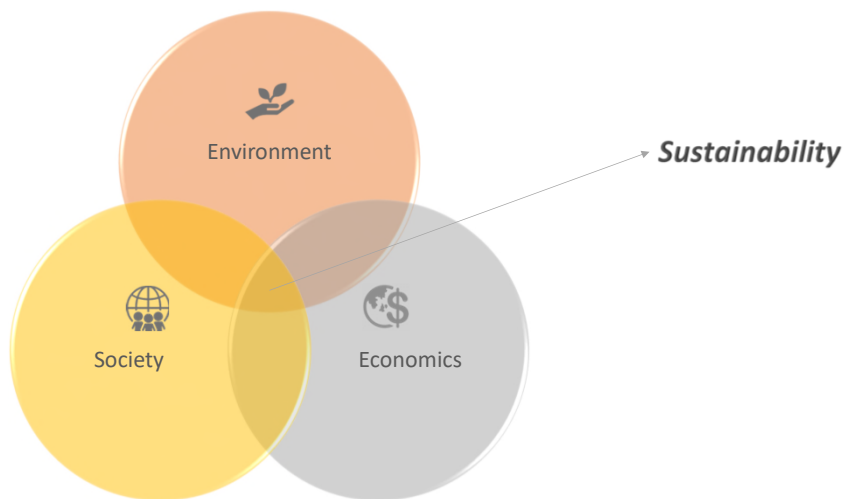
2

Perspective matters: Energy transitions and sustainability are complex



3

Sustainability is about *systems* balance



4

Sustainability requires balancing all three domains

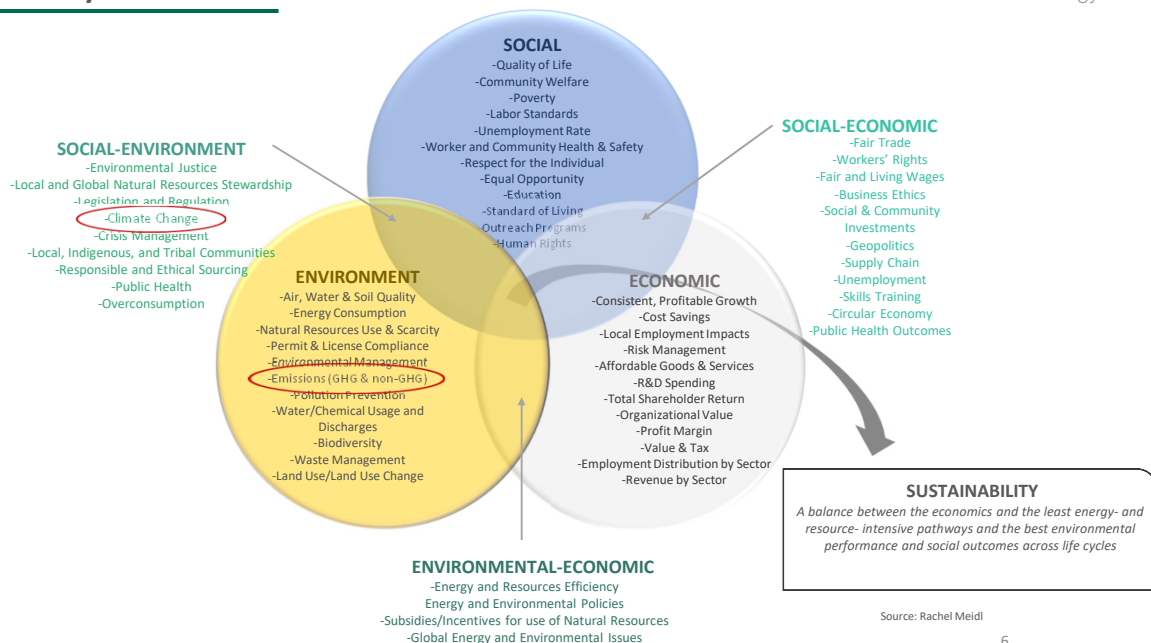
- Sustainability requires a balance of **environmental**, **social**, and **economic** dimensions – three legs on a stool that support a sustainable development platform.
- **Innovation**, **market design**, and **policy** are the glue that binds the constituent parts.
- If any one of the legs collapses, sustainability is not achievable.



Source: Rachel Meidl and Ken Medlock

5

Sustainability is multifaceted

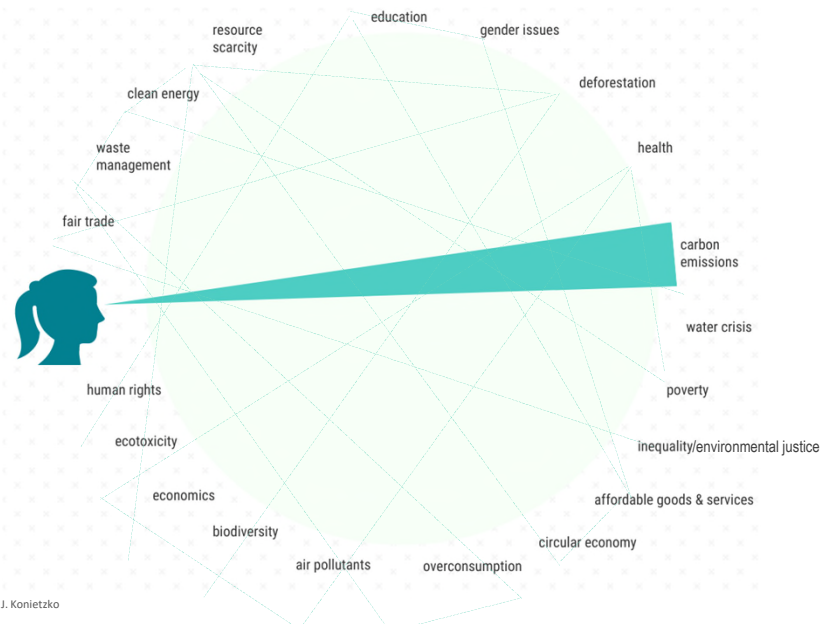


Source: Rachel Meidl

6

6

Carbon tunnel vision detracts from sustainability

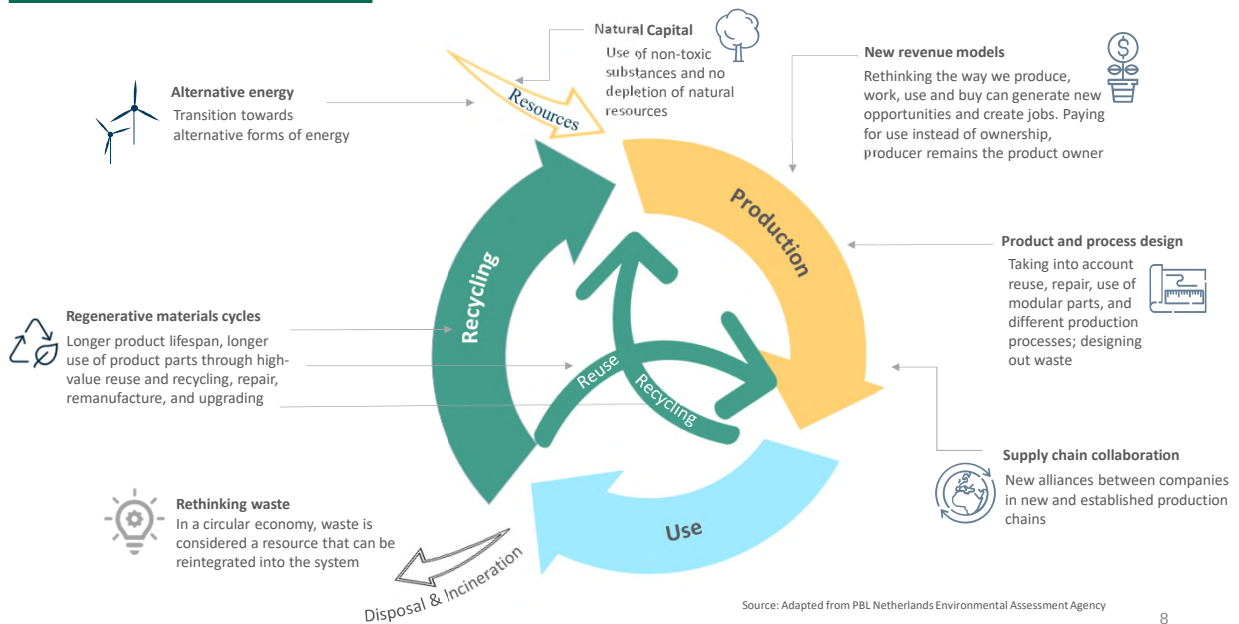


Rachel Meidl: Graphic inspired by J. Konietzko

7

7

Circular Economy: Systems-level thinking

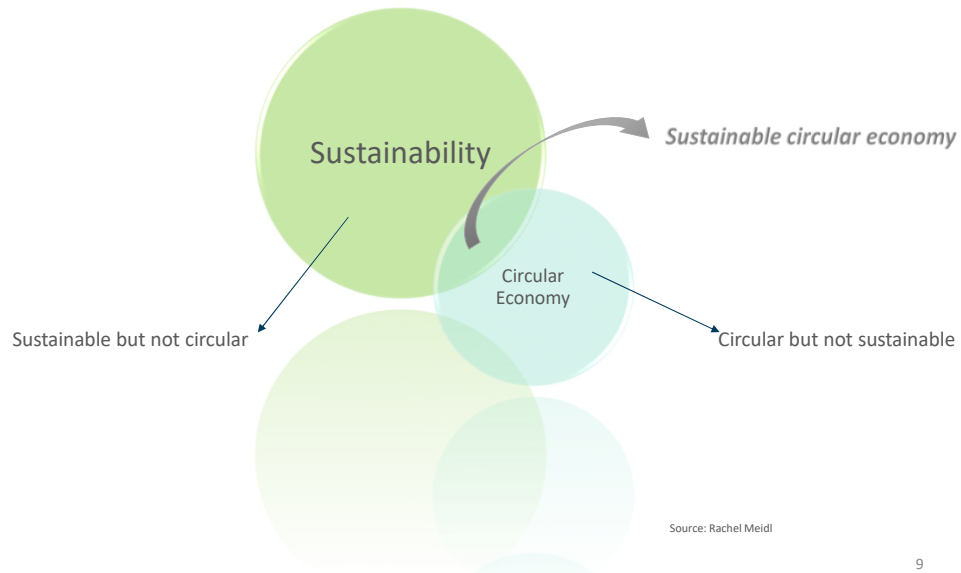


Source: Adapted from PBL Netherlands Environmental Assessment Agency

8

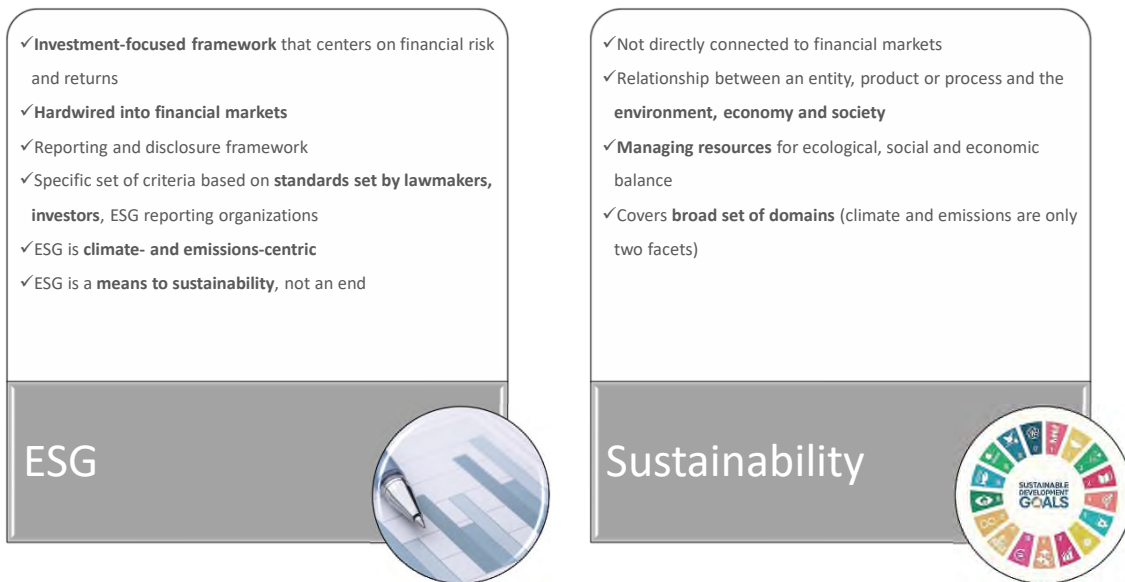
8

Circular economy does not equate to sustainability

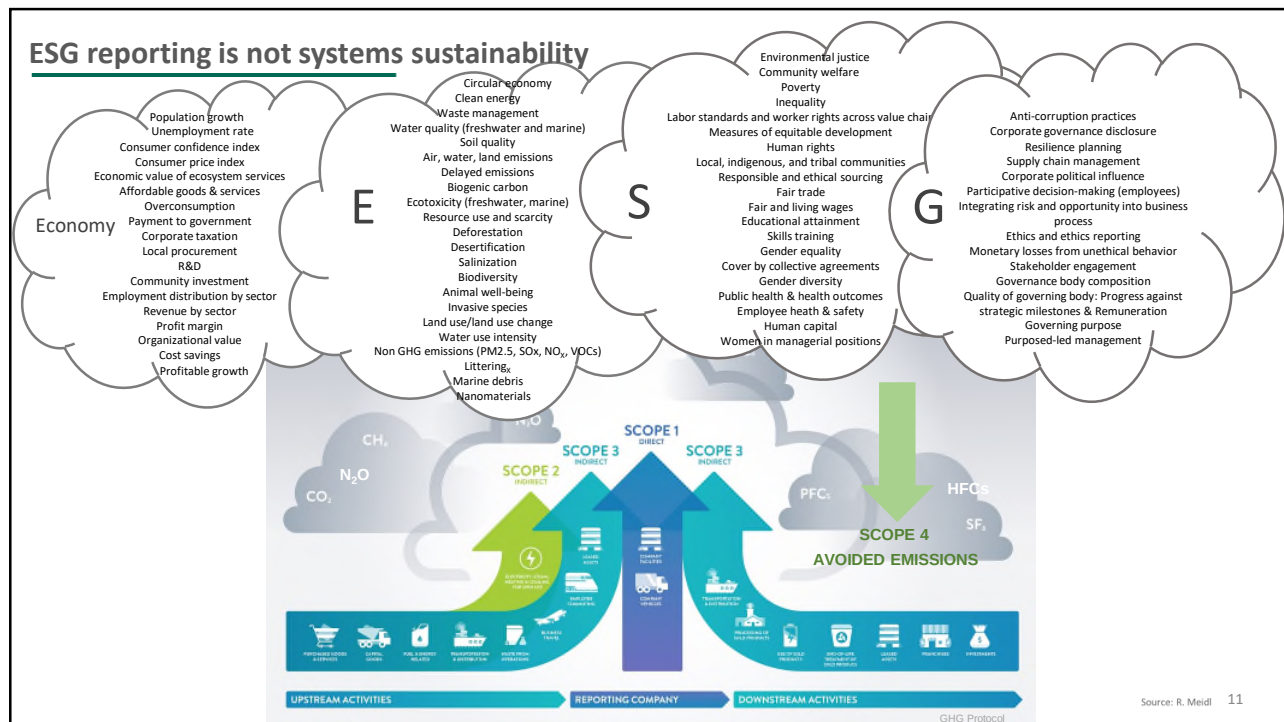


9

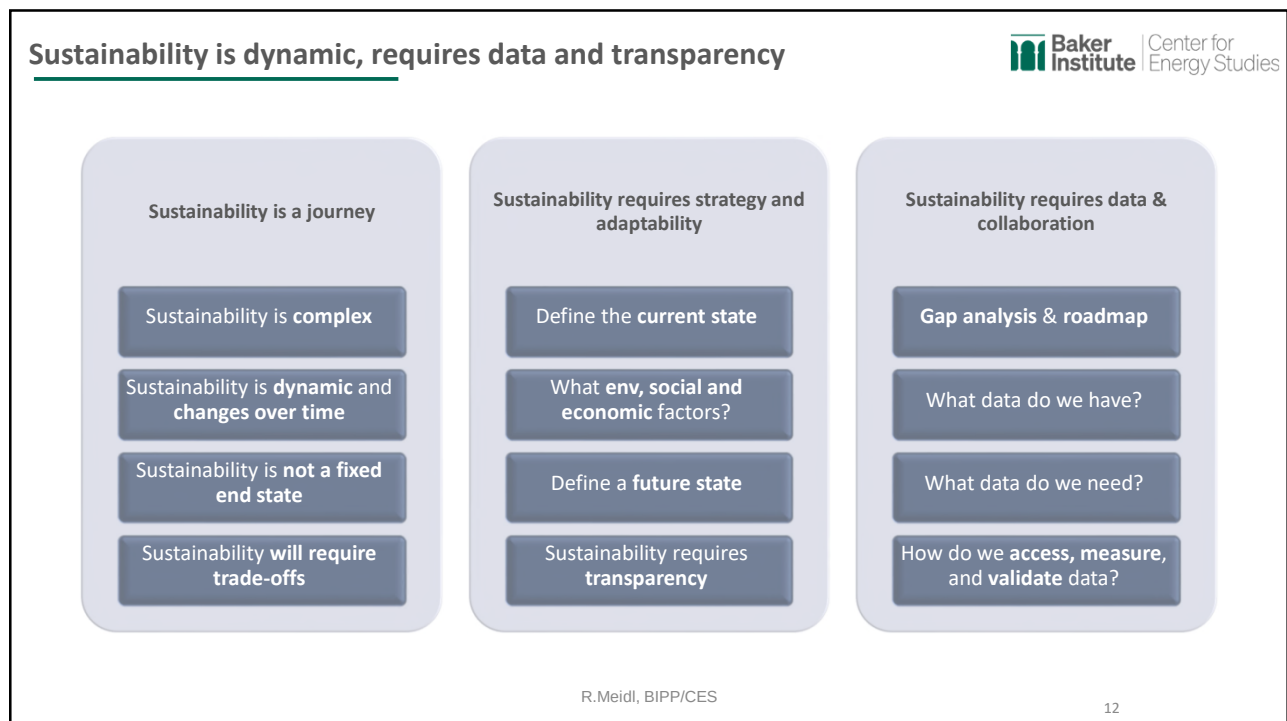
ESG should not be confused with sustainability



10



11



12

Stay connected...



www.bakerinstitute.org/center/center-energy-studies



<https://www.bakerinstitute.org/expert/rachel-meidl>



rachel.a.meidl@rice.edu



[@CES_Baker_Inst](https://twitter.com/CES_Baker_Inst)



www.linkedin.com/in/rachelmeidl



1-713-348-2256



06 **BALLOONING CHALLENGES: 2024 RULEMAKING DEVELOPMENTS UNDER THE CAA**

'Maximum urgency and de facto risk' - EPA braces for 2024

Greenwire

January 12, 2024 Friday

Copyright 2024 Politico LLC All Rights Reserved

Section: TODAY'S STORIES; Vol. 10; No. 9

Length: 1860 words

Body

By Kevin Bogardus In 2024, EPA will be on the defensive and rushing to meet deadlines as the agency aims to wrap up far-reaching regulations and distribute billions of dollars across the country. EPA needs to soon cement protections on air, climate and water to avoid those rules being buried by a Republican-led Congress and White House in 2025 if the coming elections turn against Democrats. In addition, the agency has to implement President Joe Biden's trademark climate and infrastructure laws, standing up new programs and bringing on fresh staff to manage historic funding flowing through EPA. It's a tall order to accomplish in what may be a chaotic year. The agency will have to rush out regulations and funds before the possible return of former President Donald Trump, the GOP front-runner who targeted environmental protections during his administration.

Former EPA Administrator William Reilly told E&E News the agency's status now is "one of maximum urgency and de facto risk," considering the uncertain politics it's facing. "The EPA situation in the midst of an election period is always a delicate one," said Reilly, who led the agency during the George H.W. Bush administration. "You're not supposed to, as EPA administrator, campaign, but the backwash of a lot of political stuff will affect the agency." Christine Todd Whitman, formerly head of EPA during the George W. Bush administration, said "at a potential end of a term, you push all the regs out that you can. The ugly babies go out." She added, "I expect EPA to be aggressive as they can be." Time is short for the agency on crafting its rules, especially if Biden loses his reelection bid in 2024. "They know if it's Trump, that will be the end of them. That could be the end of the agency as it exists," Whitman said. EPA also has been transformed into a massive funding hub under the Biden administration. The agency has been slated more than \$100 billion in additional spending over the coming years from the Infrastructure Investment and Jobs Act and the Inflation Reduction Act combined. "They have a lot of decisions to make and money to move out under the infrastructure and IRA laws," said Carol Browner, EPA's longest-serving administrator who led the agency during the Clinton administration. Those funds will help rebuild water systems, clean up Superfund sites, finance capital for clean energy and aid marginalized communities long burdened with pollution. The money has already started moving out the door, as EPA earlier this week awarded nearly \$1 billion in grants under the infrastructure law for electric and low-emission school buses. "I give EPA kudos for getting a lot done with a lot of new things on their plate. They deserve credit," Browner said. "I think they've done a nice job of keeping things moving." EPA now rolls into this year off a 2023 that activists have called history-making. "It just has to be said that 2023 was just an incredible year when it comes to levels of financial assistance to disadvantaged communities, tribal communities, [environmental justice] communities," said Vernice Miller-Travis, an environmental justice advocate for more than three decades. "I would like to be proven wrong, but I don't think it is going to happen at this level again in my lifetime." 'Big year' for rules Deputy Administrator Janet McCabe told EPA staff in an internal email obtained by E&E News that 2024 will be "a big year" for the agency's regulatory programs, with rules coming for climate pollution, wetlands protections, air quality and drinking water. "I want each rule writer, regulatory development team member, economist, scientist, ecologist, biologist, and public health officer to know that Administrator Regan and I have got your back as you make your way through your work this year," McCabe said in the email sent last week. "We have an important job to do, and I am confident that together we will deliver." The Supreme Court this year is expected to weigh in on a key EPA rule meant to reduce cross-state air pollution, and litigation likely will follow other major agency regulations finished in 2024. Rules not completed by springtime,

'Maximum urgency and de facto risk' - EPA braces for 2024

some estimate, may be open to being overturned quickly by the next administration and Republicans on Capitol Hill under the Congressional Review Act. Regulations finalized later this year could carry over to 2025 and be pulled back if Biden loses reelection. "The Congressional Review Act is the specter that hangs over any last year of a presidential administration," said Joseph Brazauskas, who led the Trump EPA's congressional and intergovernmental relations office. "There is going to be a real hustle to get rules out before that look-back period begins." Regulations don't come much bigger than EPA's standards for power plants' greenhouse gas emissions, which are expected to be finalized this April. "That is going to be the major regulatory piece we see coming out of EPA," said Brazauskas, now senior counsel at the Policy Resolution Group at law firm Bracewell, about the climate rule. Other rules are under scrutiny. Lisa Frank, executive director of Environment America's Washington legislative office, is looking forward to EPA's tougher standards on particulate matter, commonly known as soot, which are now expected by the end of this month. "America has made huge gains on air quality over the years, but we are starting to see that come undone by wildfire smoke," Frank said. "It's really critical we do everything we can to secure stronger air protections." In addition, Frank is watching out for EPA actions on per- and polyfluoroalkyl substances, or PFAS - including the hazardous waste designation for PFOA and PFOS and drinking water standards for some members of the "forever chemicals" family - as well as the revised Lead and Copper Rule for drinking water systems. "We want to make sure that the final rule remains strong on removing lead pipes," she said about the latter. Gwen Keyes Fleming, who served as EPA Region 4 administrator and chief of staff at the agency during the Obama administration, is on the lookout for PFAS rules as well. "That is the top game-changer," said Keyes Fleming, now a partner and co-chair of the environmental practice group at law firm DLA Piper. "Each and every office has some say on what happens with that suite of chemicals." More cash to come EPA has moved serious money under the climate and infrastructure laws. Administrator Michael Regan told agency employees in a holiday message last month that EPA has provided under the infrastructure law \$13 billion to improve water infrastructure and \$1 billion to expedite cleanups at Superfund sites. Funds are heading to environmental justice communities, too. That includes \$600 million for large grantmaking organizations, EPA announced in December. And the cash will keep coming for several programs. The climate law allots community groups \$2 billion, which will be awarded on a rolling basis in 2024, while the agency is accepting applications until the end of January for another round of clean school bus rebates. "It's an election year. They're going to want to get that money out. They're going to want to show it's being spent," said Doug Benevento, who served as acting EPA deputy administrator during the Trump administration. "I think you will see Congress and the [inspector general] ask, 'Is that money being spent wisely?'" Browner warned EPA needs to be wary of trouble with GOP lawmakers during campaign season. "The first thing that you need to watch out for is the fact that you have a Republican House and oversight hearings," Browner said. "I think that the reason, in and of themselves, they're problematic, but I would think secondly, they can reverberate over into a campaign easily." EPA's workforce has expanded during the Biden administration. The agency hired 1,977 new employees in 2023, surpassing its own hiring goal by nearly 200 staffers. As of Jan. 1, EPA had 15,937 employees, agency spokesperson Remington Belford told E&E News. Whitman expects EPA might struggle to boost staffing in 2024. "Those who don't support the agency will be watching, and if they see the agency growing, they will raise holy heck," Whitman said. "[EPA] may need it, but it's not a strategic thing to do this year." The agency's core budget may be tighter this year as Congress works out long-term funding for fiscal 2024. Lawmakers need to move quickly, too, as under a two-tiered stopgap spending measure, EPA and other agencies are set to run out of funds by Feb. 2. "We hope a shutdown is averted," said Marie Owens Powell, president of American Federation of Government Employees Council 238, which represents about 8,000 EPA employees. The agency may have a new contract with its largest union in 2024, which would set workplace conditions for years. EPA and the council entered into mediation for bargaining in December. Discussions during this phase are confidential, but the union president expressed optimism that a contract would be reached this year. "What I can say is I'm very hopeful that we'll reach an agreement soon," Powell said. EPA waits for nominees Meanwhile, the agency still does not have its full cohort of political leadership in place. Earlier this week, Senate Democrats pulled a motion to advance Joe Goffman, head of the water program since 2021, is leaving by the end of next month. Also, the White House has no pending nominees to lead EPA's environmental justice, mission support and solid waste offices either. Securing confirmation for any of Biden's picks grows tougher by the day, as floor time is scarce with senators itching to jump on the campaign trail. "It is going to become more and more difficult to move nominees," said Benevento, now a partner at law firm Holland and Hart. "Holding nominees to get the attention of EPA is going to become more acute, especially for people in cycle." Miller-Travis, who is an executive vice president at Metropolitan Group, a social change agency, questioned whether the politics

'Maximum urgency and de facto risk' - EPA braces for 2024

would line up to approve EPA nominees. But she was pleased with staff already there. "The people who are operating in an acting capacity are doing a pretty damn good job," she said. Belford with EPA referred E&E News to the White House regarding the agency's nominees. White House press officials didn't respond to a request for comment for this story. Surprises may await the agency in 2024. This past year, EPA was in the national spotlight as it helped respond to disasters such as the train wreck and chemical spill in East Palestine, Ohio, as well as the wildfires in Maui, Hawaii. Stan Meiburg, who served 39 years at EPA, including as acting deputy administrator during the Obama administration, anticipates such a catastrophe could happen again, warranting the agency's attention. "It's almost inevitable in an election year that something unexpected will occur, whether some form of an accidental release or extreme weather event that requires EPA emergency response resources," said Meiburg, now executive director of Wake Forest University's Sabin Center for Environment and Sustainability.

Classification

Language: ENGLISH

Publication-Type: Newswire

Subject: ENVIRONMENTAL DEPARTMENTS (90%); ENVIRONMENTAL LAW (90%); POLITICAL PARTIES (90%); US REPUBLICAN PARTY (90%); ELECTIONS (89%); POLLUTION (89%); CAMPAIGNS & ELECTIONS (78%); CONSERVATION (78%); ELECTIONS & POLITICS (78%); SUPERFUND (78%); US ENVIRONMENTAL LAW (78%); GREEN FINANCE (77%); NEGATIVE ENVIRONMENTAL NEWS (77%); POLITICS (76%); US DEMOCRATIC PARTY (76%); US PRESIDENTIAL CANDIDATES 2016 (76%); GRANTS & GIFTS (75%); HAZARDOUS WASTE (73%); POLLUTION & ENVIRONMENTAL IMPACTS (73%); VEHICLE EMISSIONS (73%); SUSTAINABLE TRANSPORTATION (68%); INDIVIDUAL RETIREMENT ACCOUNTS (60%)

Industry: ENERGY & UTILITIES (78%); SUPERFUND (78%); GREEN FINANCE (77%); ALTERNATIVE & RENEWABLE ENERGY (73%); HAZARDOUS WASTE (73%); VEHICLE EMISSIONS (73%); SUSTAINABLE TRANSPORTATION (68%); INDIVIDUAL RETIREMENT ACCOUNTS (60%); MOTORCOACHES & BUSES (50%)

Person: JOE BIDEN (89%); DONALD TRUMP (79%); CAROL BROWNER (58%); GEORGE H W BUSH (56%); GEORGE W BUSH (56%)

Load-Date: February 9, 2024

End of Document

Environmental Protection Agency delays new ozone pollution standards until after the 2024 election

The Associated Press

September 6, 2023 Wednesday 10:07 AM GMT

Copyright 2023 Associated Press All Rights Reserved

Section: BUSINESS NEWS; WASHINGTON DATELINE

Length: 985 words

Byline: MATTHEW DALY, Associated Press

Dateline: WASHINGTON

Body

WASHINGTON — The [Environmental Protection Agency](#) is delaying plans to tighten air quality standards for ground-level ozone — better known as smog — despite a recommendation by a scientific advisory panel to lower air pollution limits to protect public health.

The decision by EPA Administrator [Michael Regan](#) means that one of the agency's most important air quality regulations will not be updated until well after the [2024 presidential election](#).

"I have decided that the best path forward is to initiate a new statutory review of the ozone (standard) and the underlying air quality criteria," Regan wrote in a letter to the EPA advisory panel last month. The letter cites "several issues" raised by the panel in a recent report that "warrant additional evaluation and review."

The review, which will last at least two years, will "ensure that air quality standards reflect the latest science in order to best protect people from pollution," Regan said.

Regan's decision avoids an election year battle with industry groups and Republicans who have complained about what they consider overly intrusive EPA rules on [power plants](#), refineries, [automobiles](#) and other polluters.

The delay marks the second time in 12 years that a Democratic administration has put off a new ozone standard prior to an election year. President Barack Obama shut down plans to tighten ozone standards in 2011, leading to a four-year delay before the [standards were updated in 2015](#).

Paul Billings, senior vice president of the American Lung Association, called the EPA's decision "profoundly disappointing" and a missed opportunity to protect public health and promote environmental justice. [A recent report by the lung association](#) showed that minority communities bear a disproportionate burden from ground-level ozone, which occurs when air pollution from cars, power plants and other sources mixes with sunlight. The problem is particularly acute in urban areas.

Billings called the ozone rule "the public health cornerstone of the Clean Air Act," adding that "millions of people will breathe dirty air for many more years" as a result of the delay. An increased number of asthma attacks, sick days and even premature death are likely to occur, he and other public health advocates said.

Raul Garcia, vice president of policy and legislation for Earthjustice, called the delay "shameful" and unjustified. "The science tells us we are long overdue," Garcia said.

Environmental Protection Agency delays new ozone pollution standards until after the 2024 election

Democratic lawmakers also were disappointed. "Inaction threatens public health and puts those with underlying conditions such as asthma or lung disease at an elevated risk," said Rhode Island Sen. Sheldon Whitehouse. He and 51 other Democrats had urged swift action on a new rule.

"Unfortunately we've seen the process for updating the ozone standards repeatedly swept up in political games that risk lives," the lawmakers said in an Aug. 7 letter to the EPA.

Conor Bernstein, a spokesman for the National Mining Association, applauded the EPA's decision "not to race ahead with an unnecessary revision of the ozone standards," which have not been changed since 2015. The current standard was reaffirmed in December 2020 under then-President Donald Trump, a Republican.

Bernstein, whose members produce coal and other fossil fuels, urged officials to reconsider other regulations that he said target coal-fired power plants and endanger reliability of the electric grid. "It's clear — and deeply alarming — that EPA (does not) understand the cumulative impact its rules will have on the grid and the nation's severely stressed power supply," he said.

A spokeswoman for the American Petroleum Institute, the top lobbying group for the oil and gas industry, said current ozone limits are among the most stringent in the world. "Any tightening of the standard could impact energy costs, threaten U.S. energy security and impact businesses and American consumers," spokeswoman Andrea Woods said in an email.

The EPA's decision comes after two advisory panels — the EPA's Clean Air Scientific Advisory Committee and the White House Environmental Justice Advisory Council — urged the agency to lower the current ozone standard of 70 parts per billion.

"Based on the scientific evidence currently available, it is concluded that the level of the current standard is not protective with an adequate margin of safety," the EPA panel said in a June report. A limit of 55 to 60 parts per billion "is more likely to be protective and to provide an adequate margin of safety," the panel said.

Lianne Sheppard, a University of Washington biostatistics professor who chairs the scientific advisory panel, said Regan's decision was "his alone" to make.

"However, I am disappointed, given the robust scientific evidence that ozone is harmful to public health and welfare," she told E&E News last month.

The White House environmental justice council, meanwhile, cited the "horrible toll of air pollution" and its disproportionate effect on minority communities. In a letter to the White House, co-chairs Richard Moore and Peggy Shepard said the problem is "compounded by the inadequate monitoring and enforcement in many of our communities."

Moore is co-director of Los Jardines Institute in Albuquerque, New Mexico, while Sheppard is co-founder and executive director of WE ACT for Environmental Justice in New York City.

Tomas Carbonell, a top official in the EPA's Office of Air and Radiation, said the report by the scientific panel left the EPA with little choice but to launch a comprehensive review even though all but one panel member supported a stricter ozone standard.

"When we're looking at our national air quality standards, there's really no way to cut corners around that process," Carbonell said in an interview.

The agency will convene workshops next spring to gather information and will release a review plan for action in late 2024, he said. A final decision could be years away.

Classification

Language: ENGLISH

Environmental Protection Agency delays new ozone pollution standards until after the 2024 election

Document-Type: Spot Development

Publication-Type: Newswire

Subject: AIR QUALITY REGULATION (97%); AIR QUALITY (94%); POLLUTION (94%); ENVIRONMENTAL DEPARTMENTS (93%); AIR POLLUTION (91%); ENVIRONMENTAL LAW (91%); POLLUTION & ENVIRONMENTAL IMPACTS (91%); SMOG (91%); CAMPAIGNS & ELECTIONS (90%); CONSERVATION (90%); DELAYS & POSTPONEMENTS (90%); ENVIRONMENT & NATURAL RESOURCES (90%); NEGATIVE ENVIRONMENTAL NEWS (90%); PUBLIC HEALTH (90%); US ENVIRONMENTAL LAW (90%); ASTHMA (89%); ENVIRONMENTAL REGULATION & POLICY (89%); MINING & ENVIRONMENT (89%); POLITICAL PARTIES (89%); RESPIRATORY DISORDERS & INJURIES (89%); ASSOCIATIONS & ORGANIZATIONS (87%); BUSINESS NEWS (79%); US DEMOCRATIC PARTY (79%); US REPUBLICAN PARTY (79%); DISEASES & DISORDERS (78%); ELECTIONS (78%); ENVIRONMENTAL & WILDLIFE ORGANIZATIONS (78%); ENVIRONMENTAL JUSTICE (78%); HEADS OF GOVERNMENT ELECTIONS (78%); INDUSTRIAL POLLUTION (78%); INDUSTRY & ENVIRONMENT (78%); US PRESIDENTIAL CANDIDATES 2008 (78%); US PRESIDENTIAL CANDIDATES 2012 (78%); US PRESIDENTIAL ELECTIONS (78%); VEHICLE EMISSIONS (78%); EXECUTIVES (72%); EPA ozone pollution Biden smog lung (%); Public health (%); Air quality (%); Politics (%); Climate and environment (%); Government regulations (%); Pollution (%); Elections (%); Climate and environment (%); Business (%); Health (%); Washington news (%); General news (%)

Organization: US ENVIRONMENTAL PROTECTION AGENCY (94%); U.S. Environmental Protection Agency

Industry: PRESS AGENCY RELEASES (90%); MINING & ENVIRONMENT (89%); ENERGY & UTILITIES (78%); VEHICLE EMISSIONS (78%); MINES & MINING (50%)

Person: BARACK OBAMA (78%); SHELDON WHITEHOUSE (59%)

Geographic: RHODE ISLAND, USA (79%); UNITED STATES (94%)

Load-Date: September 6, 2023

End of Document

<< [BACK TO GREENWIRE \(HTTPS://WWW.EENEWS.NET/PUBLICATION/GREENWIRE/\)](https://www.eenews.net/publication/greenwire/)

EPA punts ozone standard review

By [Sean Reilly](#) | 08/21/2023 02:35 PM EDT



A smog-covered skyline of New Jersey is in the background as pedestrians walk along the Hudson River in New York in 2007. EPA on Monday announced new plans regarding a regulatory standard to address ozone, a precursor of smog. Adam Rountree/AP Photo

EPA is restarting review of a high-stakes decision on ground-level ozone standards in a step that short-circuits the prospects for any imminent action to tighten limits on the lung-damaging pollutant.

Like a similar move by then-President Barack Obama in 2011, the delay could allow EPA to avoid a politically difficult decision until after next year’s presidential election.

In a [newly posted letter \(https://subscriber.politicopro.com/eenews/f/eenews/?id=0000018a-1957-dbo3-a3ce-db5729ed0000\)](https://subscriber.politicopro.com/eenews/f/eenews/?id=0000018a-1957-dbo3-a3ce-db5729ed0000) to an expert advisory panel, EPA Administrator Michael Regan wrote that “it is clear” that the panel’s assessment has identified several issues “that warrant additional evaluation and review” to the National Ambient Air Quality Standards for ozone.

LEARN MORE

Advertisement

REQUEST MORE INFORMATION OR GET A FREE TRIAL

POLITICO

New Jersey Playbook

The power player's guide to Garden State politics.

SUBSCRIBE NOW

“I have instructed my staff to immediately announce a new review of the ozone NAAQS, as well as the underlying air-quality criteria,” Regan wrote, “and to complete this review as expeditiously as possible, while also upholding the scientific integrity and rigor of the NAAQS review process and providing opportunities for public input and engagement.”

His decision immediately drew angry responses from environmental and public health groups that had been awaiting the results of a previously announced reconsideration of a Trump-era decision to leave the current 70-parts-per-billion standard unchanged. Earlier this year, the panel, officially known as the Clean Air Scientific Advisory Committee, had recommended strengthening that limit to between 55 and 60 ppb.

Regan’s letter does not spell out a timetable for the new review.

[<< BACK TO GREENWIRE \(HTTPS://WWW.EENEWS.NET/PUBLICATION/GREENWIRE/\)](https://www.eenews.net/publication/greenwire/)



<https://www.eenews.net>

[About https://www.eenews.net/about/](https://www.eenews.net/about/)

[Explore E&E News https://www.eenews.net/get-access/](https://www.eenews.net/get-access/)

[Meet the Team https://www.eenews.net/meet-the-team/](https://www.eenews.net/meet-the-team/)

[RSS \(/articles/feed/\)](/articles/feed/)

[in https://www.linkedin.com/company/e&e-publishing-llc/](https://www.linkedin.com/company/e&e-publishing-llc/) [X https://twitter.com/EENewsUpdates](https://twitter.com/EENewsUpdates) [f https://www.facebook.com/EEnews.net/](https://www.facebook.com/EEnews.net/)

© POLITICO, LLC

[Privacy Policy https://www.politico.com/privacy](https://www.politico.com/privacy)

[Terms of Service https://www.politico.com/terms-of-service](https://www.politico.com/terms-of-service)

LEARN MORE

REQUEST MORE INFORMATION OR GET A FREE TRIAL



Environmentalists threaten suit over missed SO2 deadlines

January 25, 2024

Post

The Center for Biological Diversity (CBD) and Sierra Club are threatening to sue EPA over its failure to ensure that adequate state plans are in place to meet the agency's air quality standards for sulfur dioxide (SO₂), after states and EPA missed a series of deadlines for submission and approval of plans.

In a [Dec. 20 notice of intent to sue](#), which EPA posted on its website Jan. 16, the groups gave EPA 60 days' notice of their threatened lawsuit, which is aimed at ensuring compliance with the 2010 national ambient air quality standard (NAAQS) for SO₂, set at 75 parts per billion (ppb) using a novel one-hour averaging time.

The groups say EPA has failed to issue "findings of failure to submit" state implementation plan (SIP) revisions with respect to several states.

In particular, they say areas in Arizona, Michigan, New York, Tennessee and Virginia failed to attain the SO₂ standard by the applicable statutory deadlines, requiring them to submit SIP revisions to move these areas back into attainment, but the states did not supply the required plans.

As a result, EPA must find the required plans missing, triggering a two-year clock for the states to either submit acceptable plans, or EPA to issue federal implementation plans (FIPs) instead.

Meanwhile, EPA has missed such a two-year deadline to issue FIPs for parts of Arizona, Indiana, Louisiana, Guam and Puerto Rico, the groups say.

Further, EPA has failed to issue required determinations of whether parts of Guam, Illinois, Indiana, Louisiana, Maryland, Michigan, Puerto Rico and Texas attained the NAAQS by their attainment deadlines, the letter says.

244048

SITE LICENSE AVAILABLE

Economical site license packages are available to fit any size organization, from a few people at one location to company-wide access. For more information on how you can get greater access to InsideEPA.com for your office, contact Online Customer Service at 703-416-8505 or iepa@iwpnews.com.

STAY CONNECTED



© 2024. Inside Washington Publishers | [Contact Us](#)

FORBES > INDUSTRY > POLICY

The Diminishing Returns Of Tighter Fine Particle Standards

Susan E. Dudley Contributor 

I apply economic insights to improve regulations and their effects.

Follow



Mar 27, 2023, 01:48pm EDT



abstract financial chart with red color 3d downtrend line graph and numbers in stock market on ... [\[+\]](#) GETTY

Justice Stephen Breyer warned in [1993](#) that “well-meaning, intelligent regulators, trying to carry out their regulatory tasks sensibly, can nonetheless bring about counterproductive results” by trying to exorcise the “last ten percent” of a pollutant, even as the costs of doing so soar. The Environmental Protection Agency’s

(EPA) recent proposal setting National Ambient Air Quality Standards (NAAQS) for fine particles (PM_{2.5}) may be the poster child for that warning. It chases diminishing marginal returns while constraining investments in activities important for other goals, including modernizing infrastructure and combatting climate change.

Section 109 of the 1970 Clean Air Act requires EPA to set primary NAAQS at a level that is “requisite to protect the public health” with “an adequate margin of safety.” The statutory language Congress penned more than 50 years ago is less than 700 words long, but it has spawned countless pages of regulation and litigation, and led to [contentious](#) disagreements across and even [within](#) administrations. The latest [rulemaking](#) takes up 162 pages of fine print in the Federal Register and thousands of pages of [supporting documents](#).

The Act (as amended in 1977) requires EPA to review the “latest scientific knowledge” every five years to determine whether existing standards adequately protect public health and welfare. Due to the complexity of the NAAQS rulemaking process, that [timeline](#) often slips. EPA set the first PM_{2.5} standard in 1997 at 15 micrograms per cubic meter (µg/m³), modified the form slightly in 2006, lowered the level to 12 µg/m³ in 2012, and retained that standard in 2020. Now, just two years into the five-year cycle, EPA proposes to reduce the standard again to 9-10 µg/m³ or lower.

Existing regulations have already gathered all the low (and medium) hanging PM fruit from power plants, vehicles, and large industrial sources, so EPA is now going after ever smaller operations, like restaurant [charbroilers](#). It suggests the proposed standards could compel states to [pave](#) dirt roads to reduce dust, even though paving [increases](#) greenhouse gas emissions. Ironically, as [other agencies](#) are working to move us away from gas stoves,

EPA suggests that we should convert [woodstoves to gas logs](#) to meet this standard.

The controls EPA considers are all “illustrative,” and given the statutory framing, EPA need not be constrained by feasibility. The Supreme Court in 2001 [affirmed](#) EPA’s view that it cannot consider the costs of attaining the standards, so, while it prepares a Regulatory Impact Analysis (RIA) for its rules, the Administrator does not base decisions on it.

MORE FROM [FORBES ADVISOR](#)

Best Travel Insurance Companies

By **Amy Danise** Editor



Best Covid-19 Travel Insurance Plans

By **Amy Danise** Editor



The [RIA](#) for the current rule is 467 pages, yet it is most interesting for what it does not include. Significantly, instead of estimating how much meeting the proposed standard would cost, EPA offers a partial cost estimate—implicitly acknowledging that the increasing marginal cost of removing additional units of PM are exorbitant, as Justice Breyer warned. Further, contrary to standard practice, the partial estimates of costs and benefits it provides are only for the year 2032 and beyond. This further lowers the apparent costs because, by 2032, capital costs, such as changing out or upgrading equipment, have already been incurred. This is like calculating the cost of a new home by considering expenses incurred only after the mortgage is paid off. That window also captures projected health benefits at a high point, and lo, reported benefits exceed costs by a significant amount. (The benefit estimates suffer from other

problems that are beyond the scope of this article, including the unsupported assumption that all particles are equally hazardous.)

Forbes Daily: Get our best stories, exclusive reporting and essential analysis of the day's news in your inbox every weekday.

[Sign Up](#)

By signing up, you accept and agree to our [Terms of Service](#) (including the class action waiver and arbitration provisions), and [Privacy Statement](#).

EPA is not clear on why it selected 2032 for its analysis, though it is [explicitly not](#) because it expects states will be able to achieve the proposed standards by that year. In fact, the RIA [acknowledges](#) that some parts of the western U.S. will be unable to meet even the 2012 standards by then. Many more counties—in the northeast, southeast, west, and California—will be in violation of the proposed standards, even after all known control strategies are applied (which explains EPA's reliance on partial cost estimates).

While EPA sets the standards without regard to cost or feasibility, it is the states who bear the responsibility for meeting them, and a “nonattainment” designation seriously limits a region's opportunities for growth. Researchers [estimate](#) that nonattainment areas lose billions of dollars every year due to reduced manufacturing productivity.

Further, by imposing the obligation of NAAQS attainment on the states, EPA effectively [commandeers](#), not only the considerable state resources that are needed to carry out the program, but also the much broader array of police powers that states enjoy. State Implementation Plans may include land use controls and other regulatory options that are not available to EPA under the Constitution, let alone the Clean Air Act. If a state fails to develop a

plan that meets with EPA's approval, the agency may impose a more restrictive (and possibly punitive) Federal Implementation Plan; the federal government can also withhold federal highway funding from states chronically out of attainment.

It's not too late to bring some rationality to this rulemaking. EPA is accepting [public comment](#) on its proposal until the end of March. Also, it would not be unprecedented for President Biden to direct EPA to return to regular order (the 5-year cycle), as President Obama [did](#) with NAAQS standards for a different pollutant in 2011. Presidents Clinton and Bush also [took](#) the highly unusual step of publicly and personally intervening in EPA's NAAQS decisions during their terms. Ultimately, though, Congress must amend Section 109 to direct EPA to consider all relevant factors if we are to get out of Justice Breyer's "vicious cycle" of counterproductive regulation.

Follow me on [Twitter](#). Check out my [website](#).



Susan E. Dudley

[Follow](#)

I am the director of the George Washington University Regulatory Studies Center and distinguished professor of practice in the Trachtenberg School of Public... **Read More**

[Editorial Standards](#)

[Reprints & Permissions](#)

ADVERTISEMENT



Environmentalists, States Urge White House Not To Further Delay PM NAAQS

January 3, 2024

Post

Environmental groups and state air regulators are urging the Biden administration not to further delay issuance of EPA's rule tightening national ambient air quality standards (NAAQS) for fine particulate matter (PM_{2.5}), as industry continues to lobby against tougher limits and the White House engages in extended review of the measure.

EPA in a [Jan. 2 legal filing](#) said it will need until Jan. 30 to finalize the rule, which the agency had hoped to issue by the end of 2023. The rule would reconsider a 2020 Trump EPA regulation that retained PM limits set by the Obama administration in 2012.

The draft final rule remains under White House Office of Management and Budget (OMB) review, and the administration continues to host meetings with industry and labor groups through at least Jan. 8. Groups meeting with OMB include the Greater Phoenix Chamber of Commerce, Southeastern Lumber Manufacturers Association, and the United Steelworkers union.

Environmentalists are alarmed at the timeline slipping further. "The continued delay is unfortunate. We expect to see a final rule setting stronger standards this month despite the polluting industries' aggressive lobbying to block the standards," said Paul Billings, national senior vice president for public policy at the American Lung Association (ALA).

Industry groups and GOP lawmakers have warned of dire consequences should EPA tighten the PM_{2.5} limits, with broad swaths of the country pitched into "nonattainment" status, requiring states to impose costly pollution controls.

But environmentalists say the industry claims are overblown, and they are urging the administration not to be swayed by such arguments.

"Particulate matter air pollution is lethal, and people of color and low-income communities bear a disproportionate burden from this dangerous air pollutant. Much stronger particulate matter standards are urgently needed and long overdue. Stronger standards are vital to meet the administration's health equity and environmental justice goals," said Billings.

ALA and other public health groups want EPA to tighten its annual health-based NAAQS for PM_{2.5} down from the current limit of 12 micrograms per cubic meter (ug/m³) to 8 ug/m³. ALA also calls for EPA to strengthen its 24-hour health-based limit from 35 ug/m³ to 25 ug/m³.

EPA has proposed to tighten the annual limit to between 9-10 ug/m³, but its proposal would not tighten the 24-hour standard.

State air officials are also concerned about the continued delay. While some states are opposed to tougher PM_{2.5} limits, many others back the agency's proposal, but they also urge EPA to ensure that implementation can follow as smoothly as possible.

State Officials

Before EPA confirmed the final rule's delay, the National Association of Clean Air Agencies (NACAA), representing air regulators in 40 states, [sent a letter](#) to President Joe Biden on Dec. 21, asking the administration to proceed quickly with its final rule.

NACAA says, "we urge the Administration to finalize the rule promptly to put in place the more protective standards that are now long overdue." The group outlines its serious misgivings with the 2020 Trump rule, which it says was the result

of a “flawed” review process.

“With respect to implementation of more protective standards, it is imperative that EPA maintain a strong firewall between setting or revising health-based NAAQS and addressing issues related to implementing those NAAQS. We do, however, acknowledge that any decisions EPA makes to revise the PM NAAQS will have a profound impact on the work of state and local air pollution control agencies,” NACAA says.

“Toward this end, we urge that the Administration recognize this fact and take timely action on several fronts,” the group adds.

The group cites its March 2023 comments to the agency that sought: an improvement in monitoring for PM_{2.5}; an updated implementation regulation for states to craft air quality plans to meet the standards; more federal funding for permitting, compliance, planning, administration and monitoring activities; an easing of the process to exclude air emissions data gathered during “exceptional events” such as wildfires; and tougher federal measures to reduce PM_{2.5}.

Federal action is especially important because of state and local regulators’ limited Clean Air Act authority to curb pollution from vehicles, NACAA says. “EPA should also ensure that state and local air agencies are able to take credit for federal measures that achieve real emission reductions. The mobile source sector is especially ripe for such action.”

NACAA also downplays industry claims about exorbitant implementation costs and a threat to economic development. “Also regarding implementation, we note that some have expressed concern over potential impacts on U.S. supply chains, manufacturing and infrastructure. Based on decades of experience, NACAA has confidence that even with more protective standards the economy will continue to grow as air quality and public health improve.”

EPA officials are pledging **a swifter revision** of implementing measures than with prior NAAQS updates. Peter Tsirigotis, director of EPA’s Office of Air Quality Planning and Standards, said in December that EPA intends to issue implementation measures “very quickly” once a final NAAQS rule is issued. But it is unclear if this will involve guidance, regulatory changes or a mix of both. -- *Stuart Parker* (sparker@iwpnews.com)

243738

RELATED NEWS

- **EJ Lawyer Warns EPA ‘Colluded’ To Draft Weak ‘Contingency Measures’ Rule**
- **NASEM Urges Mitigation For Indoor PM But Sees Limited EPA Oversight**
- **Industry Makes Case For EPA To Set 3-Year Implementation For PM Limits**
- **Beshear Urges Biden To Adopt ‘Step-Down’ Approach For Tougher PM Limit**
- **NOx-SOx-PM Standards Schedule Slips As EPA Rejects Further Review**

SITE LICENSE AVAILABLE

Economical site license packages are available to fit any size organization, from a few people at one location to company-wide access. For more information on how you can get greater access to InsideEPA.com for your office, contact Online Customer Service at 703-416-8505 or iepa@iwpnews.com.

STAY CONNECTED



EPA aims to slash the oil industry's climate-warming methane pollution

Minnesota Public Radio: Web Edition Articles

December 2, 2023 Saturday

Distributed by Newsbank, Inc. All Rights Reserved

Copyright 2023 KNOW Minnesota Public Radio, Copyright © 2023 APM.

Section: CLIMATE CHANGE

Length: 855 words

Byline: Jeff Brady

Body

The oil industry has long leaked methane into the atmosphere, contributing to the greenhouse gasses that are warming the planet. Now, new federal rules aim to dramatically reduce that pollution in the next 15 years.

The Biden administration has issued strict new regulations to reduce methane from oil and gas industry operations. The announcement from the Environmental Protection Agency comes as world leaders are in Dubai for the annual United Nations climate meeting, where controlling methane is a big focus.

Methane is the main ingredient in natural gas. It stays in the atmosphere for a shorter time than carbon dioxide – the most abundant greenhouse gas from humans. But methane is a much more potent climate-warming gas. Research shows that even small amounts of methane escaping into the atmosphere can equal the climate-warming effects of burning coal.

EPA Administrator Michael Regan, in a written statement, called the new final rule an "historic action to reduce climate pollution, protecting people and the planet." He said the regulation is part of President Biden's ambitious climate change efforts, to zero out the country's greenhouse gasses by 2050 and meet goals in the landmark Paris climate agreement.

The EPA estimates the new rule will reduce methane emissions nearly 80 percent below what they were projected to be, and that will "prevent an estimated 58 million tons of methane emissions from 2024 to 2038." The agency says that's the equivalent climate warming power "as all the carbon dioxide emitted by the power sector in 2021."

The EPA says over that period, the amount of methane that will be captured or leaks avoided, would be enough to heat nearly 8 million American homes for a winter.

The agency also estimates the final rule will have net financial benefits of at least \$7.3 billion a year from 2024 - 2038. Included in that accounting is the cost of deploying new technologies, along with climate savings and health benefits.

Human-caused methane emissions are responsible for about 30 percent of global warming today, according to the United Nations Environment Programme. Most of the methane emitted by humans comes from the energy sector, agriculture and landfills.

Included in the new rule is a "Super Emitter Program" that allows third parties, including environmental groups, to detect and report large methane releases from oil and gas sites. The EPA says studies show these large emitters account for almost half the methane emissions from the oil and gas industry.

EPA aims to slash the oil industry's climate-warming methane pollution

There's also a requirement for the industry to phase out routine natural gas flaring at new oil wells. Often drillers will flare, or burn, gas that comes out of the ground with more valuable oil when there isn't a pipeline nearby to transport the gas to buyers.

The new rule also requires "comprehensive monitoring" for methane leaks from well sites and compressor stations. In addition to regularly inspecting sites, the EPA says oil and gas companies will have to choose "low-cost and innovative methane monitoring technologies" to detect leaks.

And the rule creates standards for reducing emissions from equipment, such as controllers, pumps and storage tanks.

Some states already have methane emissions programs. They will now have two years to submit them to EPA for approval to ensure they comply with the new federal regulation.

"With other countries also zeroing in on methane as a key climate risk, it's a signal to operators worldwide that clean-up time is here," said Fred Krupp, Environmental Defense Fund president in a statement. EDF is among groups that have established methane monitoring programs, including plans to launch a \$90 million satellite to detect methane from oil and gas fields.

Even though the new rules are aimed at the oil industry, they're getting praise from some larger companies.

"BP welcomes the finalization of a federal methane rule for new, modified and – for the first time – existing sources," Orlando Alvarez, chairman and president of BP America said in a statement.

But smaller companies have been critical, fearing increased costs that could make some wells unprofitable.

The industry's largest trade group, the American Petroleum Institute, says it's still reviewing the final rule. Earlier this year, API detailed its concerns in comments submitted to the EPA. Among them, API mentioned potential legal issues with using third-party monitors for the "Super Emitter Program." The group said the EPA "must establish requirements for monitoring of third-party data" and provide limits on how that information is released to the public.

A senior EPA official says the agency made changes based on such comments. The official says now the EPA will certify groups with methane monitoring expertise, assess reports of releases for accuracy and then notify a responsible company of the release so they can fix it.

It's not yet clear whether that will satisfy API's concerns but the comments highlight something many people involved in this rulemaking process assume: the new regulations will likely be challenged in court.

Copyright 2023 NPR. To see more, visit <https://www.npr.org>.

Graphic

A flare burns off methane and other hydrocarbons as oil pumpjacks operate in the Permian Basin in Midland, Texas, Oct. 12, 2021. David Goldman/AP

Classification

Language: ENGLISH

Publication-Type: Web Publication

EPA aims to slash the oil industry's climate-warming methane pollution

Subject: GREENHOUSE GASES (99%); POLLUTION & ENVIRONMENTAL IMPACTS (92%); GLOBAL WARMING (91%); POLLUTION MONITORING, PREVENTION & REMEDIATION (91%); AGENCY RULEMAKING (90%); AIR QUALITY REGULATION (90%); CLIMATE ACTION (90%); CLIMATE CHANGE (90%); CLIMATOLOGY (90%); EMISSIONS (90%); ENVIRONMENTAL DEPARTMENTS (90%); ENVIRONMENTAL LAW (90%); NEGATIVE ENVIRONMENTAL NEWS (90%); POLLUTION (90%); ENERGY & UTILITY REGULATION & POLICY (89%); ENVIRONMENT & NATURAL RESOURCES (89%); NEGATIVE NEWS (89%); OIL & GAS REGULATION & POLICY (89%); REGULATORY COMPLIANCE (89%); CLIMATE CHANGE REGULATION & POLICY (79%); ENVIRONMENTAL & WILDLIFE ORGANIZATIONS (79%); ENVIRONMENTAL REGULATION & POLICY (79%); UNITED NATIONS (79%); AGREEMENTS (78%); CONSERVATION (77%); TALKS & MEETINGS (76%); UNITED NATIONS INSTITUTIONS (76%); LANDFILLS (72%)

Industry: OIL & GAS INDUSTRY (92%); GLOBAL WARMING (91%); METHANE (91%); EMISSIONS (90%); NATURAL GAS (90%); ENERGY & UTILITIES (89%); ENERGY & UTILITY REGULATION & POLICY (89%); NATURAL GAS PRODUCTS (89%); OIL & GAS FACILITIES (89%); OIL & GAS PIPELINES (89%); OIL & GAS REGULATION & POLICY (89%); PUBLIC BROADCASTING (89%); PUBLIC RADIO (89%); OIL EXTRACTION (78%); LANDFILLS (72%)

Geographic: MINNESOTA, USA (90%); DUBAI, UNITED ARAB EMIRATES (79%); UNITED ARAB EMIRATES (79%); UNITED STATES (79%)

Load-Date: December 4, 2023

End of Document

EPA proposes slashing toxic fumes at coal-fired power plants

By Sean Reilly

04/05/2023 11:01 AM EDT

EPA is advancing plans to tighten controls on coal-fired power plant emissions of mercury, acid gases and other air toxics for the first time since 2012.

Under [a proposed rule released Wednesday](#), the agency would strengthen existing limits on those releases. The proposal marks a reversal of a 2020 decision made under then-President Donald Trump that no change was needed.

The annual compliance costs of the proposed changes would be relatively modest, according to an accompanying forecast. If made final, they would nonetheless add to the economic pressure on coal-fired facilities whose operators are already facing new requirements to cut smog-forming emissions, limit toxic wastewater discharges and ensure safe handling of coal ash. EPA hopes to issue the final version by next March.

The proposed update follows a statutorily required review of what are formally known as the Mercury and Air Toxics Standards. In part, the review aims to determine whether technological advances during the last decade make added pollution cuts feasible.

While MATS, issued in 2012, has led to steep emissions reductions, power plants still released almost 3 tons of mercury in 2022, according to the most recent available EPA numbers. Mercury is a neurotoxin that can damage babies' brains; in its organic form, the heavy metal bioaccumulates in fish, posing a particular risk to subsistence fishers.

In an earlier about-face from another Trump-era decision that set the stage for the newly released proposal, EPA in February revived the legal basis for the standards by reasserting that it was "appropriate and necessary" to regulate hazardous pollutant releases from coal- and oil-fired power plants ([Greenwire](#), Feb. 21).

GREENWIRE

GOP senators ask EPA to scrap power plant toxics proposal

The lawmakers said the rule would have "negative impacts on our electric reliability and increased costs for consumers."



BY: **SEAN REILLY** | 06/28/2023 01:31 PM EDT



Sen. Steve Daines (R-Mont.) during a press conference at the Capitol. | Francis Chung/POLITICO

GREENWIRE | Two Republican lawmakers are urging EPA to scrap a plan for further cutting toxic air pollution from coal-fired power plants, saying it could raise the risk of power outages and drive up rates.

"We request that you withdraw this proposed rule to prevent negative impacts on our electric reliability and increased costs for consumers," Sens. Steve Daines of Montana

and John Hoeven of North Dakota [wrote in a letter](#) to EPA Administrator Michael Regan made public Tuesday.

In their letter, both lawmakers said the rule could negatively affect power plants in their states.

EPA press aides did not reply to an emailed request for comment. The agency has previously estimated that its plan would yield net yearly health benefits of \$300 million to \$350 million, far outstripping the estimated annual compliance costs of \$23 million to \$33 million over a decade.

The proposal, released this spring, would mark the first major strengthening of the agency's Mercury and Air Toxics Standards since the landmark regulations were issued in 2012. The plan would also reverse a Trump-era finding that no changes were needed.

As initially drafted, the proposal would close a loophole that sets a much laxer mercury emission limit for plants that burn lignite, a particular dirty form of coal. It would also more broadly tighten regulation of releases of arsenic and other hazardous metals besides mercury.

The deadline for public comment on the draft rule ended Friday. Despite the proposed tightening of regulations, [a group of 16 Democratic](#) state attorneys general want EPA to make them considerably stronger. Agency officials hope to make a final decision by next March.

Both Daines and Hoeven have home-state concerns in mind.

Defenders of the Colstrip power plant in eastern Montana [say that added pollution control requirements](#) could force its remaining two generating units to close while lignite-burning plants are concentrated in North Dakota and Texas, according to EPA. Elimination of the existing carve-out "would impose unachievable standards" on those plants, Daines and Hoeven wrote.

Under the Clean Air Act, EPA is supposed to revisit hazardous air pollutant standards for power plants and other industries within eight years of initially setting them, in part to see whether technological advances have made further emissions cuts possible.

Under then-President Donald Trump, the agency in 2020 opted against any changes. The recently released proposal would undo that determination; it came on the heels of [a February decision](#) by President Joe Biden's administration to restore the legal underpinning for the Mercury and Air Toxics Standards (MATS) that had been scrapped under Trump.

The coal-fired power sector was traditionally the biggest industrial source of mercury — a neurotoxin that is particularly dangerous to babies — and other pollutants. Those releases have plunged since the Mercury and Air Toxics Standards (MATS) were issued.

In their letter, Daines and Hoeven note that EPA has not reversed a 2020 assessment that found the remaining health risks posed by the sector are acceptable.

"Given this tacit validation of the safety and effectiveness of current standards, it does not make sense for the EPA to target coal-fired power plants that are in compliance with existing standards with unnecessary new regulations," they wrote.

Their letter mischaracterized, however, a 2015 Supreme Court decision following legal challenges to MATS brought by Republican-led states and power companies.

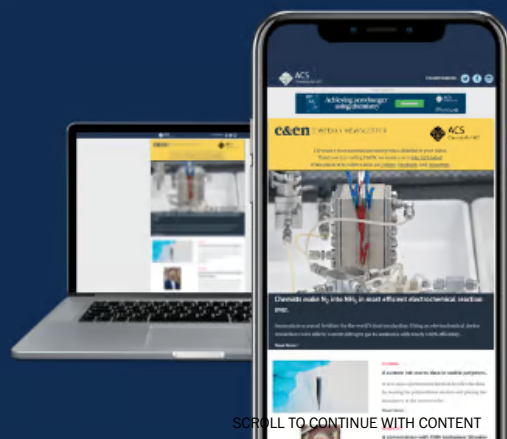
While Daines and Hoeven said the high court effectively blocked the standards by sending the litigation back to a lower court, the 5-4 opinion actually allowed EPA to continue with the regulations' implementation.

The high court did rule that EPA had failed to consider compliance costs in making the statutorily required determination that it was "appropriate and necessary" to limit power sector releases of hazardous air pollutants. The agency reaffirmed that determination in the final rule released in February.



YOUR ACCOUNT MANAGEMENT TEAM

ADVERTISEMENT



Want to receive a curated dose of chemistry news, distilled to your inbox?

Sign up for the latest in chemistry news from **c&en**

[CLICK HERE TO SUBSCRIBE](#)

SCROLL TO CONTINUE WITH CONTENT

POLLUTION

EPA to expand hazardous air pollutant reporting

MOST POPULAR IN ENVIRONMENT

How can companies recycle wind turbine blades?

As nuclear waste piles up, scientists seek the best long-term storage solutions

EPA will pick up the pace of chemical regulations in 2024

Lithium-ion battery recycling goes large

Industrial ammonia production emits more CO₂ than any other chemical-making reaction. Chemists want to change that

Proposed rules broaden who reports hazardous air pollutants and how often

by **Leigh Krietsch Boerner**

July 27, 2023 | A version of this story appeared in **Volume 101, Issue 25**



Credit: Shutterstock

The US Environmental Protection Agency has proposed new rules to monitor hazardous air pollutants.

The US Environmental Protection Agency has proposed **new rules** designed to keep a closer eye on potentially toxic or carcinogenic air pollutants. The rules would require that some emitters of hazardous air pollutants (HAPs), compounds that are known or suspected to cause cancer or other harm, report their emissions directly to the EPA every year.

The change is part of an EPA push to gather missing data on pollution hotspots and what groups of people might be exposed to harmful air pollution. “When we have the most recent, most accurate data on air toxics and other emissions, we can improve our identification of areas where people may be at risk from pollution, develop solutions and help ensure everyone has clean air to breathe,” EPA Administrator Michael S. Regan says **in a statement**.

The new rules, which wouldn't go into effect until 2027, are targeted at the nearly 130,000 facilities nationwide identified as "point sources." The EPA calls facilities point sources if they are major sources of air pollution according to the Clean Air Act, or if they are smaller sources but put out certain toxic compounds above a threshold amount.

Advertisement

Some sources not in a permanent place, such as floating oil rigs, will also have to report their emissions as point sources. The proposed rule targets HAPs, **defined by the EPA** as 188 contaminants or classes of contaminants, including dioxins, benzene, chromium, and perchloroethylene. These compounds fall under rules separate from those that cover criteria pollutants, which include particulate matter, carbon monoxide, and nitrogen dioxide.

According to the EPA, current rules for reporting HAPs are inconsistent across the US. Some states and tribal nations already report HAP emissions to the EPA, but this is not a requirement. This disparity in data gives the agency a patchy picture of where air pollution is a potential health hazard.

Chemical & Engineering News

ISSN 0009-2347

Copyright © 2024 American Chemical Society

YOU MIGHT ALSO LIKE...



10 US refineries exceeded federal benzene levels at their perimeters

Chemical plants may get options for monitoring hazardous air emissions



EPA Eyes Tighter Ozone Air Standard

SPONSORED CONTENT

Automated Monoclonal Antibody Subunit Analysis

by [Agilent Technologies](#)

MOST POPULAR IN ENVIRONMENT

How can companies recycle wind turbine blades?

As nuclear waste piles up, scientists seek the best long-term storage solutions

EPA will pick up the pace of chemical regulations in 2024

Lithium-ion battery recycling goes live

Industrial ammonia production emits more CO₂ than any other chemical-making reaction. Chemists want to change that

Sign up for C&EN's must-read weekly newsletter

Email Address

Subscribe »

[Contact us](#) to opt out anytime

ADVERTISEMENT

September 13, 2023

EPA's New Proposed Air Emissions Reporting Rule: More Companies Covered, More Emissions to Report, More Often

H. Max Kelln, Aaron Szabo

Faegre Drinker Biddle & Reath LLP

+ Follow

Contact



At a Glance

- EPA is proposing to annually collect new air emissions data and other information EPA never previously required to be collected, including potentially Per- and Polyfluoroalkyl Substances (PFAS).
- This rule will impact over 120,000 facilities and state environmental agencies and cost over \$3 billion.
- EPA is collecting more information to develop regulations faster and provide more information to the public. In addition to new regulatory requirements, this could result in additional enforcement and lawsuits for companies.

On August 9, 2023, the U.S. Environmental Protection Agency (EPA) published its proposed updated Air Emissions Reporting Rule (Updated AERR).¹ The comment period for the AERR closes on October 18, 2023, and EPA expects to finalize the AERR in Summer 2024.

According to EPA, the Updated AERR will cost over \$3 billion over the next 10 years, impact over 120,000 facilities including approximately 43,000 small businesses. Reporting requirements begin in 2027, although companies and states will need begin preparing before then.

Privacy - Terms

The AERR was initially finalized in 2002 as a way to consolidate reporting requirements for various EPA Clean Air Act regulations – such as for National Ambient Air Quality Standards (NAAQS) and Regional Haze Program. Currently, the AERR requires state and local air agencies to collect criteria air pollutants and precursors (CAPs) emissions data from facilities within their area and report that information to EPA.

The Updated AERR would require facilities to additionally submit their actual emissions of hazardous air pollutants (HAPs) to EPA – either directly or indirectly – in addition to their CAPs emissions. HAPs have generally been collected on a voluntary basis through state environmental agencies. In addition, EPA is collecting information on generating units located at facilities.

Per- and Polyfluoroalkyl Substances (PFAS) are neither a CAP nor a HAP, but EPA nonetheless is taking comment on whether they should collect air emissions data on PFAS (and provides example regulatory text). EPA recognizes the issues with the lack of emissions monitoring techniques as well as a lack of toxicity or risk from PFAS; however, EPA proposes an actual emissions air emissions reporting threshold of 0.05 tons per year (TPY) based on Toxics Reporting Inventory (TRI) thresholds.

EPA's justification for increased reporting requirements for HAPs is based on the EPA Office of Inspector General's report that recommended EPA "establish requirements for State reporting of air toxics emissions data and compliance monitoring information."² In addition, EPA cites to *Louisiana Environmental Action Network v. EPA*, 955 F.3d 1088 (D.C. 2020), which required EPA to consider all HAPs emitted from all emissions points for each category when reviewing National Emission Standards for Hazardous Air Pollutants (NESHAPs).³ This means that companies that have facilities with unregulated HAPs or emission sources (such as fugitive emissions) can expect this information to be used to in future rulemakings to include those unregulated emissions.

In addition to collecting emissions information from sources around the country, EPA is also proposing to require companies to detail all state and federal air requirements to which the source is subject, thereby giving a roadmap for future enforcement actions or citizen suits.

What Does This Mean for Companies?

In the near term, companies covered by this rule will have to gather the required information for eventual reporting to the EPA. This also adds new reporting requirements that are subject to inspections by EPA. According to EPA, the required information for the AERR will be more detailed than currently provided under the TRI for many HAPs because the EPA says it needs this additional information to perform the appropriate modeling to assess risk and to establish new requirements. This continues EPA's use of modeling to limit emissions from facilities and require additional control equipment.

EPA stated that they plan to allow for information that is submitted under the Updated AERR to be cross applied to other programs such as the TRI reporting program.

For large sources of emissions that already are required to submit air quality information to EPA or the state under their air permits, the increase in requirements will be fewer; however, the information reporting frequency will be significantly higher. For smaller sources of emissions that have traditionally either not had to report or reported significantly less information, those sources will be required to submit more information than previously.

The rule also proposes flexibility for small businesses (as defined by the U.S. Small Business Administration or Clean Air Act) that would not have to report as detailed information. However, that flexibility for a small business can be removed if modeling results show cancer risk from the facility greater than 20-in-one million.

EPA's stated objective is to use the information provided by companies to develop new regulations. According to EPA, this emissions data will not be confidential and will be made publicly available. With recent actions taken by EPA related to community monitoring and the increase in citizen suits, additional publicly available emissions data can increase potential liability for companies. In other words, this information will be used for enforcement purposes or in potential litigation from citizens, states and/or localities.

EPA specifically cites to additional information being used for regulatory actions such as: implementation of NAAQS and Regional Haze Program; National Emission

Standard for HAPs (NESHAPs); and Integrated Risk Information System (IRIS) program analyses.

FOOTNOTES

1. 88 FR 54118 (Aug. 9, 2023).
2. U.S. EPA Office of Inspector General, “Improvements in Air Toxics Emissions Data Needed to Conduct Residual Risk Assessments,” Report No. 08–P–0020, October 31, 2007, <https://www.epa.gov/office-inspector-general/report-improvements-air-toxics-emissions-data-needed-conduct-residual-risk>.
3. 88 FR at 54127/1.

[✉ Send](#)[🖨 Print](#)[⚠ Report](#)

DISCLAIMER: Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

© Faegre Drinker Biddle & Reath LLP 2024 | Attorney Advertising



From Climate Extra

EPA Floats Methane Fee Proposal, Including Key Exemption Parameters

January 12, 2024

Post

EPA has released long-awaited proposed implementing rules for the Inflation Reduction Act's (IRA) methane fee, outlining how to calculate payments by oil and gas facilities, when such payments must be made to the Treasury, and when and how officials would grant several exemptions to the fee required by Congress.

Notably, [the proposed rule signed Jan. 12](#) indicates that a crucial exemption would not take effect until EPA has approved all states' compliance plans for the agency's just-finalized existing source methane standards.

However, once that exemption is triggered, the agency indicates that emissions covered by the fee would drop precipitously.

Specifically, EPA's [regulatory impact analysis](#) estimates that funds collected under the fee would drop off sharply by 2027 under a scenario in which the agency approves all states' plans for complying with the methane standards. Payments under the program would drop from \$640 million in 2026 to just \$13 million the next year in "nominal" dollars not adjusted for inflation, according to EPA's analysis.

Overall, EPA suggests that the fee would generate \$2.3 billion by 2035, which is approximately a third of what the Congressional Budget Office (CBO) projected would be collected -- analysis that could help assuage industry concerns about the fee's effects.

The fee "is specifically tailored to impose a change on high-emitting oil and gas facilities to incentivize actions to reduce wasteful methane emissions while EPA and states work toward full implementation of" EPA's methane emissions standards finalized last month, according to [an agency fact sheet](#).

The summary cites the fee as part of a "three-part framework" under the IRA's methane emissions reduction program, which also includes over \$1 billion in financial and technical assistance to help secure emissions cuts, as well as EPA's already-proposed updates to greenhouse gas reporting requirements to shore up the fee's implementation.

Congress specified that the fee -- calculated based on emissions of covered facilities above certain thresholds in the law -- will start at \$900 per metric ton for 2024, reaching \$1,500 per metric ton in 2026 and thereafter.

EPA proposes to require payment of the fee by March 31 of the year after the emissions in question, though EPA is taking comment on whether that deadline should be extended for the first year of the program.

The proposal also includes suggested procedures for emissions "netting" across different facilities under common ownership, as the IRA requires. "Netting would mean that if an owner or operator has multiple applicable facilities reporting more than 25,000 metric tons of carbon dioxide equivalent to [EPA's GHG reporting program] . . . under common ownership or control, the emissions above and below the waste emissions thresholds from all applicable facilities can be summed to calculate net emissions," the fact sheet says.

Publication of the proposal will trigger a 45-day comment period, with a public hearing slated for 15 days after that publication.

Fee Exemptions

Among the most anticipated elements of the proposal is language proposing how to implement three exemptions included in the IRA: one for unreasonable delay in permitting gathering or transmission lines needed to manage

increased gas offtake from implementation of methane controls; another for emission from wells permanently closed in the previous year; and a third for facilities complying with EPA's emissions standards for new and existing facilities that depends on how quickly states move to implement the existing source limits.

With respect to the environmental compliance-related exemption, EPA's proposal appears designed to provide a maximum incentive for states to draft and win approval of those compliance strategies, with EPA also defending this approach as consistent with the IRA's mandates.

"The EPA is proposing that the prerequisite Administrator determinations for the regulatory compliance exemption would be made after all state and Federal plans pursuant to [Clean Air Act] section 111(d) are approved and in effect," the agency says.

EPA says it considered a different approach that would make the regulatory compliance exemption on a state-by-state basis. But it concluded that this would be both "inconsistent with the statutory text" and suffer from other flaws. These include that it would "unfairly advantage and disadvantage" facilities or companies based on their geographic location.

With respect to the permitting-related exemption, EPA's proposal also floats four criteria: that a facility have emissions exceeding the waste emissions threshold; that neither the entity seeking the exemption nor the entity responsible for seeking the permit have contributed to the delay; exempted emissions must be "those (and only those)" resulting from the flaring of gas that would have been mitigated without the permit delay -- with that flaring in compliance with all flaring rules; and a set period of months must have passed from the time a submitted permit application was determined to be complete by the applicable permitting authority.

The proposal's release comes just days after [a House Energy & Commerce panel hearing](#) during which *de facto* air chief Joe Goffman suggested that the agency had a significantly different projection of overall receipts from the fee compared to the CBO's prior analysis.

A top House Republican at the proceeding highlighted CBO's estimate that the fee could result in \$6.3 billion. EPA's rule includes an estimate that the levy could generate only \$1.8 billion in 2019 dollars, or \$2.3 billion in nominal dollars.

Those projections assume a steep decline in charges after 2026, due to EPA's assumptions that the regulatory compliance exemption would take effect the following year. That would mean oil and gas industry segments subject to EPA's methane emissions standards -- the vast majority of facilities covered by the IRA fee -- would no longer owe any payments. -- *Doug Obey* (dobey@iwpress.com)

243881

RELATED NEWS

- **Attacking Limits On Discretion, GOP States File Suit Over EPA's 111 Rule**
- **EPA Aims To Avoid Overstating Methane Releases, Goffman Assures Hill**
- **GOP Senators Object To EPA's Oil & Gas Emissions Reporting Proposal**
- **COP28 Draft Deal Suggests 'Reducing' Fossil Fuel As Deadline Nears**
- **Final EPA Methane Rule Sets Stage For States To Tighten Oil And Gas Curbs**

SITE LICENSE AVAILABLE

Economical site license packages are available to fit any size organization, from a few people at one location to company-wide access. For more information on how you can get greater access to InsideEPA.com for your office, contact Online Customer Service at 703-416-8505 or iepa@iwpress.com.

STAY CONNECTED



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

Greenhouse Gas Standards/Guidelines for Fossil Fuel-Fired Power Plants: U.S. House of Representatives Committee on Energy and Commerce Chair/Subcommittee Chairs Request EPA Withdrawal

11/15/2023

The U.S. House of Representatives Committee on Energy and Commerce Chair, along with two Subcommittee Chairs, sent a November 13th letter to U.S. Environmental Protection Agency ("EPA") Administrator Michael S. Regan addressing the proposed Greenhouse Gas ("GHG") Standards and Guidelines for Fossil Fuel-Fired Power Plants ("Clean Power Plan 2.0 or CPP2.0 Proposal").

The letter was jointly authored by:

- Cathy McMorris Rodgers
Chair
House Committee on Energy and Commerce
- H. Morgan Griffith
Chair
Subcommittee on Oversight and Investigations
- Bill Johnson
Chair
Subcommittee on Environment, Manufacturing,
and Critical Material

The CPP2.0 Proposal was issued by EPA in May 2023. See 88 Fed. Reg. 33,240.

The CPP2.0 Proposal would limit GHG emissions for fossil fuel-fired power plants. This would include both new and existing natural-gas-fired plants and from existing coal-fired plants pursuant to Section 111 of the Clean Air Act.

The CPP2.0 Proposal would set limits for:

- New gas-fired combustion turbines
- Certain existing gas-fired combustion turbines
- Existing coal, oil, and gas-fired steam generating units

The proposed standards are based on technologies that include carbon capture and sequestration/storage (“CCS”), low-greenhouse gas hydrogen co-firing, and natural gas co-firing.

EPA has a history of promulgating regulations attempting to address power plant GHGs under the Section 111 of the Clean Air Act. They were initially proposed during the Obama Administration. However, the Trump Administration rescinded the Obama Administration’s Clean Power Plan and replaced it with the Affordable Clean Energy Rule.

The United States Court of Appeals for the District of Columbia subsequently invalidated the Affordable Clean Energy Rule in 2021. In 2022 the United States Supreme Court invalidated the Obama Clean Power Plan in *West Virginia v. EPA*, applying the “Major Questions Doctrine.” The United States Supreme Court *West Virginia* decision generally prohibits EPA from setting emission standards that determine market share of various types of power generation.

In the current CPP2.0 Proposal EPA has taken the position that it does not run afoul of *West Virginia* because it sets standards based on emission reduction measures that can be implemented at individual facilities.

The November 13th Committee on Energy and Commerce letter to Administrator Regan expresses a number of concerns about the CPP2.0 Proposal. Those concerns include:

- Ability of the power sector to meet the requirements with CCUS because of lack of infrastructure
- Delay of certain CO2 pipeline projects
- Causing transformation of United States electric generation which could lead to reliability and expense issues
- Overestimation of the feasibility for operating fossil electric-generating units including the needed non-electric generating unit infrastructure necessary for meeting the CPP2.0 Proposal
- Violation of the Major Questions Doctrine
- Misleading and defective EPA analyses undermines public trust and creates costly regulatory/legal uncertainty, harming orderly planning for power generation

The letter requests that EPA consider withdrawing the CPP2.0 Proposal. It also asks that the Administrator provide certain information which would assist the Committee in examining EPA’s process in developing the rule.

A copy of the letter can be downloaded [here](#).

Environment & Energy

Nov. 21, 2023, 11:59 AM EST; Updated: Nov. 21, 2023, 5:32 PM EST

Industry Slams Tougher Air Rules as EPA Readies Soot Limits (1)

By Jennifer Hijazi

Related Stories [Chamber Predicts 'Permitting Gridlock' With Strict Soot Proposal \(1\)](#)

Nov. 9, 2023, 12:01 AM EST

[EPA Soot Rule Faces Pressure From Both Advocates And Industry](#)

Feb. 22, 2023, 3:23 PM EST

[EPA Limits For Particulate Matter Standards Draw Criticism \(1\)](#)

Jan. 6, 2023, 10:00 AM EST

-
- EPA set to release new PM 2.5 rules before 2024
 - Proposal floats spectrum of potential limits

Critics of tougher particulate matter air quality limits unleashed a flurry of disapproval actions this month, lambasting incoming rules that could stem widespread pollution from large swaths of industry.

The Environmental Protection Agency is in the last stages of finalizing new National Ambient Air Quality Standards for particulate matter, or PM 2.5. The rules will potentially decrease the amount of PM 2.5 that is allowable in states' ambient air, triggering increased requirements to protect public health in many areas that don't meet the limits.

The EPA is deciding on a spectrum of limits within the range of 9 to 10 micrograms per cubic meter of air. Industry wants the number to remain at 12, but advocates want that number as low as 8.

The standards are meant to be reviewed every five years and haven't been changed since 2012. President Joe Biden's EPA reversed course from the previous administration's decision to leave the limits unchanged and called for a reconsideration of PM 2.5 rules in 2021.

The action is widely unpopular among certain states and industrial sectors, prompting a recent blitz of condemnation. This includes a National Association of Manufacturers television ad, which aired 126 times in the Washington, D.C., market between Nov. 8 and Nov. 16, according to data compiled by AdImpact.

Coalitions of House lawmakers and manufacturers have also sent letters to the Biden administration condemning a potential hike in requirements, which challengers claim would hinder manufacturing and potentially cause a 47% increase of areas out of attainment, according to a report issued by the US Chamber of Commerce last week.

Industry has “big concerns” with “the cumulative impacts of all these regulations, which EPA doesn’t take a look at because they issue all these rulemakings in silos,” said Chad S. Whiteman, vice president for environment and regulatory affairs at the US Chamber of Commerce’s Global Energy Institute. “We’re trying to re-shore manufacturing and at the same time this rulemaking will push back on that.”

‘Simply Not the Case’

Fine particulate pollution like PM 2.5 is created from combustion sources, including power plants, manufacturing facilities, vehicle use, and wood-burning stoves. When inhaled, it can accumulate in the airways and exacerbate a spectrum of short- and long-term health problems, including asthma, heart disease, and tissue damage. Climate change-fueled wildfires, getting more frequent annually, contribute to the spread of the pollutant every year.

Public health experts and advocates remain on defense for the standards, which protect the public from one of the deadliest forms of combustion-related pollution in the ambient air.

Industry arguments that huge chunks of the US will fall out of attainment or that the rules are innovation killers are just “simply not the case,” according to Vijay Limaye, a climate and health scientist at the Natural Resources Defense Council.

Limaye and other experts want to debunk arguments that stricter Clean Air Act regulations lead to less innovation and job opportunity. National Ambient Air Quality Standards are “not a death sentence” for economic gains, according to Limaye.

“This argument has been made time and time again by industry over the years and it rests on a radical assumption that the manufacturing sector cannot become more environmentally efficient in its operations before 2031,” Limaye said in an email.

“The NAAQS must be based solely on the health and environmental effects in the air of the pollutant at issue,” he said.

(Adds quote and context on 2021 reconsideration. A previous version corrected the percentage increase in fifth paragraph.)

To contact the reporter on this story: Jennifer Hijazi in Washington at jhijazi@bloombergindustry.com

To contact the editors responsible for this story: Maya Earls at mearls@bloomberglaw.com; JoVona Taylor at jtaylor@bloombergindustry.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Environment & Energy
July 25, 2023, 3:06 PM EDT

New Air Toxics Emissions Reporting Requirements Proposed by EPA

By Jennifer Hijazi

Documents

 [Proposed Rule](#)

-
- Proposal would make air toxics reporting more consistent
 - More than 100,000 facilities included in the rule

States would need to report more of their hazardous air pollutant data to the EPA under a proposal announced by the agency on Tuesday.

The proposal would make air toxics reporting more consistent for state air agencies, which are currently only required to report certain common air pollutants such as particulate matter. The move would allow the EPA to more easily spot and address pollution disparities in overburdened communities, according to a press release.

“Data and science are the very foundation of the work we do every day at EPA to protect public health and the environment,” according to EPA Administrator Michael Regan.

“When we have the most recent, most accurate data on air toxics and other emissions, we can improve our identification of areas where people may be at risk from pollution, develop solutions and help ensure everyone has clean air to breathe,” Regan said in a statement.

Emissions reporting feeds the National Emissions Inventory, which provides the agency a detailed snapshot of air quality as it considers regulations. It’s also released to the public every three years.

Under the proposal, nearly 130,000 facilities will need to report their air toxics—known as HAPS, which include benzene, formaldehyde, and other chemicals—directly to the EPA.

“Complete, predictable, and routine” reporting requirements would alleviate the “sporadic,” one-time data collection approach currently used to gather data for rulemaking, according to the proposed rule.

"EPA would have data about all of the units, processes, release points, and controls at facilities and their associated emissions, so that EPA would not need to implement future ad hoc efforts to gather such information," according to the proposal.

There is a 70 day comment period for the proposal, in addition to several informational webinars for background on the proposal to be held by the agency.

To contact the reporter on this story: Jennifer Hijazi in Washington at jhijazi@bloombergindustry.com

To contact the editor responsible for this story: Zachary Sherwood at zsherwood@bloombergindustry.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved



EPA Moves To Expand Good Neighbor Ozone Rule Ahead Of High Court Suit

January 24, 2024

Post

EPA is proposing to expand its troubled Good Neighbor Plan (GNP) interstate ozone rule to another five states, citing new modeling showing their “significant contribution” to ozone problems elsewhere, even as the rule is stayed in more than half of the 23 states now covered and EPA faces Supreme Court argument on the issue next month.

In its [supplemental proposal](#) quietly released Jan. 23, EPA plans to disapprove state implementation plans (SIPs) for interstate ozone reduction from Arizona, Iowa, Kansas, New Mexico and Tennessee, and to instead include these states in the GNP via federal implementation plan (FIPs).

“The FIPs would require fossil fuel-fired power plants in these five states to participate in an allowance-based ozone season nitrogen oxides (NOx) emissions trading program beginning in 2025,” EPA says in [a fact sheet](#).

Arizona and New Mexico are not currently covered by the Cross-State Air Pollution Rule (CSAPR) interstate emissions trading program, the forerunner of the GNP, and therefore would face such trading requirements for the first time, EPA says.

The other states three newly covered by GNP trading requirements would transition from their existing participation in CSAPR programs to tougher GNP emissions caps.

Further, Arizona industries would be subject to NOx rate caps beginning in 2027, including combustion engines used in natural gas pipelines; cement kilns; iron and steel mills; glass manufacturing; metal ore mining; chemical manufacturing; petroleum refining; pulp and paper mills; and solid waste combustors. These are the sectors that will be subject to the GNP in 2026 for states presently covered by the rule.

EPA will take comment on the supplemental proposal for 45 days following its publication in the *Federal Register*.

The plan “is based on an assessment of the information and analyses provided by states in their individual SIP submissions, EPA’s most recent nationwide air quality analysis projecting ozone air quality and contributions in 2023 and 2026, and recent air quality monitoring data,” EPA says.

But adding more states to the GNP is likely to prove highly controversial, given that the rule is currently stayed in 12 states as a result of actions by multiple regional appeals courts, pending merits rulings on the regulation.

Regional courts stayed EPA disapprovals of interstate ozone SIPs for states within their jurisdiction, disapprovals that are legal prerequisites for the GNP itself. In response, EPA has administratively stayed the GNP in the affected states.

Further, the Supreme Court [will hold oral argument](#) Feb. 21 on emergency applications by Ohio, Indiana and West Virginia to stay the entire GNP nationwide, based in part on concerns that the suspension of rule implementation in so many of the 23 original states renders the rule’s assumptions and calculations invalid. This renders the rule arbitrary and imposes unreasonable burdens on those states still implementing the GNP, the three states argue.

Industry groups are also applying to the high court for a national stay, including the pulp and paper sector, steel sector, gas pipeline sector and others.

‘Downwind’ States

Nevertheless, EPA in its supplemental proposal says action is required to mitigate the interstate ozone-forming emissions of the five additional states, which compromise the ability of other “downwind” states to meet the agency’s

2015 ozone national ambient air quality standards (NAAQS), set at 70 parts per billion (ppb).

The proposal would satisfy the five states' obligations under the Clean Air Act good neighbor mandate to reduce their "significant contribution" to problems of downwind states attaining or maintaining the NAAQS, EPA says.

EPA again applies its Obama-era method for determining significant contribution, which includes a threshold of one percent of the NAAQS in order to establish "linkage" between an upwind state and a downwind air monitor. The Biden agency has rejected SIPs based on an alternative, weaker threshold of 1 ppb, allowed in guidance by the Trump EPA, and continues to do so in this rulemaking.

Even so, in Arizona, the state's use of the 1 ppb threshold is "irrelevant," because the state's contribution exceeds this 1 ppb anyway, EPA says.

Tennessee also used the 1 ppb threshold, citing EPA guidance on "significant impact levels," or SILs, used by EPA and states as a screening tool in the air permitting process. But EPA now says that Tennessee cannot rely on the SIL to avoid "significant contribution" in the good neighbor context, and EPA applies its one percent of the NAAQS threshold instead.

The state asserted that it does not contribute significantly to other states' ozone issues using either the 1 ppb standard or the tougher one percent of the NAAQS threshold, EPA says, but the agency disagrees.

EPA finds that all five additional states "interfere with maintenance" of the NAAQS in other states.

The agency is further using its air law "error correction" authority to scrap its previous approval of interstate ozone SIPs submitted by Iowa and Kansas, saying that new data show these states do in fact contribute significantly to ozone problems elsewhere. The states' existing SIPs found no such contribution to mitigate.

Anticipating potential legal challenges to the rule if finalized, EPA says the regulation is "nationally applicable" and therefore litigation must be heard only in the U.S. Court of Appeals for the District of Columbia Circuit.

In the alternative, if courts find the measure only "locally or regionally applicable," the "Administrator intends to exercise the complete discretion afforded to him under the [air law] to make and publish a finding that the final action is based on several determinations of 'nationwide scope or effect,'" again requiring litigation to be heard only in the D.C. Circuit, the proposal says.

EPA also says the rule would be "severable" in numerous ways for the purposes of litigation, in order to preserve as much of it as possible in the event of adverse legal rulings in certain states or judicial circuits.

"EPA views this rule, if finalized as proposed, as severable along those state and/or tribal jurisdictional lines, such that the proposed rule could continue to be implemented as to any remaining jurisdictions. This action proposes discrete emissions control requirements for the power sector and for each of nine other industries. Should any industry-specific aspect of the proposed rule be found invalid once final, the EPA views this rule as proposed as severable as between the different industries and different types of emissions control requirements," EPA says. -- *Stuart Parker*

(sparker@iwpnews.com)

244008

RELATED NEWS

- **EJ Lawyer Warns EPA 'Colluded' To Draft Weak 'Contingency Measures' Rule**
- **EPA Agrees To July 1 Deadline For Action On L.A. SIP 'Contingency' Rules**
- **4th Circuit Blocks EPA's Denial Of West Virginia SIP, Another Blow To GNP**
- **GNP Critics Ask D.C. Circuit To Pause Briefing Pending High Court Ruling**
- **EPA Seeks Remand Of Trump Ozone Standards, Buying Time For Review**

SITE LICENSE AVAILABLE

TRENDING: [VP RACE](#) [RFK JR.](#) [BORDER DEAL](#) [JESSE WATTERS](#)

ENERGY & ENVIRONMENT

Supreme Court to hear arguments on blocking EPA cross-state smog pollution rule

BY RACHEL FRAZIN - 12/20/23 4:15 PM ET

Share

Tweet

...

More



In this April 28, 2009 file photo smog covers downtown Los Angeles. (AP Photo/Nick Ut)

The Supreme Court will hear arguments about whether to block an Environmental Protection Agency (EPA) rule that seeks to address interstate smog, the court said Wednesday.

The court issued an order saying it would not yet decide whether to block the rule from being effective. Instead, it will hear oral arguments on the matter during its February session.

The rule in question seeks to reign in emissions of smog-forming nitrogen oxides from power plants and industrial facilities in upwind states, so pollution from these states does not harm their neighbors.

In October, Republican attorneys general, as well as industry and utility groups, [asked the Supreme Court to halt the rule](#) after a federal appeals court declined to do so.

They said [in a legal brief](#) the rule would “irreparably” harm their industries and citizens because they would have to spend money to comply with the mandate they view as unlawful. They also argued it would undermine their ability to generate electricity and will destabilize states’ power grids.

A spokesperson for the EPA declined to comment on the Supreme Court’s move. When the agency put the rule forward, it touted the public health benefits of cutting pollution, saying it expected to prevent 1,300 premature deaths in 2026 alone.

While it is not clear which way the court will ultimately rule in this case, in recent years the conservative-majority Supreme Court has moved to curtail the EPA’s [authority on climate and water regulations](#).

TAGS

Copyright 2023 Nexstar Media Inc. All rights reserved. This material may not be published, broadcast, rewritten, or redistributed.

[SHARE](#)[TWEET](#)[MORE](#)

SPONSORED CONTENT

[Privacy Policy](#)

The US States People Are Fleeing And The Ones They Are Moving To

[Forbes](#) | Sponsored

Look For Any High School Yearbook, It's Free

[Classmates](#) | Sponsored

[Learn More](#)

Camper Vans Have Done It Again. This Year's Lineup Has Left Us Speechless

[SearchTopics](#) | Sponsored

[Search Now](#)



4th Circuit Blocks EPA's Denial Of West Virginia SIP, Another Blow To GNP

January 10, 2024

Post

A divided appellate court has granted West Virginia's motion to stay EPA's disapproval of the state's interstate ozone plan pending merits argument, and rejected the agency's efforts to move litigation to the District of Columbia Circuit, dealing another blow to the Good Neighbor Plan (GNP) program ahead of Supreme Court arguments on the issue.

In [its 2-1 opinion](#) issued Jan. 10, a split panel of the U.S. Court of Appeals for the 4th Circuit finds that a stay of EPA's denial of West Virginia's state implementation plan (SIP) -- a prerequisite for implementing the agency's GNP -- is warranted until merits issues are resolved, joining six other regional appeals courts in reaching this conclusion.

Judge Paul Niemeyer, in the majority opinion for himself and Judge Marvin Quattlebaum in *State of West Virginia v. EPA*, writes that the case for a stay "weighs clearly in favor of West Virginia." Although the majority is "neutral" on the prospects for success on the merits, West Virginia has convincingly demonstrated other factors that support a stay, Niemeyer writes.

The court had already issued an administrative stay of EPA's disapproval of the West Virginia SIP, but the decision now extends this until the eventual resolution of the case, a decision broadly in line with remarks from the judges at [oral argument](#) Oct. 27.

"The State notes that if the EPA's disapproval is unlawful, the State's expenditures of its valuable resources will be irrevocably lost. The State also asserts that, absent a stay, providers of electricity in West Virginia will pass off compliance expenses to West Virginians through rate hikes," Niemeyer writes.

"While the EPA argues that the State's claim of lost resources is too speculative, we reject the argument. Clearly, the agency's action will require a response that, in several respects, will consume state labor and resources. Such a response simply cannot be made without cost and burden to the State."

The opinion adds, "the public interest surely lies in favor of reducing ozone, a gas harmful to human health, and the EPA's action is aimed at doing so. But the public also has an interest in the efficient production of electricity and other industrial activity in the State, even as such production is balanced with environmental needs."

Because "the issue here is essentially one of a short-term stay, we cannot find that the public interest precludes our granting one in light of other relevant circumstances."

In effect, staying the SIP disapproval also stalls implementation of the federal GNP in West Virginia, because denial of the SIP is a legal prerequisite to the GNP, which EPA imposed via a federal implementation plan (FIP) on 23 states. The rule is now stayed by courts and EPA's own interim rules in 12 of those states.

West Virginia, along with Indiana, Ohio, and a wide range of industries are asking the Supreme Court to stay the entire GNP nationwide, claiming that the rule is now based on the false premise that 23 states will participate, placing an unfair burden on the states still implementing the rule. The high court [will hear oral argument](#) on the stay requests Feb. 21.

'Locally Or Regionally Applicable'

Niemeyer's opinion also agreed with West Virginia that the SIP disapproval is a "locally or regionally applicable" action and hence venue is correct in the regional court, and not in the D.C. Circuit as EPA claims.

EPA packaged the disapproval with 20 others in a single rule, claiming it to be "nationally applicable," and based on a finding of "nationwide scope or effect," and hence only eligible for review by the D.C. Circuit, according to the Clean Air

Act.

EPA “assessed the local and regional circumstances of each of the 21 States and based on those circumstances, it rejected each SIP, giving a unique mixture of reasons for each rejection, even though some of the individual reasons overlapped. This individualized process was consistent with the requirements of the Clean Air Act itself and the rights given to each State to challenge the EPA’s assessment of its SIP,” Niemeyer writes.

“And the fact that the EPA consolidated its disapprovals in a single final rule does not, by that fact alone, make its 21 separate decisions included within its final rule either a single nationally applicable action or one based on a determination of nationwide scope or effect,” Niemeyer adds.

However, in her dissenting opinion, Judge Stephanie Thacker sharply disagrees. “In my view, this is not a close question. The Final Rule is nationally applicable on its face. Therefore, I would hold that venue only lies with the D.C. Circuit,” Thacker writes.

The SIP disapproval in this case is nationally applicable on its face because “it disapproves SIPs from 21 states across the country because those states all failed to comply with the Good Neighbor provision,” Thacker finds. And under the precedent of many courts, this has previously been sufficient.

“Until very recently, federal courts across the country have universally agreed that ‘court[s] need look only to the face of the agency action, not its practical effects, to determine whether an action is nationally applicable,’” Thacker says, citing findings by the D.C. Circuit and the 7th and 11th circuits.

Also, the majority “conflates a ‘nationally applicable’ final action with one that is ‘locally or regionally applicable’ but ‘based on a determination of nationwide scope or effect.’ In other words, the majority believes that a final action is only nationally applicable if it is based on a determination of nationwide scope or effect,” but this is a misreading of the Clean Air Act.

“Rather than considering first whether the final action is nationally applicable -- as it recognized it should -- the majority skips to ‘determin[ing] if [the] agency action is based on a determination of nationwide scope or effect, [by] examin[ing] the geographical aspects of the factual and analytical circumstances of the agency’s determination,’” Thacker writes.

Further, “Because I would hold that we must transfer the case, that would necessarily moot West Virginia’s Motion to Stay. I am nonetheless compelled to respond to the majority’s analysis in granting the Motion to Stay because, in my view, that analysis also defies logic.”

“The majority opines that a stay here will not substantially injure interested parties because it is ‘essentially’ ‘a short-term stay.’ . . . I am curious as to how the majority can deem the stay to be ‘short-term’ given that the time frame for any appeal to wind its way through the judicial review process is unknown,” Thacker says.

Also, “what time period could ever be sufficiently ‘short-term’ so as to not cause injury in this case? Is even one day breathing air that is ‘harmful to human health,’ . . . acceptable?”

Thacker concludes that “a stay in this case is not in the public interest.” -- *Stuart Parker* (sparker@iwpnews.com)

243831

RELATED NEWS

- **EPA Moves To Expand Good Neighbor Ozone Rule Ahead Of High Court Suit**
- **GNP Critics Ask D.C. Circuit To Pause Briefing Pending High Court Ruling**
- **Justices Could Send ‘Very Strong Message’ On EPA’s Good Neighbor Rule**
- **Justices Order Argument Over Critics’ Call To Stay EPA Good Neighbor Rule**
- **EPA Poised To Release Decision On Adding More States To GNP Program**

SITE LICENSE AVAILABLE

Economical site license packages are available to fit any size organization, from a few people at one location to company-wide access. For more information on how you can get greater access to InsideEPA.com for your office, contact Online Customer Service at 703-416-8505 or iepa@iwpnews.com.

STAY CONNECTED



© 2024. Inside Washington Publishers | **Contact Us**

Environment & Energy
July 28, 2023, 11:48 AM EDT

EPA Pivots on Traveling Ozone Plans While Litigation Continues

By Jennifer Hijazi

Documents

 [Interim Final Action](#)

Related Stories

[EPA Good Neighbor Lawsuit Paused In DC While Circuits Deliberate](#)

June 27, 2023, 2:55 PM EDT

[EPA 'Good Neighbor' Ozone Plan Under More Legal Fire From States](#)

June 7, 2023, 5:35 PM EDT

[EPA's Traveling Ozone Plan For Kentucky Temporarily Halted](#)

June 1, 2023, 3:02 PM EDT

[Circuit Panel's Halt Of EPA Ozone Rule Threatens National Limits](#)

May 5, 2023, 5:31 AM EDT

-
- EPA carries out stay orders for certain states
 - Applies to select states suing over EPA ozone rule

The Environmental Protection Agency is carrying out court-mandated halts of its new good neighbor ozone plan for certain states, according to an interim final action filed in the Federal Register on Friday.

A federal implementation plan for traveling ozone pollution won't go into effect for Arkansas, Kentucky, Louisiana, Mississippi, Missouri, and Texas, which are part of a group of states that would have been subject to stricter requirements under the EPA's new good neighbor standards.

States have been launching lawsuits over the EPA's denial of their state air plans and subsequent replacement with federal programs. Courts in response have largely frozen the implementation of the good neighbor rules for certain states while litigation carries on.

"EPA is also revising certain other regulations to ensure that sources in these states will continue to be subject to previously established requirements to mitigate interstate air pollution with respect to other ozone NAAQS while the Good Neighbor Plan's requirements are stayed," according to the interim final action, which references the 2015 National Ambient Air Quality Standards.

The action will formally publish on July 31 and go into effect Aug. 4. The interim rule is limited to the states specified, while implementation carries forward in other states regulated under traveling ozone standards.

Good neighbor regulations mitigate emissions from downwind states that create ozone pollution, which travels into upwind states. The EPA's new good neighbor rule denies air plans from 21 states and adds additional regulated industrial sectors.

To contact the reporter on this story: Jennifer Hijazi in Washington at jhijazi@bloombergindustry.com

To contact the editor responsible for this story: JoVona Taylor at jtaylor@bloombergindustry.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

What the hydrogen tax credit means for EPA's power plant rule

By Jean Chemnick

01/25/2024 06:47 AM EST

The Treasury Department's guidance for the clean hydrogen tax credit could force EPA to change its rule limiting power plant pollution.

EPA leaned heavily on that lucrative tax credit in a draft version of its power plant rule, as part of its statutory obligation to consider cost. The Internal Revenue Service's guidance, [proposed months later](#), is strict — and early analyses show the credit might do less to encourage domestic hydrogen production than EPA originally estimated.

That matters because EPA's draft rule partly bases its limits on carbon pollution on the ability of large gas plants to switch to hydrogen. The Clean Air Act stipulates that in choosing those "best systems of emissions reduction" (BSER), an agency must consider cost.

"You don't have to show exact cost parity," said Ben King, associate director of the energy and climate program at the Rhodium Group. "But they've previously ruled out other technological approaches, because they've been wildly too expensive. So, it matters to some extent, how much you're getting this hydrogen for coming out of this specific type of hydrogen production setup."

The outlook for green hydrogen has changed substantially since EPA issued its power plant proposal in May. The draft rule gave large gas power plants that run often a choice of BSER: capture carbon or committing to burning very high blends of "green" hydrogen by the 2030s.

Green hydrogen — made through electrolysis powered by renewable electricity, rather than with fossil fuels — is not yet widely available. But EPA's proposal projected that such low-emission hydrogen would be available for delivery at \$1 per kilogram through 2032 — when that cost would be cut in half because of "investment certainty to produce hydrogen for use in power sector applications."

Part of that certainty would come from increased demand, including from the rule itself — which would phase in a 30 percent clean hydrogen blend requirement by 2032 and 96 percent by 2038.

But EPA's documents make it clear that it is counting on the 2022 climate law's new clean hydrogen production tax credit to do most of the work of bringing costs down.

The credit, enacted as part of the Inflation Reduction Act, gives producers \$3 per kg for qualifying hydrogen with life cycle emissions below a set threshold. EPA's regulatory analysis assumed the incentive would erase the cost advantage fossil-fuels-based hydrogen now enjoys and cut deeply into its market share.

"By the next decade, costs for low-[greenhouse-gas] hydrogen are expected to be competitive with higher-[greenhouse-gas] forms of hydrogen given declines due to learning and the [clean hydrogen production tax credit] subsidies," EPA writes in its regulatory support documents.

The agency even questioned whether it needed to produce its own definition for low-emissions hydrogen or whether the market would take care of it. But EPA floated adopting the Treasury Department's definition.

That worried environmentalists. Passage of the credit — known as 45V — led to a war of white papers from environmental groups and industry advocates on what exactly qualifies as green hydrogen and who should be able to access the credit.

Congressional Democrats had hoped the credit would both kickstart a domestic industry and cement climate guardrails. But the question of how to balance those objectives — which some argue are often at odds — has hung over the Biden administration as it works to deploy the credit and a \$7 billion regional hub initiative.

'Quite aggressive' guidance

Environmentalists and climate policy experts say that absent stringent standards, federal support for hydrogen could contribute to climate change, rather than be part of the solution. Hydrogen production is energy-intensive; if it is produced with fossil fuels, its climate impact could be substantial.

“[Our analysis](#) has shown that getting it very right or getting it very wrong can have pretty important swings in emissions,” said King of Rhodium Group.

Some environmentalists worried that the IRS, in setting the requirements for the credit, wouldn’t have the expertise to set protective standards on life cycle emissions.

“At the time that EPA proposed its rules, it was still an open question of where Treasury would come down,” said Julie McNamara, a senior energy analyst at the Union of Concerned Scientists.

And then, three days before Christmas, the IRS gave environmentalists most of what they wanted.

The proposed guidance, which is open now for public comment, makes it very hard for hydrogen made with nuclear energy or fossil fuels to qualify for the full tax credit. It requires owners of power-hungry electrolyzers to buy certificates from newly built or expanded clean power projects in their region.

Beginning in 2028, those certificates — known as energy attribute credits — must be generated during the hours when the electrolyzer is running. If the wind isn’t blowing and the sun isn’t shining, hydrogen producers can’t earn the credit.

That has rarely been the standard for such government policies. States with renewable energy standards, for example, usually require energy attribute credits every year, instead of every hour.

“It is quite aggressive, to the point that today there's actually very few parts of the country where the systems that track the renewables can actually do that hourly accounting,” said King, though he added that it wouldn’t be technically difficult to build such systems.

Hourly matching ensures that peak demand coincides with times when there is enough renewable power on the grid, King said.

Janet McCabe, EPA’s deputy administrator, filed [a memo](#) to the Treasury Department’s docket on the 45V draft guidance calling the proposal “reasonable” and consistent with past EPA policy. That would seem to indicate that the agency is eyeing a similar standard for its final power plant rule, which is expected in April.

McNamara of UCS commended the IRS guidance as “very strong.” The EPA memo, she said, could fortify Treasury’s legal basis for considering carbon emissions from coal and gas power plants that would ramp up if hydrogen producers used the grid to run electrolyzers.

But utilities and many hydrogen producers are broadly critical of the IRS guidance, which they said would lead to far fewer companies taking advantage of the production tax credit to make “green” hydrogen.

Those critics include some of the most vocal industry supporters of EPA’s power plant rule.

Constellation Energy CEO Joseph Dominguez has told investors his company might withdraw from a DOE hydrogen hub partnership if Treasury finalizes a guidance that disqualifies hydrogen made with existing nuclear power. The utility has [supported EPA’s](#) carbon proposal. American Council on Renewable Energy and American Clean Power Association both urged Treasury to scrap its hourly matching requirement, at least in the medium term.

Analysts say the Treasury guidance is likely to drive up the cost of clean hydrogen.

“The extent to which those prices go up has been a subject of furious debate,” said Aaron Bergman, a fellow at Resources for the Future.

He pointed to [early analyses](#) that suggest Treasury's requirement for hourly — instead of yearly — matching with renewables would add between fifty cents and \$3.50 per kilogram to the cost of making green hydrogen. That's before factoring in other aspects of the Treasury guidance or comparing the cost of producing green hydrogen with hydrogen made with fossil fuels.

Some attorneys say EPA should reopen last year's climate proposal in response to the Treasury guidance or even rethink the wisdom of including the hydrogen pathway in the final rule.

"BSER must be adequately demonstrated taking cost into account," said Scott Segal, a partner at Bracewell. "Under current circumstances, hydrogen doesn't seem to meet the test."

This story also appears in Climatewire.

MINORITY NEWS

Capito Leads Colleagues in Urging EPA to Rescind Unattainable Air Pollution Standard

September 21, 2023

WASHINGTON, D.C. – Today, U.S. Senator Shelley Moore Capito (R-W.Va.), Ranking Member of the Environment and Public Works (EPW) Committee, led 22 other senators, including every Republican on the EPW Committee, in urging the U.S. Environmental Protection Agency (EPA) to rescind its proposed particulate matter (PM_{2.5}) national ambient air quality standard (NAAQS).

“The EPA’s proposal fails to consider several important factors that will make implementation of a lower annual standard extremely difficult, or in some cases impossible, to no measurable benefits to public health, the environment, or the economy. The EPA should not finalize a discretionary reconsideration of a PM_{2.5} NAAQS that is unattainable and will likely lack an accompanying, detailed implementation plan,” **the senators wrote** in a letter to EPA Administrator Michael Regan.

Cosigners of Ranking Member Capito’s letter include, U.S. Senators John Barrasso (R-Wyo.), John Boozman (R-Ark.), Mike Braun (R-Ind.), Katie Britt (R-Ala.), Tom Cotton (R-Ark.), Kevin Cramer (R-N.D.), Mike Crapo (R-Idaho), Ted Cruz (R-Texas), Steve Daines (R-Mont.), Deb Fischer (R-Neb.), Lindsey Graham (R-S.C.), John Hoeven (R-N.D.), James Lankford (R-Okla.), Cynthia Lummis (R-Wyo.), Roger Marshall (R-Kan.), Markwayne Mullin (R-Okla.), Pete Ricketts (R-Neb.), Jim Risch (R-Idaho), Dan Sullivan (R-Alaska), JD Vance (R-Ohio), Roger Wicker (R-Miss.), and Todd Young (R-Ind.).

Read the full letter here or further below.

BACKGROUND:

In June 2023, Ranking Member Capito led introduction of the *National Ambient Air Quality Standards Implementation Act of 2023*, which would improve the processes both for EPA to revise current NAAQS and for states to implement the standards. Under the Clean Air Act’s NAAQS program, the EPA sets standards for six criteria pollutants, including ground-level ozone and particulate matter. Earlier this year, the EPA took a discretionary action to propose making the NAAQS for particulate matter (PM_{2.5}) more stringent. Historically, the EPA has consistently missed

statutory deadlines for both reviewing standards and for providing implementation guidance to states. Capito's legislation would address these issues and set a more reasonable and attainable schedule for EPA actions.

LETTER:

Dear Administrator Regan:

On December 18, 2020, the Environmental Protection Agency (EPA) completed its comprehensive review and published a final decision to retain the Obama Administration's 2013 National Ambient Air Quality Standards (NAAQS) for particulate matter (PM). Thirty-three days later, the Biden Administration issued an executive order directing the EPA to undertake a reconsideration of that decision. On January 27, 2023, the EPA published a discretionary proposal to revise the primary annual fine particulate matter (PM_{2.5}) standard by lowering the level from 12 µg/m³ to between 9-10 µg/m³, an up to 25-percent reduction. Additionally, the EPA sought comment on an alternative standard as low as 8 µg/m³ – as much as 33 percent lower than the current standard.

According to the World Health Organization our nation enjoys some of the cleanest air in the world. The EPA's own figures report that direct emissions of PM_{2.5} are down 40 percent from 1990 levels and annual ambient PM_{2.5} concentrations have decreased 43 percent between 2000 and 2019. Considering this progress in improving our air quality and the limited percentage of PM emissions from stationary point sources subject to the relevant regulation, the EPA should heed the advice of experts that it is neither necessary nor advisable to revise the primary annual PM_{2.5} standard and rescind the proposed reconsideration.

Establishing a lower NAAQS does not directly limit emissions. Rather, it establishes a level of ambient pollution that the Administrator determines is "requisite to protect the public health" with "an adequate margin of safety" and it falls to the states to implement procedures and pollution controls to attain and maintain the standards.

However, as the PM_{2.5} standard is approaching natural background levels, there are fewer sources available to regulate in order to achieve compliance. According to the Association of Air Pollution Control Agencies, wildfires and miscellaneous sources accounted for over 70 percent of domestic PM_{2.5} emissions in 2022. The EPA's Policy Assessment for the PM NAAQS reconsideration estimated that only 16 percent of PM_{2.5} emissions come from power plants and industrial sources, while the vast majority of the emissions are from non-point sources, such as wildfires, construction, road dust, and international transport.

Many of these non-point sources are exceedingly onerous or impossible to control, or like wildfires, are beyond the scope of the Clean Air Act's regulatory authorities. In light of this, sharply lowering the current PM_{2.5} annual standard would increase nonattainment levels across the country. This would increase permitting and regulatory burden on manufacturers, energy producers and several other key industries to our economy without a feasible path to attainment given the high costs and diminishing returns of additional control technologies.

This would result in Americans inheriting all of the negative consequences of nonattainment: offshoring of our domestic manufacturing, job loss, electric reliability concerns, higher prices, reliance on China, energy insecurity, and slow economic growth. At the same time, it would produce little to no measurable public health or environmental benefits. This proposal, particularly with its confounding inclusion of a request for comments on a standard as low as 8 µg/m³ that the EPA attests it is not even considering, is already causing uncertainty in the business community. This uncertainty is negatively impacting investments that would create good-paying jobs, including in the renewable energy sector the Biden Administration professes to support.

The EPA's proposal fails to consider several important factors that will make implementation of a lower annual standard extremely difficult, or in some cases impossible, to no measurable benefits to public health, the environment, or the economy. The EPA should not finalize a discretionary reconsideration of a PM_{2.5} NAAQS that is unattainable and will likely lack an accompanying, detailed implementation plan. With that, I urge the EPA to rescind its proposed reconsideration of the PM_{2.5} NAAQS, and review the NAAQS under the Clean Air Act's regular five-year review schedule. At that time, the EPA must set standards that follow the science and operate within the bounds of what is technologically and economically feasible.

#

Permalink: <https://www.epw.senate.gov/public/index.cfm/2023/9/capito-leads-colleagues-in-urging-epa-to-rescind-unattainable-air-pollution-standard>

[Hearings](#) | [Privacy Policy](#) | [Newsroom](#)

410 Dirksen Senate Office Building
Washington, D.C. 20510
202-224-8832



EPA Moves To Codify Narrow Approach To Title V Air Permit Reviews

January 8, 2024

Post

In a blow to environmentalists, EPA is planning to codify its current narrow view of what “applicable requirements” may be examined during review of Clean Air Act Title V air operating permits, seeking to entrench a more-restrictive approach first taken by the Trump administration that largely excludes consideration of underlying air permitting decisions.

An [EPA proposal](#) slated for *Federal Register* publication Jan. 9 would formalize an approach the agency has taken in individual permit reviews since 2017 that mostly rejects calls by environmentalists for EPA to consider the substance of underlying air permits, such as new source review (NSR) permits.

The method also eschews consideration of whether state air regulators correctly required “minor source” air permits instead of tougher “major source” permits for some sources.

“Provided a source obtains an NSR permit under EPA-approved (or EPA-promulgated) title I rules, with public notice and the opportunity for comment and judicial review, that NSR permit establishes and defines the relevant NSR-related applicable requirements” of the state implementation plan (SIP) or federal implementation plan (FIP) for purposes of Title V, EPA says.

“EPA would *not* revisit those NSR decisions through the title V process,” the proposal adds.

The proposal [effectively ends](#) a shift back toward the Obama EPA’s broader review of Title V permits that the agency first signaled in a 2022 response to a judicial finding overturning the Trump-era policy with respect to a contested air permit for a Utah power plant.

EPA also proposes to codify its established position that air law “general duty” requirements are not “applicable requirements” under Title V permits, and environmentalists therefore may not seek EPA objections to Title V permits based on a failure to discharge such general requirements. EPA will take public comment on the proposal for 60 days, until March 9.

The proposal represents a setback for environmental groups that have urged EPA to revert to its pre-2017 position, under which the agency took a broader view of the circumstances that might allow it to object to state permitting decisions when it conducts Title V reviews.

Environmentalists continue to bring numerous petitions for EPA to object to Title V permits, which are “umbrella” documents that must list all applicable requirements under the Clean Air Act. Such requirements include underlying NSR permits or requirements from EPA-approved SIPs, for example, but not “state-only” air permits. Applicable requirements also include EPA’s national new source performance standards (NSPS) and air toxics standards.

However, most such petitions now focus on allegations that the targeted Title V permits fail to include sufficient provisions to ensure compliance with underlying permit terms.

EPA Administrator Michael Regan has on multiple occasions [issued such objections](#), largely limited to compliance-related terms that the agency says are still reviewable under Title V.

EPA’s decision to codify the narrower approach it has followed since 2017 comports with a ruling of the U.S. Court of Appeals for the 5th Circuit finding that Title V review may not open underlying permitting to revision.

The court in its 2020 ruling in *Environmental Integrity Project v. EPA* upheld the agency’s order rejecting environmentalists’ petition seeking consideration of NSR issues during review of a Title V permit for the ExxonMobil

olefins plant in Baytown, TX.

Contrasting Ruling

But the new proposal also allows EPA to sidestep a contrasting 2020 ruling of the 10th Circuit in *Sierra Club v. EPA*, which found that the narrow approach runs counter to existing air act regulations on the issue. The *Sierra Club* ruling vacated EPA's 2017 order rejecting review of NSR issues in the *PacificCorp Hunter* order, which pertained to the Title V permitting of a power plant operated by utility PacifiCorp in Utah.

"Unlike the Fifth Circuit, the Tenth Circuit did not address the EPA's statutory interpretation but instead rejected the EPA's reasoning as inconsistent with the EPA's regulations," EPA now says.

"Because these two courts ruled on different grounds (with the Fifth Circuit focusing on the statute, and the Tenth Circuit focusing on the EPA's existing regulations), the legal reasoning underlying their holdings is not in direct conflict. However, for practical purposes, the differing rulings have made it difficult for the EPA to apply a uniform interpretation of its current title V regulations nationwide," EPA says.

"EPA considers it prudent to update the EPA's regulations to reflect its interpretation of the statute. The changes proposed in this rulemaking will allow the EPA to apply a single framework across the nation by amending the text in the regulations."

Further, it "also more clearly aligns the EPA's regulations with the EPA's statutory interpretation endorsed by the Fifth Circuit."

The narrow approach is consistent with current Regan's approach to Title V reviews, which does not allow for "second-guessing" of state regulators' decisions on which permit to require, and what terms to include.

However, it contains a number of important caveats that would, in some limited circumstances, allow EPA to also consider NSR issues during a Title V review.

One of the chief scenarios where the proposal allows such consideration would be a failure by state regulators to follow public notice-and-comment procedures, and allow for judicial review, when issuing NSR or other permits.

EPA can also wade into substantive NSR issues where no Clean Air Act-mandated "Title I" permit, such as an NSR permit, has been issued by state authorities when required, the proposal says.

It reads, "the limited situations in which the EPA does use (and proposes to continue using) the title V process to address NSR-related issues is wholly consistent with the EPA's position that, in general, the title V process should not be used to second-guess or alter substantive applicable requirements that are established through a title I permitting process with public notice and the opportunity for comment and judicial review."

EPA also says that certain permit procedures employed by states, including "concurrent" NSR and Title V processes, and "enhanced NSR" programs, can confuse the two legally distinct programs.

"Where NSR and title V permit documents have been merged to such an extent that it is impossible to legally distinguish the NSR permit action from the title V permit action, it may be necessary to use the title V process to review whether the NSR-related requirements of the SIP are included in the title V permit," the proposal says.

Therefore, the agency discourages states from using such practices. "EPA strongly encourages permitting authorities that currently employ an 'enhanced NSR' framework to stop using such procedures and instead consider other mechanisms for streamlining," it says. -- *Stuart Parker* (sparker@iwpnews.com)

243810

RELATED NEWS

- **Industry Expects Suits Over EPA's Title V Plan Due To 'Scant' Authority**
- **EPA Faces Lawsuit Over Partial Denial Of Suncor Refinery Title V Permit**
- **Environmentalists Petition EPA To Set NO2, SO2 NAAQS' 'Increments'**

- **Chevron Loses Second Bid To Challenge EPA Offshore Permitting Decision**
 - **Judges Doubt EPA Applicability Decision Is 'Final' But Fault Uncertainty**
-

SITE LICENSE AVAILABLE

Economical site license packages are available to fit any size organization, from a few people at one location to company-wide access. For more information on how you can get greater access to InsideEPA.com for your office, contact Online Customer Service at 703-416-8505 or iepa@iwpnews.com.

STAY CONNECTED



© 2024. Inside Washington Publishers | [Contact Us](#)



07 **FIRESIDE CHAT WITH TCEQ'S EXECUTIVE DIRECTOR**

NO MATERIALS FOR THIS SESSION



08 **BREAKOUT SESSION 1:**

ENVIRONMENTAL LITIGATION TRENDS

Environmental Litigation Trends

Joshua Frank

Kent Mayo

Martha Thomsen

Chris Danley

Jeff Wettengel

Tiffany Cheung

CONFIDENTIAL
© Copyright Baker Botts 2024. All Rights Reserved.

BAKER BOTTS

1

Presenters



Joshua Frank

Partner
Washington, DC
P: +1.202.639.7748
joshua.frank@bakerbotts.com



Kent Mayo

Partner
Washington, DC
P: +1.202.639.1122
kent.mayo@bakerbotts.com



Martha Thomsen

Partner
Washington, DC
P: +1.202.639.7863
martha.thomsen@bakerbotts.com



Chris Danley

Special Counsel
Washington, DC
P: +1.202.639.7842
christopher.danley@bakerbotts.com



Jeff Wettengel

Senior Associate
Washington, DC
P: +1.202.639.1333
jeff.wettengel@bakerbotts.com



Tiffany Cheung

Associate
New York
P: +1.212.408.2575
tiffany.cheung@bakerbotts.com

2

State of Play for Environmental Litigation

- **Reduced EPA Enforcement**

- Resurgence of enforcement litigation did not fully materialize in current administration
- Some States are becoming more aggressive in enforcement (e.g., New Jersey, California)

- **Fewer Citizen Suits Under Federal Environmental Statutes**

- Even in current administration, environmental groups seem more focused on taking on government inaction than bringing suit directly against companies
- Continued strategic decision-making by environmental groups to avoid protracted and costly litigation, with focus instead on action in regulatory processes.

- **Evolution of Environmental Torts and Class Actions**

- Increasing number of actions based on one-time facility events or ongoing facility operations, with focus on environmental justice areas
- Used more and more to achieve plaintiffs' environmental goals of influencing corporate behavior through claims for injunctive relief and damages (e.g., climate suits)
- Expanded scope into emerging chemicals (e.g., PFAS) and products (e.g., plastics)

Environmental Litigation Trends

Tort Suits

CERCLA Wartime Claims

NRD Claims

PFAS

Takeaways and Questions



TORT SUITS

01

BAKER BOTTS

5

Managing Threats From Tort Suits

- Environmental Tort Litigation regularly makes the list of what keeps industry clients awake at night
 - High dollar risks
 - Unpredictable outcomes
 - Well-funded plaintiffs' counsel
 - Negative public attention
 - Substantial resource costs
- Anticipating and understanding potential tort exposure and litigation process and strategy can help companies prepare for and mitigate future threats



6

Environmental Torts - Background

- Tort: An act (or omission) that causes harm to another and for which courts may impose civil liability.
- Typical environmental tort claims:
 - Based on state common and statutory law.
 - Nuisance, negligence, and trespass.
 - Strict liability, failure to warn, defective product.
- Harms may include: personal injury and property damage
 - including interference with use and enjoyment or diminution of property values.
- Claims may stem from contamination of any media (air, water, soil).
- May focus on individual facilities or entire industries.
- Damages sought may include money damages
- Plaintiffs often seek punitive damages that increase risk exposure.
- Often brought as a class action.

7

Overview of Types of Environmental Tort Actions

- Environmental tort actions can cover many types of situations.
- Typically, but not always, the genesis of such an action is the proximity of a facility to a nearby community and impacts from operations.
 - This could include groundwater contamination, surface or drinking water contamination, air emissions, soil contamination, odor, noise, vibration, *etc.*
- Sometimes, the alleged harms are more widespread, *e.g.*, city-wide, state-wide or even national
- Types of claims include:
 - **Ongoing operation** at individual facilities
 - **Historical operations** that caused environmental contamination
 - **One-time incidents**, *e.g.*, spills, explosions, containment failures
 - **Industry-wide conduct**, *e.g.*, placing an allegedly harmful product into the stream of commerce

8

Tort Law = Additional Layer of Regulation

- **Regulatory compliance provides no immunity**
- Tort suits can be brought against any type of industrial facility, even if in compliance with environmental statutes.
 - Regulatory compliance can aid defense, particularly for claims based on negligence.
 - Likewise, NOV's and noncompliance will complicate defense of suits.
- Appellate decisions have uniformly rejected preemption of tort claims by the Clean Air Act; similar reasoning applies to other statutes.
- Legal standard varies based on type of claims brought and applicable state law
 - Subjective standard of care based on "reasonable person" difficult to predict

Tort Claims as Class Actions

- **Tort suits likely to be brought as class actions.**
 - ***What is a class action?***
 - A class action is a type of lawsuit brought by a small group of named plaintiffs who seek to represent a large group of individuals.
 - The first stage is for the court to determine whether the class should be "certified" and allowed to proceed as a class action.
- **Class action status creates significant risk multiplier; damages can be sought for large group without their participation in litigation.**
- **Defeating class certification is paramount for Defendants – will often functionally end the case.**
 - Environmental claims often entail numerous individual issues of causation and damages that may make class certification less likely.
 - But Plaintiffs can increase likelihood of class certification through artful pleading.



Mitigating Risk

- Maintain and enhance compliance programs
- Understand state tort laws
- Understand your permits, and make sure they accurately describe your practices
- Monitor public disclosures
- Be careful about private, non-privileged communications
- Understand environmental justice categorization and concerns for nearby communities
- Evaluate potential impacts on communities and take actions
- Be proactive in communications with the community, especially in advance of big decisions

BAKER BOTTS

11

11

Tort Actions in the Energy Transition

- **New Activities Undertake as Part of Energy Transition Create Additional Tort Risks.**
- **Additional construction and operation of facilities within communities gives rise to interactions that can lead to tort claims.**
 - Wind farms, solar farms, battery units, CCS all have potential for impacts on neighboring landholders
- **Claims less likely to focus on traditional emissions and more likely to address other physical impacts alleged to affect use and enjoyment of neighboring property.**
 - Noise, runoff, vibration, odor, sediment
- **Less likely to be existing regulatory standard, so even greater uncertainty regarding standard of care.**

BAKER BOTTS Environmental Litigation Trends | Baker Botts' 37th Annual Environmental, Safety and Incident Response Seminar

12

12

Tort Actions in the Energy Transition – Ex. Wind Farms

- **Shadow flicker**
- **Noise** – “deep thumping noise similar to a helicopter, jet engine, or train” and infrasound
- **Negative aesthetic impact**



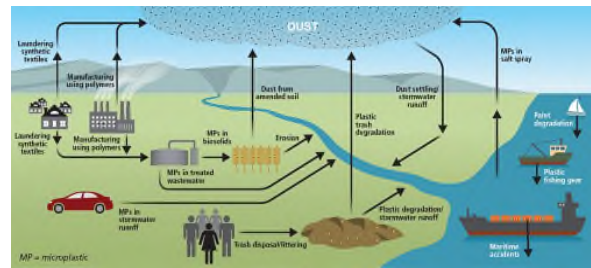
Tort Actions in the Energy Transition – Ex. Solar Farms



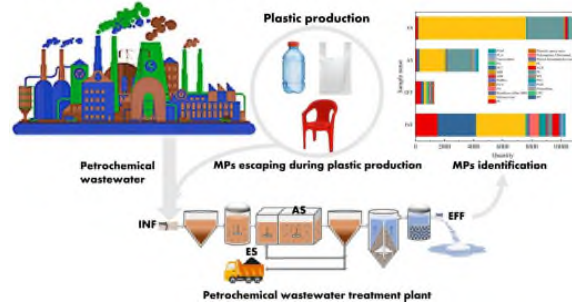
Georgia couple awarded \$135.5M for polluted land and water

Plastics Litigation

- Claims arising in the context of single-use plastics, plastic waste, and microplastics (including plastic pellets and nurdles)
 - Microplastics are tiny plastic particles (less than 5 millimeters in diameter) that result from both commercial product development and the breakdown of larger plastics
 - Nurdles are microplastic resin pellets (generally under 5 millimeters) that absorb persistent organic pollutants from the environment and may enter the environment during phases of the plastics industry's supply chain
- Microplastics and other plastics are widely spread in the environment and are persistent, mobile, and biotoxic



The petrochemical industry



Sources: Haley Aldrich, "Microplastics legislation is imminent. Why should you care?" (Nov. 10, 2021); Journal of Hazardous Materials, "Is the petrochemical industry an overlooked critical source of environmental microplastics?" (June 5, 2023).

Plastics Litigation: Common Claims

- Tort: public nuisance
- Federal environmental statutes: CWA; NEPA; RCRA; CAA
- State and local laws
 - California Assembly Bill No. 258 (2007) became law (requiring the State Water Resources Control Board "to designate, as appropriate, stormwater discharges of preproduction plastic from plastic manufacturing, handling, and transportation facilities as contributors of pollutants")
 - Some states (e.g., Texas and South Carolina) have seen failed attempts to pass legislation specifically addressing plastic pollution
 - Other states (e.g., Pennsylvania) take the position that existing environmental laws can be leveraged to regulate plastics-related pollution
- Consumer Protection: false advertising; greenwashing

Plastics Litigation: Representative Cases

- ***Center for Biological Diversity v. U.S. Army Corps. of Engineers*, Case No. 1:20-cv-00103 (D.D.C. 2020)**
 - o Conservation and community groups filed APA challenge to USACE permit for proposed petrochemical facility in Louisiana alleging, *inter alia*, that the failure to disclose the environmental damage and public risks of the plastics facility violated NEPA and CAA
 - o Court ultimately dismissed the case but noting that USACE was re-evaluating the permit
- ***PennEnvironment, Inc. v. BVPV Styrenics LLC*, Case No. 2:23-cv-02067-NR (W.D. Pa. 2023)**
 - o ENGO citizen suit under CWA alleging unpermitted discharges of nurdles; further alleging that discharge of nurdles violated specific permit conditions prohibiting discharges of floating solids and discharges of any substances in harmful amounts
- ***State of New York v. PepsiCo, Inc.*, NYSCEF Dkt. No. 814682/2023 (2023)**
 - o New York Attorney General filed an action all that defendants failed to remedy harms and abate the public nuisance it caused by its continued manufacturing, production, marketing, distribution, and sale of significant quantities of single-use plastics packaging
 - o Causes of action: public nuisance; (2) strict products liability (failure to warn); and (3) violations of New York general business and executive law

WARTIME CLAIMS

02

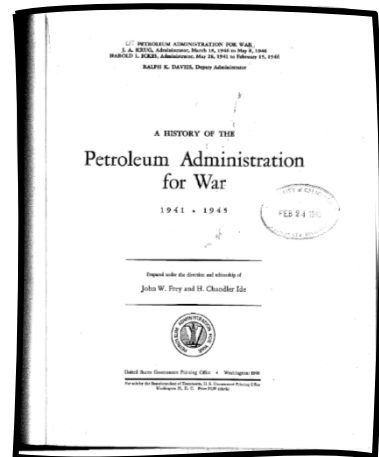
CERCLA AND GOVERNMENT CONTRACT CONSIDERATIONS



Historical Background

"For World War II, from beginning to end, was a war of oil"

- During World War II (and other wartime periods), Government effectively conscripted oil refineries, rubber manufacturers, and other industries into war effort
- Government's wartime demands in WWII specifically included massive ramp up in production of petroleum products, synthetic rubber, and other products
- At the same time, Government rationed steel and other materials, inhibiting the ability to address leakage and pollution during wartime



Government wartime dictates



Facility contamination



Private party cleanup costs under federal and state programs

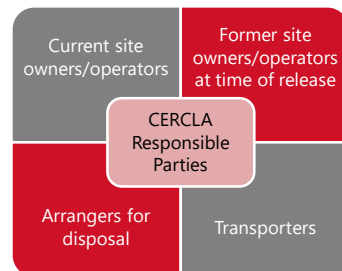


Worth considering: does the U.S. owe you some cleanup costs?

Avenues for Recovery by Private Party Plaintiffs

CERCLA

- **Former operator liability:** "any person who at the time of disposal of any hazardous substance owned or **operated** any facility at which such hazardous substances were disposed of," 42 U.S.C. § 9702(a)(2)
 - "Person" includes Government and CERCLA liability explicitly extends to Government
 - Per Supreme Court in *U.S. v. Bestfoods*, this includes any one (parent company, third party, or otherwise) who "manage[s], direct[s], or conduct[s] operations specifically related to pollution"
- **Former owner liability:** "any person who at the time of disposal . . . **owned** . . . any facility . . ." 42 U.S.C. § 9702(a)(2)
 - Ownership of part of a facility *might* cover entire facility
- **Arranger liability:** "any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . Of hazardous substances owned or possessed by such person"



Government Contract Claims

Key Issues in Assessing Potential CERCLA Claims

- **Scope of costs**
- **Statute of limitations**
 - CERCLA has a fairly permissive SOL in the sense that it does not run from the date of contamination or discovery date
 - But, need to evaluate cleanup activities/settlements and what might have triggered a 3- or 6-year SOL
- **Any federal ownership of any portion of the facility**
 - May be able to extend “owner” liability to entire facility
- **Degree of Government operational control over industry and specific facility**
 - Impacts operator liability determination – need to clear *Bestfoods* standard
 - Also impacts ultimate allocation once Government is determined liable as owner, operator, or arranger
- **Nexus between WWII activities and cleanup costs**
- **NCP consistency and state and/or federal oversight of cleanup**
- **Circuit-specific precedent on operator liability and pending Supreme Court cert. petition**
 - Broad interpretation of *Bestfoods* (pollution-generating activities) or narrow (disposal/environmental compliance activities only)
 - Cert. petition pending before Supreme Court now challenging 6th Circuit narrow interpretation (*MRP Props. Co., LLC v. United States*, No. 22-1789, 2023 WL 4141227 (6th Cir. June 15, 2023))

21

SHOW ME YOUR GOVERNMENT CONTRACTS!



22

GOVERNMENT CONTRACTS

- The Federal Circuit held that a standard provision within the avgas contract required the United States to indemnify refiners for past costs incurred to remediate contamination resulting from avgas production. *Shell v. United States*, 751 F.3d 1282 (2014).
- Costs need to be incurred as required by municipal, state, or federal law.
- Refiners need to be able to show standing.
- No statute of limitations on these claims as long as costs were incurred prior to 2011.
- Interest accrues on past costs when they are incurred at 2.5% per year.

NATURAL RESOURCE DAMAGES CLAIMS

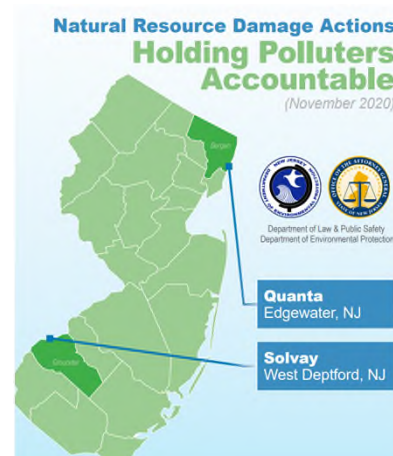
Background on NRD and NRD Claims

- **Natural resource damages (NRD)** are damages for the lost value of, injury to, or destruction of "natural resources" due to the discharge or release of hazardous substances into the environment
 - o "Natural resources" is typically broadly defined to include land, fish, wildlife, biota, air, water, groundwater, drinking water supplies, and other such resources
 - o The measure of damages is the cost of restoring injured resources to their baseline condition, compensation for the interim loss of injured resources pending recovery, and the reasonable cost of a damage assessment
- **Recovery under federal statutes:** state and federal trustees may pursue natural resource damage (NRD) claims pursuant to federal statutes (most commonly **CERCLA** and **Oil Pollution Act**) or independent state authority
- But, some **states have independent NRD authorities** too: e.g., New Jersey Spill Compensation and Control Act; Delaware Hazardous Substance Cleanup Act, etc.; California Oil Spill and Prevention Act
- State NRD suits can also be coupled with **other tort claims** (e.g., nuisance, trespass)

25

Uptick in State Suits?

- **New Jersey** has been very active, pursuing oil companies, chemical manufactures, and others for NRD claims related to surface water *and* groundwater
 - Some lawsuits PFAS related (other states have filed similar claims)
 - Settlements have ranged from low millions to hundreds of millions
- Some states (including NJ, CA, PA, and others) may retain **outside counsel on contingency fee basis** to pursue claims
- **MTBE** and **PFAS** have been one area of focus (in NJ as well as PA and Puerto Rico)
- **Groundwater** may be emerging area of focus in select states
- **What is the appetite (and statutory basis) for NRD in your state?**



26

Defenses to Consider to NRD and Associated Claims

- Prior settlements precluded further NRD claims
- Statute of limitations
- For CERCLA claims, release and damages occurred before CERCLA was enacted
- For state claims, some state statutes do not provide for retroactive recovery
- Lack of standing (private parties and some municipalities are not authorized as trustees to seek relief for harm to natural resources)
- Damage to natural resources at issue has been identified as irreversible and irretrievable in an environmental impact statement
- Affirmative defense that the release was permitted

BAKER BOTTS Environmental Litigation Trends | Baker Botts' 37th Annual Environmental, Safety and Incident Response Seminar

27

27

PFAS

04

ENFORCEMENT AND LITIGATION

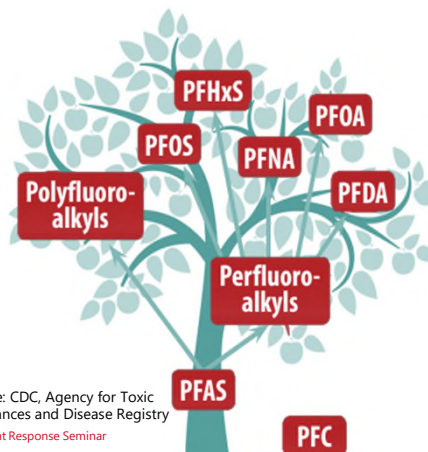
BAKER BOTTS



28

What are PFAS?

- Long-lasting “**forever chemicals**” with useful properties like resistance to oil, water, grease, and heat
- Prolific in the environment, with potential for bioaccumulation
- **9,000+ PFAS exist**
 - Only 600 are used in the United States
 - **PFOA** and **PFOS** most targeted for regulation
 - **PFBS**, **PFNA**, **PFHxS**, **PFDeA** also targeted to a degree
 - **GenX** – newer short-chain PFAS designed to replace PFOA



BAKER BOTTS Environmental Litigation Trends | Baker Botts' 37th Annual Environmental, Safety and Incident Response Seminar

29

29

Litigation Overview

- State suits against PFAS manufacturers & formulators
- Multidistrict Litigation (MDL) for firefighting foam cases
- Suits challenging federal and state PFAS policies and regulations
- Significant focus on Department of Defense (DOD) facilities and water supplies
- Claims for a variety of health and environmental damages against companies that used or disposed of PFAS
- Greenwashing and deceptive marketing suits

BAKER BOTTS Environmental Litigation Trends | Baker Botts' 37th Annual Environmental, Safety and Incident Response Seminar

30

30

Claims Against PFAS Users

- Allege a variety of harms and contamination
- Potential claims include:



Property Damage



Groundwater/Soil Contamination



Nuisance



Medical Monitoring



Cleanup



Natural Resource Damages



False Advertising

31

Illinois Firefighting Foam Cases

- *Illinois v. Sugar Camp Energy LLC*, No. 2022-ch-0002 (Ill. Cir. Ct., filed January 7, 2022).
 - o Allegations that Sugar Camp discharged PFAS into state waters during use of AFFF to **extinguish coal mine fire**
- *Illinois v. Chemtool, Inc.*, No. 2021-ch-115 (Ill. Cir. Ct. filed July 9, 2021).
 - o Allegations that Chemtool discharged PFAS in violation of state environmental laws and common law during firefighting efforts, using AFFF to **extinguish explosion and fire at grease, lubricating oils, and fluids manufacturing plant**
- Shows that even **a single PFAS incident can create liability.**

32

New York Plastics Facilities and Manufacturers

- *In re Hoosick Falls Cases*, No. 1:16-CV-917 (N.D.N.Y. filed July 27, 2016)
 - o Consolidated class actions brought by residents **against plastics facilities and manufacturers** for PFOA used in coating applications. Seeking damages for:
 - Remediating contaminated property
 - Diminution of property value
 - Punitive damages
 - Medical monitoring
 - o **Settled for \$65 million** with three of four defendants in December 2021 (including \$23M for medical monitoring)

Ohio Class Action

- *Hardwick v. 3M Co.*, No. 18-01185 (S.D. Ohio filed Oct. 4, 2018)
 - o Class action brought by firefighters on behalf of all residents of the United States who have detectable levels of PFAS in their blood.
 - o Court partially granted and partly denied the class motion (Mar. 2022)
 - o The class certified: **"Individuals subject to the laws of Ohio, who have 0.05 ppt of PFOA (C-8) and at least 0.05 ppt of any other PFAS in their blood serum."**
 - Nationwide class not certified because increased risk of disease may not be redressable harms in other states
 - Court willing to allow briefings for sub-classes in different states in the future
 - o Focusing on standing and traceability, Sixth Circuit reverses class certification and instructs district court to dismiss the case in November 2023. 87 F.4th 315 (6th Cir. 2023) ("Seldom is so ambitious a case filed on so slight a basis.").

Clean Water Act NPDES Actions

- On **April 26, 2023**, EPA announced that it was ordering **Chemours Company to take corrective action to address pollution from PFAS in stormwater and effluent discharges**
- The enforcement order requires the company to:
 - o Characterize the extent of PFAS contamination from discharges
 - o Implement an EPA-approved sampling plan to analyze PFAS
 - o Develop a plan to treat or minimize the discharge of PFAS
 - o Submit existing standard operating procedures to reduce PFAS discharges from the site
- ***Lower Susquehanna Riverkeeper Association (LSRA) v. Republic Services of Pennsylvania***, No. 1:23-cv-00044 (M.D. Pa. filed Jan. 11, 2023)
 - o ENGO files CWA citizen suit against waste and recycling company alleging NPDES permit violations stemming from PFAS discharges
 - o Potential tip of the iceberg for citizens suits as more information regarding PFAS use and release becomes publicly available

35

Greenwashing

- Expanding to increasingly target PFAS users under state/federal consumer protection laws and common law
 - o ***DiGiacinto v. Albertsons Cos.***, No. 3:20-CV-03382 (N.D. Cal. Filed May 18, 2020)
 - Class action alleging that defendants “advertise, market and sell disposable plates and bowls as compostable” even though the products contain PFAS “which do not break down and never become part of usable compost.” On April 12, 2022, the parties filed a joint stipulation for dismissal.
 - o ***Krakauer v. REI***, No. 3:22-cv-05830-BHS (W.D. Wash. Filed Oct. 28, 2022)
 - Class action alleging defendant markets the company and its products as environmentally friendly, including making statements that the company is taking steps to reduce chemical use while not disclosing presence of PFAS in products. Motion to dismiss currently pending.
 - o ***Toxin Free USA v. Cava Group, Inc.***, 2023-CAB-006356 (D.C. Super. Ct. Filed Oct. 13, 2023)
 - Lawsuit alleging defendant engages in false and deceptive marketing as “healthy and sustainable” despite the fact that, *inter alia*, its food packaging contains PFAS.

36

Potential Third-Party Litigation

- **New Jersey v. Solvay Specialty Polymers USA, LLC**, No. GLO-L-001239-20 (N.J. Sup. Ct. filed Nov. 10, 2020)
 - o State-initiated suit under state statutes and common law seeking, *inter alia*, PFAS remediation and natural resource damages
 - o Approximately \$393M settlement, including \$75M in natural resource damages, proposed in June 2023 (pending judicial approval)
 - o Example of a case that can spur third-party litigation

37

Large Manufacturer Settlements

The New York Times

**3M Reaches \$10.3 Billion Settlement
in 'Forever Chemicals' Suits**

By Lisa Friedman and Vivian Giang
June 22, 2023

CNN

**Three companies agree to pay more
than \$1 billion to settle 'forever
chemical' claims**

By Ramishah Mani, CNN
Updated 9:23 AM EDT, Sun June 4, 2023

 **REUTERS®**

**Solvay reaches nearly \$393 million PFAS
settlement with New Jersey**

Reuters
June 28, 2023 4:33 PM EDT · Updated 21 days ago

TIME

**'Forever Chemical' Lawsuits Could Ultimately Eclipse
the Big Tobacco Settlement**

BY JEFFREY KLUGER
JULY 12, 2023 7:00 AM EDT

38

Evaluating Potential Litigation Risk

- Assess any past and current usage of PFAS
 - Identify prior releases
 - Assess supply chains and any AFFF stocks
 - Trace past owners/operators of your facilities
 - Evaluate any active or legacy sites for potential PFAS implications
- Assess current and past usage of PFAS in the geographic area
- Track PFAS-related litigation in your operating regions to evaluate risk of possible third-party actions
- Identify insurance coverage, indemnities, and past settlements
- Understand applicable federal- and/or state-related PFAS investigation, reporting, and cleanup requirements
 - Particularly important in states (e.g., CA and NJ) prioritizing PFAS remediation
- Publicly available sources of information regarding your facility
- Upcoming designation of PFOA/PFOS under CERCLA will open up an additional avenue of litigation

39

CONCLUSION AND DISCUSSION

40

AUSTIN
BRUSSELS
DALLAS
DUBAI
HOUSTON
LONDON
NEW YORK
PALO ALTO
RIYADH
SAN FRANCISCO
SINGAPORE
WASHINGTON

bakerbotts.com

©Baker Botts LLP, 2024. Unauthorized use and/or duplication of this material without express and written permission from Baker Botts LLP is strictly prohibited. Excerpts and links may be used, provided that full and clear credit is given with appropriate and specific direction to the original content.



09 **BREAKOUT SESSION 2:**

CALIFORNIA...KNOWS HOW TO REGULATE.



California....knows how to regulate.

Megan Berge
Allison Watkins Mallick
Julie Cress
Day Robins

CONFIDENTIAL
© Copyright Baker Botts 2024. All Rights Reserved.

BAKER BOTTS

1

Presenters



Megan Berge
Partner
San Francisco
P: +1.415.291.6233
megan.berge@bakerbotts.com



Allison Watkins Mallick
Partner
San Francisco
P: +1.415.291.6269
allison.mallick@bakerbotts.com



Julie Cress
Special Counsel
San Francisco
P: +1.415.291.6242
julie.cress@bakerbotts.com



Day Robins
Associate
San Francisco
P: +1.415.535.6730
day.robins@bakerbotts.com

BAKER BOTTS California...Knows How to Regulate | Baker Botts' 37th Annual Environmental, Safety and Incident Response Seminar

2

2

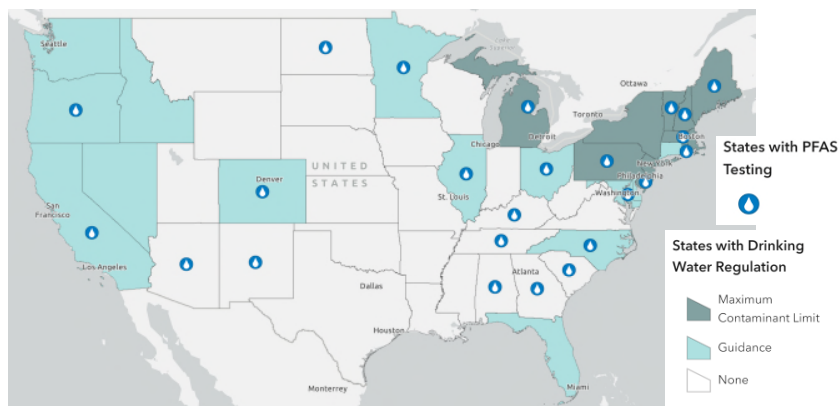
PUBLIC HEALTH- FOCUSED REGULATIONS 01

PFAS IN DRINKING WATER
OIL & GAS PRODUCTION SETBACKS

BAKER BOTTS

3

PFAS Drinking Water Regulations/Advisories/MCLs By State



Source: [Northeastern PFAS Project Lab "State Action" Map](#)

California... Knows How to Regulate.

What are California's levels?

4

California's Issued & Requested Drinking Water Advisory Levels

Notification levels: non-regulatory health-based advisory levels established by DDW **Response levels:** recommended concentration above which the water system should be taken out of service or treated.

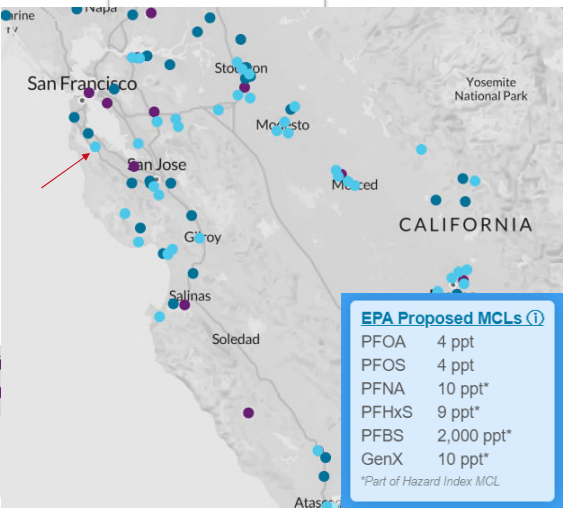
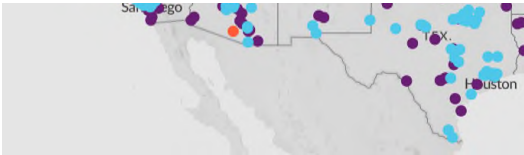
Abbreviation	Chemical name	Notification Level ng/L (ppt)	Response Level ng/L (ppt)	Date Issued / Status
PFOA	Perfluorooctanoic acid	5.1	10	February 6, 2020
PFOS	Perfluorooctane sulfonic acid	6.5	40	February 6, 2020
PFBS	Perfluorobutane sulfonic acid	500	5000	March 5, 2021
PFHxS	Perfluorohexane sulfonic acid	3	20	October 31, 2022
PFHxA	Perfluorohexanoic acid	--	--	Requested
PFHpA	Perfluoroheptanoic acid	--	--	Requested
PFNA	Perfluorononanoic acid	--	--	Requested
PFDA	Perfluorodecanoic acid	--	--	Requested
ADONA	4,8-Dioxa-3H-perfluorononanoic acid	--	--	Requested

Have PFAS tests shown detections over these limits?
5

PFAS Contamination & Overview

PFAS detected:

Chemical	Years tested	Maximum Level (ppt)
PFBA	2023	2.7
PFHxA	2023	2.6
PFOA	2023	4.2
Total PFAS	2023	6.8



Source: EWG.org
Going beyond drinking water, what about sampling at sites?
6

California's Phased Approach

Practice Tip: All submitted testing plans and results are publicly available on **Geotracker** by site. Counsel should review documentation before submission with an eye towards potential admissions to potential future liability.

WQ 2019- Mar. 20, 2021					0006-DWQ 1, 2021
Landfills	Commercial Airports	Chrome Plating	Wastewater Treatment	Bulk Fuel & Refineries	
• 196 Municipal Solid Waste Landfills • March 20, 2019 • Why? They are receivers of PFAS-containing wastes	• 30 Commercial Airports • March 20, 2019 • Why? They use AFFF	• 271 Chrome Plating Facilities • October 25, 2019 • Why? The universal use of PFAS-containing suppressants	• 249 Publicly Owned Wastewater Treatment Works • July 9, 2020 • Why? They are also receivers of PFAS-containing waste	• 161 Bulk Fuel Storage Terminals and Refineries • March 20, 2021 • Why? May have AFFF; surfactants; cereal grains treated with PFAS, etc.	
					

Goal: understand PFAS presence in the state and direct limited resources to "hot spots"

Source: Final Draft Community Air Protection Blueprint (Aug. 24, 2018)

This Photo by Unknown Author is licensed under CC BY-SA
BAKER BOTTS California . . . Knows How to Regulate.

What are the results so far?

7

Data Collected April 2022

State-wide Industry Investigative Orders provided vital information but there are gaps

Media	Chrome Platers	Airports	Landfills	POTWs	Bulk Fuel Terminals/Refineries
Soil				* Includes biosolids	
Groundwater					
Stormwater					
Surface Water/Sediment					
Wastewater			* Includes leachate		
To be assessed Not Detected to Low Concentrations (<100 ppt) Moderate Concentrations (100 ppt to 5,000 ppt) Significant Concentrations (>5,000 ppt)					

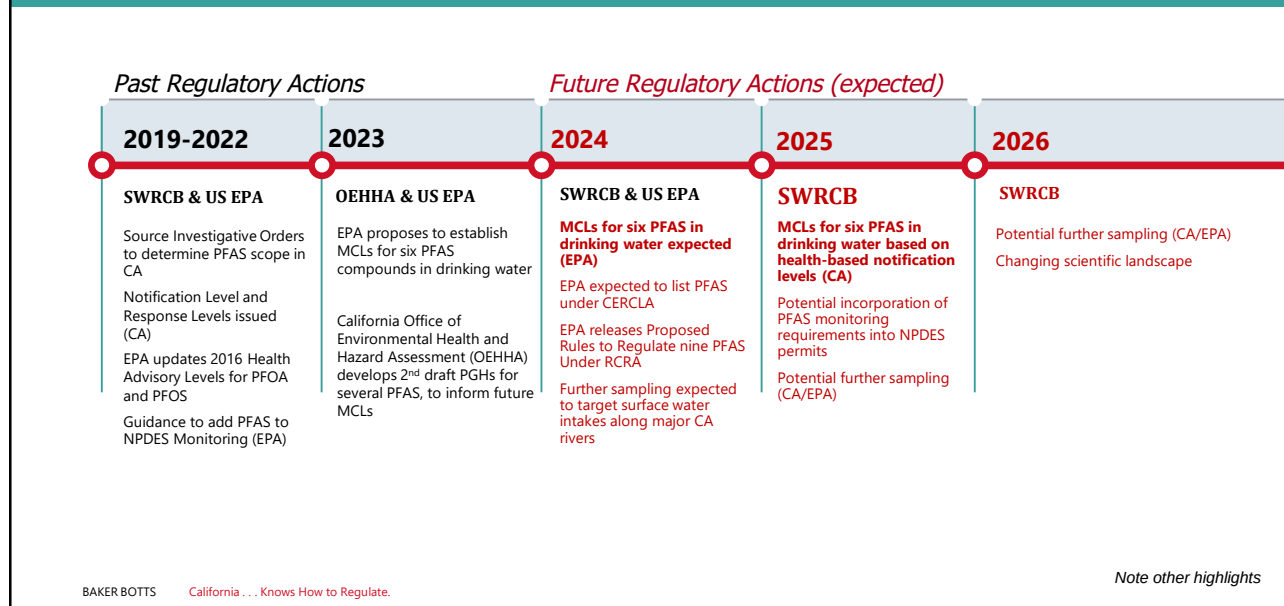
All matrices were analyzed using the DoD QSM with 25 to 38 analytes.

BAKER BOTTS California . . . Knows How to Regulate

What are the next regulatory steps in California?

8

Anticipated PFAS Requirements



9

Other Recent or Upcoming California PFAS Regulations

- **AB 1200 (food packaging & cookware)** As of January 1, 2023, California prohibits intentionally added PFAS OR food packaging that contains PFAS at levels exceeding 100 ppm.
- **AB 652 (juvenile products)** As of July 1, 2023, California prohibits the distribution and sale of products designed for use by infants and children under 12 years of age from containing regulated PFAS chemicals (e.g., cribs, strollers, and car seats). The law also requires that juvenile product manufacturers use the least toxic alternative when replacing PFAS chemicals in their goods.
- **AB 1817 (textiles)** Effective January 1, 2025, California will prohibit the manufacture, distribution, sale, or offer of textile articles containing regulated PFAS chemicals as well as require textile manufacturers to use the least toxic alternative when replacing PFAS in their products and to provide textile distributors with a certificate of compliance affirming that their products don't contain any regulated PFAS.
- **AB 2771 (cosmetic products)** Effective January 1, 2025, California will prohibit the manufacture, sale, delivery, holding, or offer of cosmetic products containing intentionally added PFAS chemicals.

10

SB 1137: Oil & Gas Production Setback Law

Regulating California's Energy Transition

- Prohibits the issuance of well permits and the construction and operation of new oil or gas production facilities within a health protection zone of 3,200 feet from a sensitive receptor.
 - Sensitive receptors include places where people live or gather such as homes, schools, health care facilities, prisons, nursing homes, day care centers, community centers, public businesses, etc.
 - The bill also establishes strict engineering controls (e.g., light and dust mitigation) to be implemented by existing operations within the health protection zone as well as continuous leak detection and water sampling.
 - The Governor personally engaged on legislature on this bill and signed it in to law last September.
 - **SB 1137 is the largest state setback requirement in the nation.**
- A ballot referendum to overturn the bill officially qualified for the 2024 ballot. As a result, the law is stayed until the November election.
 - Prior to the referendum qualifying for the ballot, CalGEM sent emergency regulations to OAL that were approved on January 6, 2023 but were then "suspended as a matter of law" on February 23, 2023.
 - Additional emergency regulations by Air Districts and Water Boards required under the law have not yet been issued.
- **If the referendum fails in November, the setback requirements could be enforced as soon as the election results are certified.**

11

SB 1137: Oil & Gas Production Setback Law

Compliance Requirements

- **2023**
 - January 1 - CalGEM will cease to approve well permits within a Health Protection Zone, unless it is necessary to prevent or respond to a threat to public health, safety, or the environment, or to comply with a court order finding that denying approval would amount to a taking of property.
 - January 1 - Operators are prohibited from constructing or operating new production facilities in a Health Protection Zone unless associated with an approved well permit or as determined by the division to protect health and safety.
 - **February 3 – SB 1137 stayed by operation of law pending a vote on the referendum.**
 - **February 23 – Notice that CalGEM's emergency regulation stayed.**
 - June 1 - CalGEM to enter into MOU with State/Regional Air Districts and Water Boards re coordinated rulemakings implementing this law
 - July 1 - All operators must submit an inventory and map of sensitive receptors, and a determination as to whether their wellheads and production facilities are located in a Health Protection Zone.
- **2025**
 - January 1 – State/Regional Air Districts and Water Boards issue LDAR and water testing regulations
 - January 1 - All wells and facilities within a health protection zone must be in compliance with specific health, safety, and environmental requirements.
 - January 1 - Operators must develop and submit leak detection and response plans to CalGEM for approval.

12

SB 1137: Oil & Gas Production Setback Law

- **2026**
 - January 1 - CalGEM approval of the leak detection response plan.
- **2027**
 - January 1 - Operators shall suspend all production and injection operations within a Health Protection Zone unless an approved leak detection and response plan is fully implemented. Operators are required to update its plan every five years.
 - January 1 - Operators are required to begin annual reporting on the results of their leak detection and response plan and baseline water testing (with data being made publicly available).
 - July 1 - CalGEM to provide legislative reports to applicable budget and policy committee on implementation of the Health Protection Zone.

BAKER BOTTS

13

13

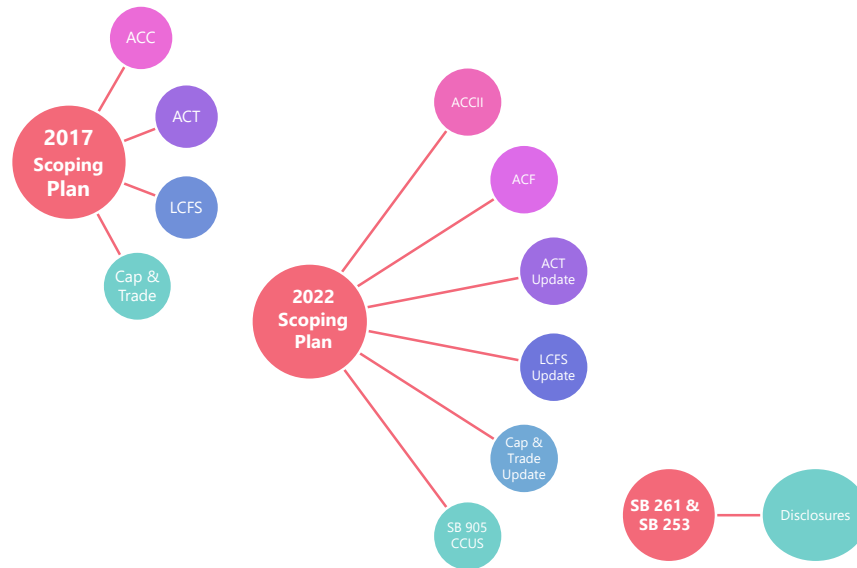
CLIMATE REGULATIONS 02

BAKER BOTTS



14

CARB Climate Regulations



15

CARB Climate Regulations

2017 Scoping Plan Rules Status Updates

Rule	Description	Sector	Status	Summary of Key Issues
ACC	Requires minimum ZEV sales in CA, Low-Emission-Vehicle requirements, and requirements for clean-fuel infrastructure	Passenger-vehicle	Challenge to EPA approval of preemption waiver pending in <i>Ohio v. EPA</i> (argued 9/15/2023); <i>Texas v. EPA</i> (argued 9/14/2023)	Unconstitutional Waiver criteria not met because: • Preempted by EPCA • Unreasonable review of whether California was "arbitrary and capricious" • No "compelling and extraordinary conditions" • "Program as a whole" = wrong standard for review of waiver request
ACT	Phased ZEV, medium- and heavy-duty manufacturer sales requirement First passed in CA, now adopted in 11 states	Heavy-duty	Challenge to EPA approval of preemption waiver pending in <i>WSTA v. EPA</i> – stayed pending outcome of <i>Ohio</i> and <i>Texas</i>	Waiver criteria not met because: • No "compelling and extraordinary conditions" • "Program as a whole" = wrong standard for review of waiver request • Major question that cannot be addressed indirectly through waiver

16

Litigation Over EPA Waiver for CA Rules

II. Scope of Preemption and Criteria for a Waiver Under the Clean Air Act

Section 209(a) of the CAA provides:

No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No state shall require certification, inspection or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

17

Litigation Over EPA Waiver for CA Rules

	20688	Federal Register / Vol. 88, No. 66 / Thursday, April 6, 2023 / Notices
ENVIRONMENTAL PROTECTION AGENCY	FOR FURTHER INFORMATION CONTACT:	
[EPA-HQ-OAR-2022-0330, EPA-HQ-OAR-2022-0331; FRL-9900-02-OAR]	David Dickinson, Office of Transportation and Air Quality, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave NW, Telephone: (202) 343-9256, Email: Dickinson.David@epa.gov ; or Kayla Steinberg, Office of Transportation and Air Quality, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Telephone: (202) 564-7658, Email: Steinberg.Kayla@epa.gov .	
California State Motor Vehicle and Engine Pollution Control Standards; Heavy-Duty Vehicle and Engine Emission Warranty and Maintenance Provisions; Advanced Clean Trucks; Zero Emission Airport Shuttle; Zero-Emission Power Train Certification; Waiver of Preemption; Notice of Decision	SUPPLEMENTARY INFORMATION:	
AGENCY: Environmental Protection Agency (EPA).	Table of Contents	
ACTION: Notice of decision.	I. Executive Summary	
SUMMARY: The Environmental Protection Agency (EPA) is granting the California Air Resources Board's (CARB's) requests for waivers of Clean Air Act (CAA) preemption for the following California regulations: the Heavy-Duty Vehicle and Engine Emission Warranty Regulations and Maintenance Provisions, the Advanced Clean Trucks Regulation, the Zero Emission Airport Shuttle Regulation, and the Zero-Emission Power Train Certification Regulation. EPA is issuing these decisions under the authority of CAA section 209.	II. Background	
DATES: Petitions for review must be filed by June 5, 2023.	A. EPA's Consideration of CARB's Request	
	1. 2018 HD Warranty Amendments	
	2. ACT, ZEAS, and ZEP Certification Regulations	
	B. Principles Governing This Review	
	1. Scope of Preemption and Waiver Criteria Under the Clean Air Act	
	2. Deference to California	
	3. Standard and Burden of Proof	
	III. Discussion	
	A. Evaluation of CARB's 2018 HD Warranty Amendments	
	B. First Waiver Criterion: are California's Protectiveness Determinations arbitrary and capricious?	
	1. EPA's Historical Interpretation of Section 209(b)(1)(A)	
	2. CARB's Discussion of California's Protectiveness Determinations in the Waiver Requests	
	a. 2018 HD Warranty Amendments	
	4. California's Standards Are Consistent With Section 202(a) Under EPA's Historical Approach	
	a. 2018 HD Warranty Amendments	
	b. ACT, ZEAS, and ZEP Certification Regulations	
	5. The Inapplicability of Section 202(a)(3)(C) to the Third Prong	
	a. EPA's Historical Practice Is Supported by the Text, Context, and Purpose of the Statute	
	b. Neither <i>AMC v. Blum</i> nor the 1994 MDV Waiver Dictate a Contrary Interpretation	
	6. Section 209(b)(1)(C) Conclusion	
	E. Other Issues	
	1. Energy Policy and Conservation Act (EPCA)	
	2. Equal Sovereignty and Other Constitutional Issues	
	IV. Decision	
	A. Judicial Review	
	V. Statutory and Executive Order Reviews	
	I. Executive Summary	
	Today, as Administrator of the EPA, I am granting two separate requests for waivers of Clean Air Act (CAA) preemption regarding four California Air Resources Board (CARB) regulations for heavy-duty ("HD") onroad vehicles and engines. CARB made these requests in two separate letters to EPA in October 2021 and December 2021, as described below. EPA is not taking action on CARB's January 2022 request concerning CARB's Omnibus Low NO _x regulation. ¹ EPA will announce its decision regarding the Omnibus Low NO _x Regulation in a separate notice in the	

18

CARB Climate Regulations: 2022 Scoping Plan Rule Updates

Rule	Description	Sector	Status	Summary of Key Issues
ACT Update	Updates related to ZEV credit pooling and hydrogen-fueled ICEVs for medium- and heavy-duty vehicles	Medium- and Heavy-Duty Vehicles	Draft Regulatory Text released Nov. 2023	- Leakage impacts associated with credit pooling - Inclusion of hydrogen and lower-carbon fuels for medium- and heavy-duty vehicles
LCFS Update	Strengthening CI reduction benchmarks, eliminating the current LCFS exemption for intrastate fossil jet fuel, and adding sustainability requirements for crop- and forestry-based feedstocks	Transportation	- ISOR and Draft EIS released Jan. 2024 - Public Hearing (Mar. 21, 2024)	- Possible preemption issues associated with impacts on jet fuel - Cost impacts associated with increased program stringency - Impacts on biofuel and ethanol availability - Preserving existing program flexibilities and streamlining pathway procedures
Cap & Trade	More stringent allowance budgets and new exemptions for biogenic emissions	Electricity & Natural Gas	Public workshops held Jun.-Nov. 2023	- Market impacts and feasibility of achieving more ambitious emission targets - Adjusting the 2030 emission target based on actual achieved reductions in previous years - Authority to extend cap-and-trade beyond 2030
Climate Disclosures	Requires annual GHG reporting for public and private companies doing business in California starting in 2026 (scope 1 & 2) and expanding in 2027 (scope 3)	Economy-Wide	Challenge to SB 253 and 261 pending in <i>Chamber of Commerce v. CARB</i> (C.D. Cal.)	- No funding in budget - Methodology for determining Scope 3 emissions
CCUS SB 905	Protocols to support additional methods of utilization or storage of captured carbon dioxide	Stationary Sources	Public workshop held in Aug. 2023	- Streamlining projects and deployment of different technologies - Incorporating CCUS and CDR into existing programs

BAKER BOTTS California...Knows How to Regulate | Baker Botts' 37th Annual Environmental, Safety and Incident Response Seminar

19

19

CARB Climate Regulations

Deeper Dive: SB 253	Deeper Dive: SB 261
Applicability: Public & private businesses with annual revenues > \$1 billion doing business in California (excludes foreign-formed companies) Scope: Annual reporting of Scope 1 & 2 emissions (2026) and Scope 3 emissions (2027)	Applicability: Public & private businesses with annual revenues > \$500 million doing business in California (excludes foreign-formed companies) Scope: Biannual reporting (2026) of climate-related financial risks & mitigation measures to address
253+ 261 Key Issues for Rulemaking: Disclosure Risks: business strategy, potential greenwashing allegations, competing disclosure requirements Scope 3 Emissions: reporting regardless of materiality or whether the company has set a Scope 3 emissions target	253+ 261 Pending Litigation: <i>U.S. Chamber of Commerce v. CARB</i> (C.D. Cal., Jan. 30, 2024) First Amendment: compels speech Preemption: <i>de facto</i> GHG emissions regulation preempted by CAA Extraterritorial Regulation: burdens on interstate and foreign commerce

BAKER BOTTS California...Knows How to Regulate | Baker Botts' 37th Annual Environmental, Safety and Incident Response Seminar

20

20

Voluntary Carbon Market Disclosures (AB 1305)

AB 1305



Who does the law apply to?

1. A "business entity" **marketing or selling** voluntary carbon offsets within California
2. An "entity" operating within California that **purchases or uses** voluntary carbon offsets and "makes claims" about offsets
3. An "entity" operating within California that **"makes claims"** about achievement of carbon neutrality or net zero emissions

These companies must annually disclose on their website:

- Detailed information relating to the voluntary carbon offsets and emissions claims

Compliance date: January 1, 2024

21

CARB Climate Regulations

2022 Scoping Plan Rules Status Updates

Rule	Description	Sector	Status	Summary of Key Issues
ACC II	Requires all new passenger vehicles sold in CA to be zero emissions by 2035	Passenger-vehicle	Subject to challenge in Fresno Superior Court	• CEQA • Separation of powers/Ultra vires • Vested rights • CA APA & HSC
			EPA has proposed to approve CA waiver for ACCII	Open for comment until Feb. 20
ACF	Requires fleet operators to operate entirely electric fleets by 2045 Requires all ZEV HDV sales by 2036	Heavy-duty sector	Subject to challenge; WSPA v. CARB (Fresno County Superior Court)	• CA APA & HSC • CEQA • Separation of powers/Ultra vires • Vested rights • Dormant Commerce Clause
			Subject to challenge; CTA v. CARB (E.D. Cal)	• CAA Preemption • Federal Aviation Authorization Act of 1994 Preemption • Dormant Commerce Clause • Note: CARB granted a stay of enforcement of the ACF requirements for High Priority Fleets and drayage trucks until EPA has made its determination of a CAA waiver.

22

AIR QUALITY REGULATIONS 03

BAKER BOTTS 

23

Section 185: Nonattainment Fees

Settlement Agreement (Feb. 9, 2024):

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is entered into between East Yard Communities for Environmental Justice, People's Collective for Environmental Justice, Communities for a Better Environment, and Sierra Club (collectively, "Plaintiffs"); the South Coast Air Quality Management District ("AQMD") and the California Air Resources Board ("CARB") (collectively "Defendants"); all referenced individually as a "Party" and collectively as the "Parties," through their counsel, on the following terms and conditions:

South Coast AQMD plans to adopt a rule in [Jun. 2024](#) implementing Section 185 for the [1997 8-hour ozone standard](#) and the [2008 8-hour ozone standard](#)

24

NAAQS: EPA Disapproval of South Coast SIP

- *Comment period closes Mar. 4, 2024*
- **Contingency Measure Plan for 1997 Ozone NAAQS:**
 - ✓ Planned new mobile source measures
 - ✓ Additional incentive funding
 - ✓ Additional reductions from federal sources
- **Basis for Proposed Disapproval:**
 - Failure to include contingency measures that would be implemented if anticipated measures fail to achieve necessary reductions
 - Shifts responsibility to the federal government for key reductions

25

AUSTIN
BRUSSELS
DALLAS
DUBAI
HOUSTON
LONDON
NEW YORK
PALO ALTO
RIYADH
SAN FRANCISCO
SINGAPORE
WASHINGTON

bakerbotts.com

©Baker Botts LLP, 2024. Unauthorized use and/or duplication of this material without express and written permission from Baker Botts LLP, is strictly prohibited. Excerpts and links may be used, provided that full and clear credit is given with appropriate and specific direction to the original content.

26



10 **BREAKOUT SESSION 3:** **WHAT YOU NEED TO KNOW:** **ENVIRONMENTAL AND** **ENERGY JUSTICE**

Environmental and Energy Justice

Alexandra Dunn

Stephanie Bergeron Perdue

Teresa Jones

CONFIDENTIAL
© Copyright Baker Botts 2024. All Rights Reserved.



1

Presenters



Alexandra Dunn

Partner
Washington, DC
P: +1.202.639.1324
alexandra.dunn@bakerbotts.com



Stephanie Bergeron Perdue

Partner
Austin
P: +1.512.322.2544
stephanie.bergeron.perdue@bakerbotts.com



Teresa Jones

Associate
Houston
P: +1.713.229.1630
teresa.jones@bakerbotts.com

2

Table of Contents

01

Setting the Table

02

Public Policy Trends

03

Agency New Developments

04

Boardroom and Corporate Accountability

05

Litigation Trends

06

Promising Practices from the Field

BAKER BOTTS

Environmental and Energy Justice | Baker Botts' 37th Annual Environmental, Safety and Incident Response Seminar

3

SETTING THE TABLE

01

BAKER BOTTS

2021-2024: Setting the Table



5

What is Environmental Justice

New Definition of EJ – EO Vol 88 Fed. Reg. 25251 April 26, 2023



25251

Federal Register

Vol. 88, No. 80

Wednesday, April 26, 2023

Presidential Documents

(b) “Environmental justice” means the just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision-making and other Federal activities that affect human health and the environment so that people:

(i) are fully protected from disproportionate and adverse human health and environmental effects (including risks) and hazards, including those related to climate change, the cumulative impacts of environmental and other burdens, and the legacy of racism or other structural or systemic barriers; and

(ii) have equitable access to a healthy, sustainable, and resilient environment in which to live, play, work, learn, grow, worship, and engage in cultural and subsistence practices.

6

What is Energy Justice

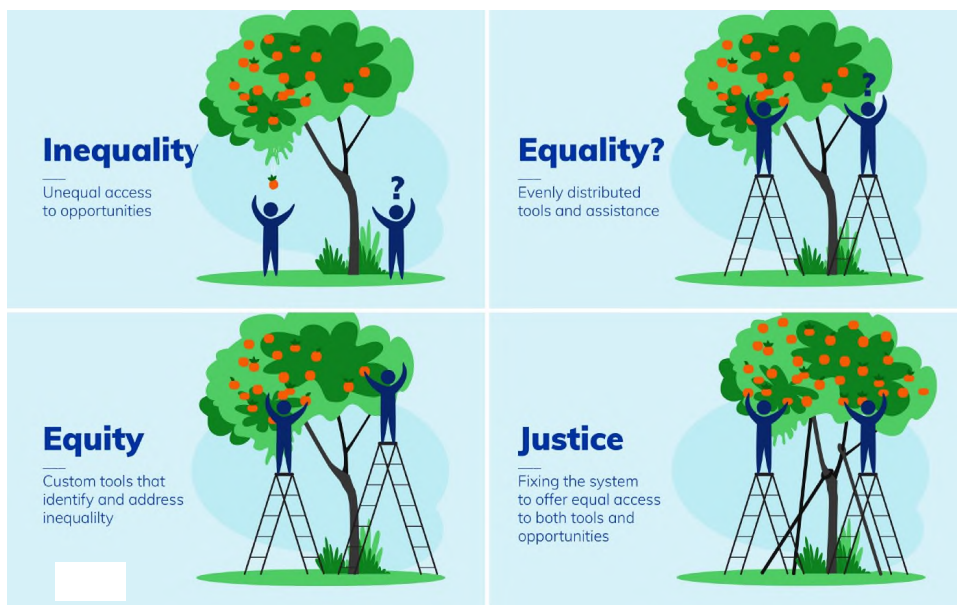
- **Energy justice** refers to the goal of achieving equity in both the social and economic participation in the energy system, while also remediating social, economic, and health burdens on those **historically harmed by the energy system** (Institute for Energy Justice)
- Ensures that everyone can afford the energy they need for **health and well-being**
- Like, *environmental justice*, energy justice allows us to frame energy disparities across **race, class, and place**.
- Requires **recognition** of the unique characteristics and needs of both people and place

A Call Energy Justice (4 Basic Rights)

1. Right to healthy, sustainable energy **production**
2. Right to best available energy **infrastructure**
3. Right to **affordable** energy
4. Right to **uninterrupted** energy service

Hernández, D. (2015). Sacrifice along the energy continuum: a call for energy justice. *Environmental Justice*, 8(4), 151-156.

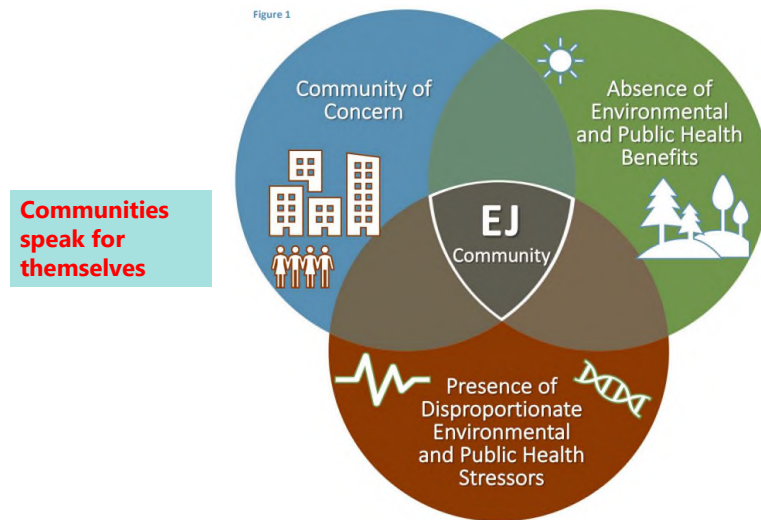
7



<https://medium.com/busara-center-blog/is-your-data-inclusive-ddd59933f108>

8

How to Identify an Environmental Justice Community



PUBLIC POLICY TRENDS 02

FEDERAL AND STATE TRENDS

Day One Orders +

Biden Administration: Executive Orders



BAKER BOTTS

11

11

Public Policy Trend: Councils, Tools

EO 14008 ('21): Justice40 Initiative, WHEJAC, NEJAC

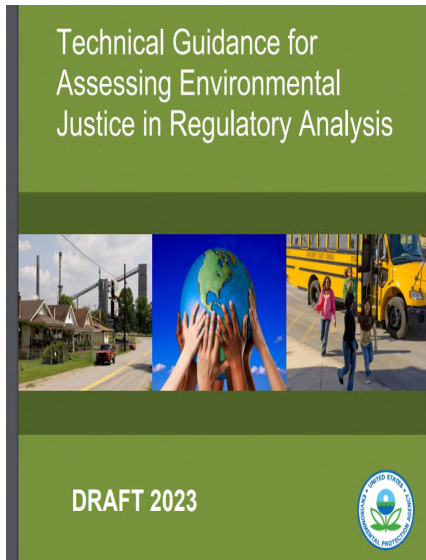
- Created a government-wide Justice40 Initiative with the goal of delivering **40 percent of the overall benefits of relevant federal investments to disadvantaged communities** and tracks performance toward that goal through the establishment of an Environmental Justice Scorecard.
- **Initiated the development of a Climate and Environmental Justice Screening Tool**, building off EPA's EJSCREEN, to identify disadvantaged communities, support the Justice40 Initiative, and inform equitable decision making across the federal government
- Established the White House Environmental Justice Interagency Council and a White House Environmental Justice Advisory Council to prioritize environmental justice and ensure a **whole-of-government approach** to addressing current and historical environmental injustices, including strengthening **environmental justice monitoring and enforcement**
- EO 14096 ('23): **New definition of environmental justice**

BAKER BOTTS Environmental and Energy Justice | Baker Botts' 37th Annual Environmental, Safety and Incident Response Seminar

12

12

Public Policy Trend: Rolling EJ Into Decisionmaking

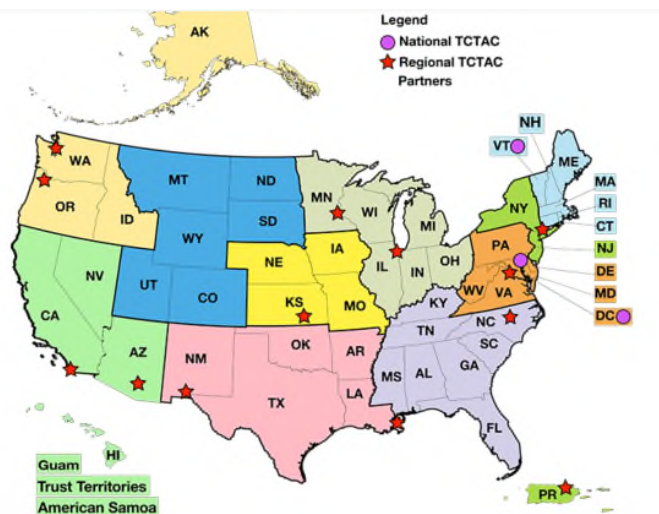


- Updates 2016 Guidance
- Recommends early in rulemaking process analysts identify the extent to which a regulatory action may raise EJ concerns and level of analysis that is feasible and appropriate.
- Comments through 1/30/24
- Topics:
 - How meaningful involvement can inform regulatory analysis
 - Vulnerability as a function of intrinsic and extrinsic factors
 - Compliance and enforcement
 - Vulnerability to climate change
 - Considering the role of multiple stressors and cumulative effects
 - Hot spots as a function of existing conditions
 - Investigating underlying heterogeneity

13

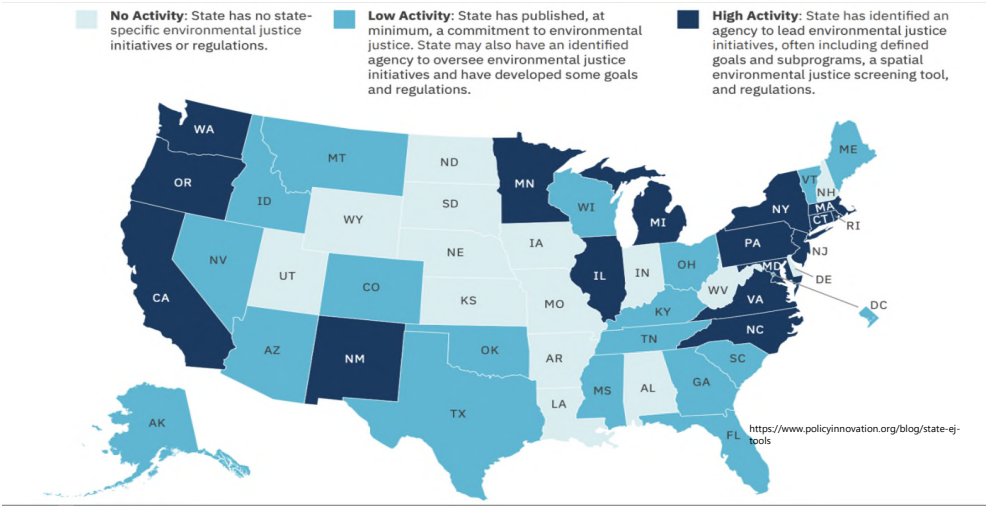
Public Policy Trend: Resources

EPA 2023 Thriving Communities Technical Assistance Centers



14

Public Policy Trend: State Developments



15

AGENCY NEW DEVELOPMENTS 03

16

Title VI of the Civil Rights Act at EPA

- How are EJ and Title VI of the Civil Rights Act different?
 - a. Title VI of the Civil Rights Act prohibits **recipients of federal financial assistance** (states, grantees, etc.) from discriminating based on race, color, or national origin in any program or activity.
 - a. Section 601: Intentional Discrimination
 - b. Section 602: Discriminatory Impacts/Effects
 - b. A Title VI civil rights complaint may raise environmental justice issues when challenging a recipient of federal fund's activity.
 - a. For instance, if a state agency receives funds from EPA to run a clean air program, that state recipient is legally prohibited from discriminating on the basis of race, color or national origin under Title VI when engaging in clean air enforcement activities.
- EPA, in complying with Executive Order 12898, can ensure the programs it funds consider disproportionately high adverse human health and environmental effects on minority and low-income populations.

Your Rights Under Title VI of the Civil Rights Act of 1964

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."



U.S. Department of Justice
Civil Rights Division
Washington, D.C. 20530

17

17

Putting Civil Rights & EJ Together: EPA FAQ (8/22/22)

"Environmental justice and civil rights compliance are **complementary**. Integrating environmental justice in decision-making and ensuring compliance with civil rights laws can together address the strong correlation between the distribution of environmental burdens and benefits and the racial and ethnic composition, as well as income level, of communities." (Q4, p4)

"Compliance with the requirements of federal environmental laws with respect to permitting ... **does not necessarily mean that the recipient is complying** with federal civil rights laws." (Q5, p6)

If a permitting authority determines a permit would have a **disparate impact**, guidance suggests mitigation by: modifying permit operating conditions, lessen or eliminate the impacts, not renew the permit, or deny the permit. (Q13, p14-15)

18

Putting Civil Rights & EJ Together: EPA FAQ (8/22/22)

Mitigation Measures Suggested to State Permitting Authorities (Q14, p15-16):



Continuous monitoring



Additional recordkeeping, monitoring, or reporting



Compliance information online



More stringent limits or additional controls



Website with real time information



Enforceable work practices/BMPs



Operating hours



Enforceable operating plans



Make modeling assumptions legally enforceable



Expansion of buffers



Mobile health monitoring program



New traffic plan



Citizen hotline



Third party monitoring



Community driven monitoring



Community benefit agreements

19

Increased Enforcement & Resources for EJ Communities

EPA Updates

- EPA "Legal Tools" (May 2022) updates earlier document
- Works EJ into existing statutory & regulatory regimes
- Cumulative impacts addendum, January 2023
- Cumulative Impacts Guidance, June 2023 – focus on broad community stressors
- Use of emergency authorities (CAA 303, SDWA 1431)
- Civil Rights complaints against state environmental agencies
- 12/18/23: EPA Enforcement and Compliance Annual Results for Fiscal Year 2023
 - ✓ Over 60% of on-site inspection at facilities affecting communities with potential EJ concerns
 - ✓ Concluding 1,791 civil settlements, where 55% of the cases in FY 2023 address facilities in communities with potential EJ concerns, highest percentage since 2014
 - ✓ Opening 199 criminal investigations, marking a 70% increase over FY 2022

While the EJ narrative is front and center in recent DOJ/EPA cases, these cases still require a violation of underlying law, permit, or regulation to commence.

20

Increased Enforcement & Resources for EJ Communities

DOJ Updates

- October 2023 – First ever EJ Report
- Key enforcement actions, petrochemical, drinking water, sanitation
- Tribal EJ efforts
- Each of the 94 US Attorney's Offices now has an EJ coordinator
- Prioritizing cases with the potential to reduce harms, exposures to overburdened communities
- Interviewing skills
- Providing relief while cases are ongoing

While the EJ narrative is front and center in recent DOJ/EPA cases, these cases still require a violation of underlying law, permit, or regulation to commence.

CUMULATIVE IMPACTS

Cumulative Impacts Addendum: OGC, 1/23

- EPA published the *Cumulative Impacts Addendum to EPA Legal Tools to Advance Environmental Justice*, which identifies the existing legal authorities to address cumulative impacts affecting EJ communities.
- Provides some answers to states that requested guidance on state authority to consider cumulative impacts (e.g., Michigan)
- The Addendum provides specific examples of how EPA may consider cumulative impacts on a program-by-program basis.



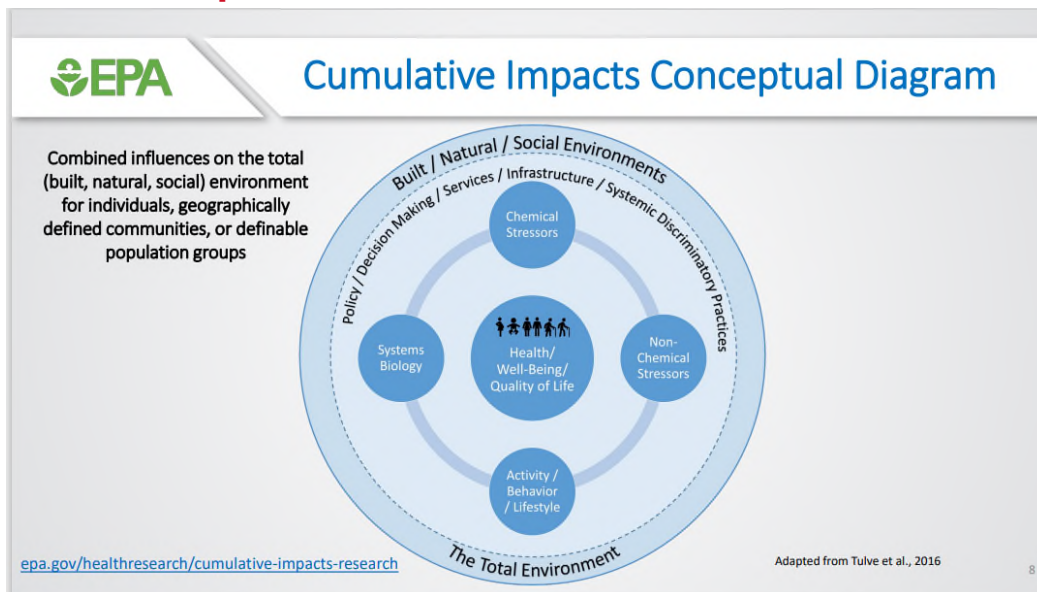
EPA Legal Tools to Advance Environmental Justice: Cumulative Impacts Addendum

January 2023

Office of General Counsel
U.S. Environmental Protection Agency

23

Cumulative Impacts Addendum



24

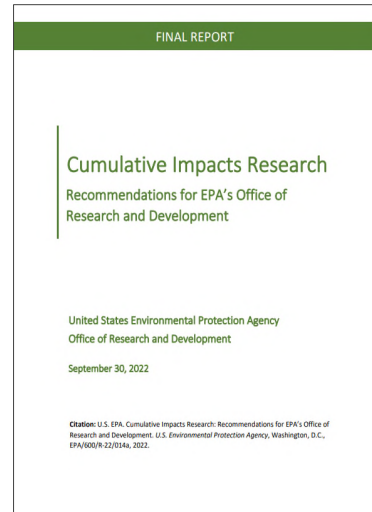
Definitions: ORD Cumulative Impacts Report

Cumulative Impacts:

The totality of exposures to combinations of chemical and non-chemical stressors and their effects on health, well-being, and quality of life outcomes.

Cumulative Impact Assessment:

Process of evaluating both quantitative and qualitative data representing cumulative impacts to inform a decision.



25

Draft Cumulative Risk Assessment (CRA) Guidelines

Released 6/16; Comments due 8/15

- Considerations for evaluating when a CRA is suitable and feasible
- Notes other approaches, such as a cumulative impact assessment, may be more suitable in some circumstances.
 - EPA is separately developing a framework for cumulative impact assessments, "a complementary assessment strategy."
- CRA is: "[a]n analysis, characterization, and possible quantification of the combined risks to health and/or the environment from multiple agents and/or stressors."
- Cumulative impacts are: "[t]he totality of exposures to combinations of chemical and non-chemical stressors and their effects on health, well-being, and quality of life outcomes."



26

When To Do a CRA?

EPA Proposed:



- Generally performed within a decision-making context to inform regulatory actions, to:
 - address a community health concern, or
 - meet legal requirements or broad EPA priorities, such as children's health, environmental justice, and sustainability
- "Initiating factors can relate to concerns of environmental justice, specific stressors (sources) or population exposures (receptors); they can be specific to a location or situation."
- In scoping the CRA, the Guidelines encourage stakeholders to consider social determinants, including
 - "[n]on chemical stressors, nutritional status, income, socioeconomic status, neighborhood factors, health care access, and social, economic, and political inequality, and other environmental justice factors (e.g., communities with potential disproportionately high exposures to stressors, including socioeconomic and nonchemical stressors)."

27

Cumulative Impacts and Including EJ in Regulatory Analysis

- Cumulative Impacts Guidance (June 2023)
 - <https://www.epa.gov/risk/guidelines-cumulative-risk-assessment-planning-and-problem-formulation>
 - Incorporating EJ in Regulatory Analysis (comments due end of January 2024)
 - <https://www.epa.gov/environmental-economics/epa-draft-revision-technical-guidance-assessing-environmental-justice>

28

BOARDROOM AND CORPORATE ACCOUNTABILITY 04

BAKER BOTTS

29

Boardroom and Corporate Accountability

- Considering EJ and ESG issues can prevent a new or existing project from being delayed, caught in litigation, or having permits held up, conditions tightened, or even denied.
- Evaluating EJ and ESG can increase community good will and tolerance for company projects
- An increasing number of Boards and public groups want ESG performance information in sustainability and related reports



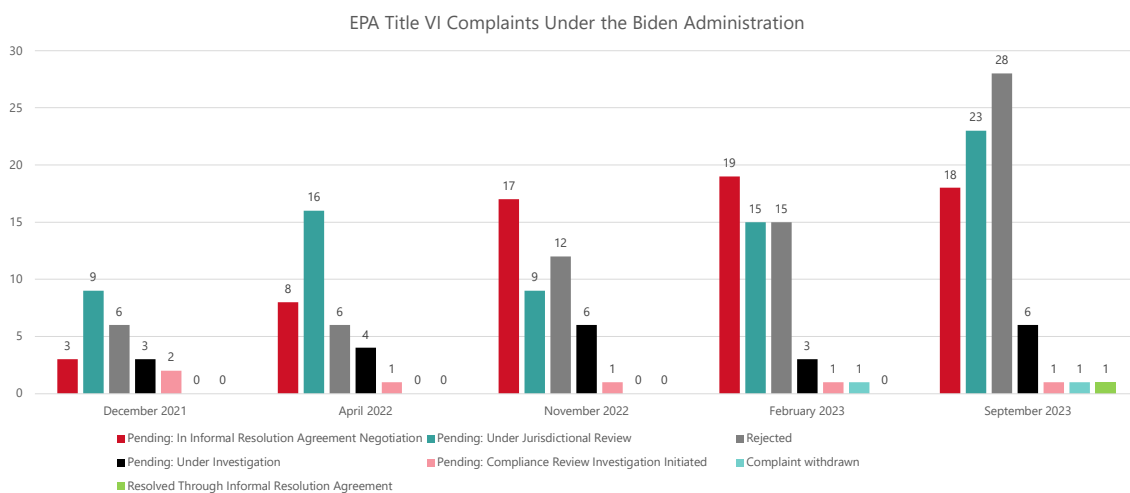
30

LITIGATION TRENDS 05

BAKER BOTTS

31

Complaints Under Civil Rights Act (CRA) Title VI



BAKER BOTTS Environmental and Energy Justice | Baker Botts' 37th Annual Environmental, Safety and Incident Response Seminar

32

32

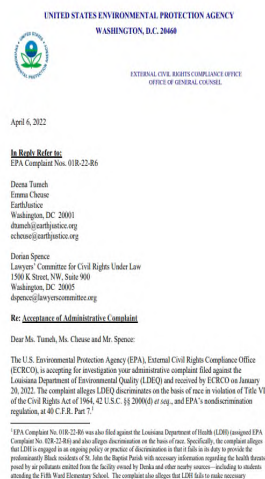
Litigation Trends

TCEQ Title VI Complaints

Closed	08/21	Race	Administrative closure without prejudice 12/26/2023: Ongoing administrative proceedings
Closed	05/22	Race, National Origin	Concrete Plant administrative Closure without Prejudice 1/2/2024: Changed circumstances
Closed	04/22	Race, National Origin	Harris County plant Administrative Closure without Prejudice 1/2/2024: Changed circumstances
Active	11/22	National Origin	Pending: Under Investigation
Resolved / In Monitoring	11/19	National Origin	Resolved with Informal Resolution Agreement 11/4/2020: In Monitoring
Closed	04/19	Race, Retaliation	Rejected/Referred to EEOC 5/1/2019: Lac

EPA v. Louisiana DEQ & Dept. of Health

- Apr. 6, 2022: EPA accepts complaint filed re: alleged disparate, adverse impact on African American community from chemical plant emissions in St. John the Baptist Parish, LA
- Addresses LDEQ's ongoing permitting of specific chemical plant operations with no additional public engagement or permit requirements.
- Also claims LDEQ failed to use enforcement authority to control emissions and LDH failed to provide public w/ health info or recommend relocation of school.
- Key issues: cumulative impacts; permit renewals; public participation



EPA v. Louisiana DEQ & Dept. of Health

- On January 23, 2024, a federal court in Louisiana granted the State of Louisiana's ("State") **preliminary injunction against the U.S. Environmental Protection Agency ("EPA") and the Department of Justice ("DOJ"). The injunction blocks the federal agencies from imposing or enforcing any disparate impact-based requirements against the State or any State agency under Title VI of the Civil Rights Act.**
- Prohibits the agencies from imposing or enforcing any Title VI-based requirements that are not both **(a) ratified by the President** and **(b) based upon requirements found within the four corners of EPA's disparate-impact regulations.**
- Found that the **EPA's disparate impact regulations "create substantial increases in costs,"** and that the **State was "entitled to unambiguous clarity concerning [the EPA's] power to regulate beyond the plain text of Title VI."**
- **Only applicable to Louisiana**

BAKER BOTTS

Environmental and Energy Justice | Baker Botts' 37th Annual Environmental, Safety and Incident Response Seminar

35

What's Next?

- **Federal Agencies**
 - Potential appeal of preliminary injunction to the Fifth Circuit Court of Appeals
 - Could potentially seek a stay
- **Louisiana's District Court**
 - Staying the Proceedings Pending Appeal
- **Ultimate Resolution**
 - Potential permanent injunction
- **Other Jurisdictions**
 - Precedent
 - Third-Party Involvement

BAKER BOTTS

Environmental and Energy Justice | Baker Botts' 37th Annual Environmental, Safety and Incident Response Seminar

36

PROMISING PRACTICES FROM THE FIELD

06

BAKER BOTTS 

37

Key Takeaways

- States will continue to face EPA pressure to, and pass their own laws and regulations, include EJ and cumulative impacts in **permitting decisions**.
- There will be more robust **public participation** in development of state regulations, state plans, and permitting decisions—specifically to avoid Title VI violations and to meet meaningful participation requirements.
- EPA will work to consider EJ in **enforcement and review**—
- Ongoing **Title VI Investigations** will set important precedent
- **Third party eyes** are watching
- **Communities are empowered** with IRA Funds

38

Managing Operations in an EJ Driven Environment

- **Develop** goals to mitigate legal, regulatory, and operational risks posed by increased local, state, and federal regulatory focus on a utility's environmental impacts in a community
- **Evaluate** policies and procedures in place to consider EJ
- **Inventory** past siting and expansion experiences
- **Assess** facility operations and performance
- **Consider** the utility's reputation and perception in a community
- **Use** demographic screening and mapping tools
- **Track** social media
- **Deploy** a system to track EJ legal, regulatory, and policy developments
- **Select** internal champions to advance employee engagement and familiarity with EJ
- **Support** statements about community investment and engagement with facts and data
- **Continue** successful practices, such as websites and social media to share information, sending flyers, holding face to face and household visits, hosting open houses and listening sessions
- **Expect** to change and adapt as new information becomes available and circumstances evolve

AUSTIN
BRUSSELS
DALLAS
DUBAI
HOUSTON
LONDON
NEW YORK
PALO ALTO
RIYADH
SAN FRANCISCO
SINGAPORE
WASHINGTON

bakerbotts.com

©Baker Botts LLP, 2024. Unauthorized use and/or duplication of this material without express and written permission from Baker Botts LLP, is strictly prohibited. Excerpts and links may be used, provided that full and clear credit is given with appropriate and specific direction to the original content.



11

BREAKOUT SESSION 4: ETHICS – DOS AND DON'TS: NEGOTIATIONS WITH GOVERNMENT OFFICIALS

Ethics – Dos and Don'ts: Negotiations with Government Officials

Sterling Marchand

Paulina Williams

Chloe Graham

Katie Jeffress

CONFIDENTIAL
© Copyright Baker Botts 2024. All Rights Reserved.



1

Introduction



Sterling Marchand

Partner
Washington, DC
P: +1.202.639.1113
sterling.marchand@bakerbotts.com



Chloe Graham

Associate
Washington, DC
P: +1.202.639.1118
chloe.graham@bakerbotts.com



Katie Jeffress

Associate
Austin
P: +1.512.322.2687
katie.jeffress@bakerbotts.com



Paulina Williams

Section Chair – Environmental, Safety
and Incident Response (Austin)
Austin
P: +1.512.322.2543
paulina.williams@bakerbotts.com

2

INITIAL COMMUNICATIONS 01

INCIDENT RESPONSE & INVESTIGATION



3

Requirements of Client Representation

- Rules 1.01, 1.02, and 1.03 (Texas Disciplinary Rules of Professional Conduct)
 - Competence and diligence
 - Abiding by client decisions
 - Not assisting or engaging in criminal or fraudulent behavior
 - Informed decision-making
 - Substantively similar rules in the ABA Model Rules of Professional Conduct
-

4

First Contact Considerations

- Immediate communications in real time
 - Usually without the benefit of all facts
- Reporting considerations
- On-site government investigations
 - How to “assist”
 - Employee interviews (Upjohn)
 - Give consideration to the need for individual counsel
 - Document productions and accompanying representations

5

Rule 1.01. Competent and Diligent Representation

- a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless:
 - 1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or
 - 2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances.
- b) In representing a client, a lawyer shall not:
 - 1) neglect a legal matter entrusted to the lawyer; or
 - 2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.
- c) As used in this Rule, “neglect” signifies inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients.

6

Rule 1.02. Scope and Objectives of Representation

(a) Subject to paragraphs (b), (c), (d), (e), and (f), a lawyer shall abide by a client's decisions:

- (1) concerning the objectives and general methods of representation;
- (2) whether to accept an offer of settlement of a matter, except as otherwise authorized by law...

Variety of exceptions:

- Criminal or fraudulent conduct
- Representation not permitted by the rules of professional conduct or other law → lawyer shall consult with client regarding the relevant limitations on the lawyer's conduct.
 - **Texas Water Code Chapter 7** authorizes civil and criminal penalties for false representations (and omissions)
 - **18 U.S.C. § 1001**: criminalizes any "materially false, fictitious, or fraudulent statement or representation" in connection with "any matter within the jurisdiction of the" federal government. Applies to concealment of a material fact or false report made under environmental statutes

Rule 1.03. Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

From comment 1: "[A] lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps to permit the client to make a decision regarding a serious offer from another party."

ENGAGING THE GOVERNMENT 02

BAKER BOTTS 

9

A Lawyer's Role in Government Negotiations

Rules of Professional Conduct Preamble: A Lawyer's Responsibilities

- "As **advisor**, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications."
- "As **advocate**, a lawyer zealously asserts the client's position under the rules of the adversary system."
- "As **negotiator**, a lawyer seeks a result advantageous to the client but consistent with the requirements of honest dealings with others."

10

Lawyer as Advisor

Texas Rule 2.01 Advisor:

- "In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice."
- *Comment:*
 - A client is entitled to straightforward advice expressing the lawyer's honest assessment.
 - Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits.
 - However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.
- Model ABA Rule 2.1 adds: "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."

Lawyer as Advocate

Texas Rule 3.04 Fairness in Adjudicatory Proceedings:

- "A lawyer shall not (a) unlawfully obstruct another party's access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value"
- Mirror ABA Model Rule 3.4
- *Comment:*
 - Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedures, and the like.
 - The right of a party, including the government, to obtain evidence through discovery or subpoena is an important procedural right.
 - Applicable law in many jurisdictions, including Texas, makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen.

Lawyer as Negotiator

Texas Rule 4.01 Truthfulness in Statements to Others:

- “In the course of representing a client a lawyer shall not **knowingly**:
 - a) make a false statement of material fact or law to a third person; or
 - b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.”
- Mirrors ABA Model Rule 4.1

18 U.S.C. 1001: False Statements Act

- “[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, **knowingly and willfully** (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) **makes any materially false, fictitious, or fraudulent statement or representation**; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5 years, or both.

Lawyer as Negotiator

Texas Rule 4.01 Truthfulness in Statements to Others:

- *Comment:*
 - Whether a particular statement should be regarded as one of **material fact** can depend on the circumstances. Opinions, conjectures, estimates, intentions, etc. are generally *not* material facts.
 - Generally, a lawyer has no duty to inform a third person of relevant or material facts, except as required by law. However, a lawyer must not allow fidelity to a client to become a vehicle for a criminal act or a fraud being perpetrated by that client.
 - In that case, the lawyer must urge the client to take the appropriate action. But if the client refuses, the lawyer must disclose a material fact if necessary to prevent the lawyer from becoming party to that crime or fraud.

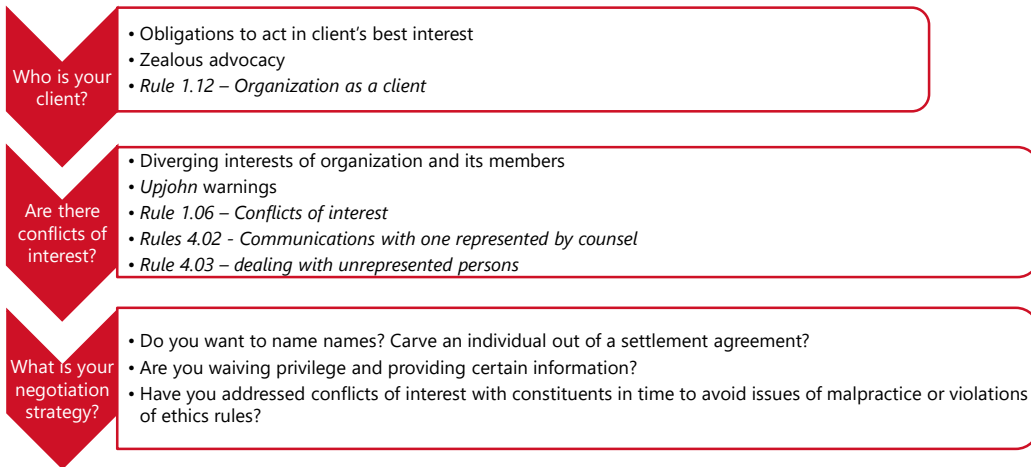
Cooperation

- Recent updates to DOJ's corporate compliance program implement consistent voluntary self-disclosure programs that promise no guilty plea where the company **voluntarily self-discloses, fully cooperates, and timely and appropriately remediates**.
- This requires disclosure of "**all relevant facts** relating to the **individuals** responsible for the misconduct," regardless of their position, status, or seniority, and regardless of their position inside or outside the company, not merely those "substantially involved." (2021 Monaco Memo)
- Requires companies produce "on a timely basis all relevant, non-privileged facts and evidence about individual misconduct such that prosecutors have the opportunity to effectively investigate and seek criminal charges against culpable individuals." (2022 Monaco Memo)

How do lawyers balance cooperating with the government with zealous advocacy for clients?

CONFLICTS OF INTEREST 03

Conflicts of Interest



17

Organization as a Client

- Representing the organization, not its individual members
- What is in the organization's best interests?
- Whose interests diverge from the organization's interest?

Texas Rule 1.12 – Organization as a Client

- (a) A lawyer employed or retained by an organization represents the entity. While the lawyer in the ordinary course of working relationships may report to, and accept direction from, an entity's duly authorized constituents, in the situations described in paragraph (b) **the lawyer shall proceed as reasonably necessary in the best interest of the organization** without involving unreasonable risks of disrupting the organization and of revealing information relating to the representation to persons outside the organization.
- (e) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer **shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents** with whom the lawyer is dealing or **when explanation appears reasonably necessary to avoid misunderstanding on their part.**
 - *Upjohn* warnings
 - Potential for misunderstanding when conducting internal investigations

18

Conflicts of Interest Rules

- Some members of the organization may also want to be represented by you
- Stop and consider potential conflicts

Texas Rule 1.06 – Conflicts of Interest: General

- (a) A lawyer shall not represent opposing parties to the same litigation.
- (b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:
 - (1) involves a substantially related matter in which that person's interests are **materially and directly adverse** to the interests of another client of the lawyer or the lawyer's firm; or
 - (2) reasonably appears to be or become **adversely limited by the lawyer's or law firm's responsibilities to another client** or to a third person or by the lawyer's or law firm's own interests.
- (c) A lawyer may represent a client in the circumstances described in (b) if:
 - (1) the lawyer reasonably believes the representation of each client will not be materially affected; and
 - (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

19

Conflict Example

Question Presented

- An attorney represents an employer and employee.
- Confidential information arises that affects the employee and leads to a conflict of interest between the employee and employer.
- Is it proper to continue representing employer but not employee in the suit?

Conclusion

- IT DEPENDS...
- Were both clients fully advised of the disadvantages and consequences of dual representation?

Takeaways

- Full disclosure is crucial
- Get everything in writing
- Avoiding likely conflict at the outset may be preferable

20

Communicating with Employees/Constituents

Texas Rule 4.03 – Dealing with Unrepresented Persons

- In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
- *Upjohn* Warning addresses this

Texas Rule 4.02 – Communications with One Represented by Counsel

- (a) In representing a client, a lawyer **shall not communicate** or cause or encourage another to communicate about the **subject of the representation** with a person, organization or entity of government the lawyer **knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer** or is authorized by law to do so.

PRIVILEGE & CONFIDENTIALITY 04

What is attorney-client privilege?



- Applies to:
 - A communication
 - Made between privileged persons
 - In confidence
 - For the purpose of seeking, obtaining, or providing legal assistance to the client
- The privilege must be affirmatively raised and cannot have been waived
- The client is the holder of the privilege
- “[T]o encourage full and frank communication between attorneys and their clients.” *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981).

23

Attorney-client privilege vs. duty of confidentiality

Texas Rule 1.05: Confidentiality of Information

“[A] lawyer shall not knowingly ... [r]eveal confidential information of a client ... [unless] the lawyer has been expressly authorized to do so in order to carry out the representation, [or] [w]hen the client consents after consultation.”

Attorney-Client Privilege	Duty of Confidentiality
Testimonial privilege	Principle of legal ethics
Protects communications from disclosure	Protects information learned by the lawyer related to a client's representation
Court cannot order disclosure, unless waived by client	Does not protect against compelled disclosure
No exceptions that allow lawyer to waive	Built in exceptions allow lawyer to disclose information in certain circumstances (client consent, disclosure necessary to avoid serious harm, future crime, etc.)
	Attorneys responsible to take reasonable steps to protect

24

Waiving attorney-client privilege

Common Pitfalls

- Disclosing a communication to a third party (or presence of a third party when communication is made) constitutes waiver of attorney-client privilege.
 - Responding to a government investigation
 - Supplying information to a governmental agency
 - Subject-matter waiver
 - Confidence must be preserved by client *and* attorney
- Exceptions:
 - If the third party is necessary to facilitate the lawyer's advice to the client (*e.g.*, translator or accountant)
 - If the third party is an agent of the lawyer or client
 - If the third party and client share a common legal interest

25

Additional considerations

- FOIA or TPIA considerations
- Sampling and monitoring – privilege as a tool
 - *U.S. v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961) (extending attorney client privilege in situations where a third party enables the attorney to provide legal advice)
- Environmental audits



26

Examples



Example 1: Outside counsel shares summaries of employee interviews with outside auditors, and auditors share with the SEC.



Example 2: Outside counsel prepares PPT for SEC that summarizes witness statements obtained during internal investigation.



Example 3: Outside counsel is hired to defend recycling facility in remediation actions. Counsel hires environmental consultant, marks all email communications as "privileged and confidential."

27

Waiver?

From: Lawyer 1@outsidelawfirm.com
To: Lawyer 1@EPA.gov; Lawyer 1@DOJ.gov
Subject: Interview Memos & Presentation
Attachment: ABC Corp. Employee 1 Interview Memo; ABC Corp. Employee 2 Interview Memo; ABC Corp. Presentation

Privileged & In Furtherance of Settlement Negotiations

EPA & DOJ –

Attached please find copies of the presentation that we made to you on Friday regarding the results of the internal investigation conducted on behalf of our client, ABC Corp. related to the incident that occurred at one of their facilities. Per your request, we are also providing two employee interview memos, whose statements support the findings that we presented.

As with our presentation on Friday, this information is being provided solely in furtherance of our settlement discussions; and is being provided per your express and prior agreement that by doing so, ABC Corp. does not waive any attorney-client privilege or work product protections over these materials, related undisclosed materials, or any other materials.

Lawyer 1

28

OTHER ETHICAL CONSIDERATIONS 05

BAKER BOTTS 

29

Lobbying

- The **Lobbying Disclosure Act** regulates lobbying of covered federal executive and legislative branch officials.
 - Requires registration, quarterly activity report, and semi-annual contribution reports
 - Requires disclosure to officials of lobbying status.
- The **Texas lobby law** regulates direct communications with members of the State legislative and executive branches of Texas government to influence legislation or administrative action.
 - Requires registration, and regular lobbying activity reports.
- Both exempt from “lobbying” communications with officials that are required to comply with existing laws, rules, or regulations; or that are made in connection with adjudicatory proceedings or investigations.
- Registered lobbyists subject to **additional restrictions** in dealing with the government (i.e., additional restrictions on gifts and travel to officials).

30

Gifts & Travel

- Under Texas law, (Penal Code 36.08-36.09), a person may not offer, confer, or agree to confer any "benefit" on a public servant that he or she knows is prohibited by law from accepting unless an exception applies. This includes:
 - A public servant in an agency performing regulatory functions or conducting inspections or investigations may not accept a benefit from a person the public servant "knows to be subject to regulation, inspection, or investigation by the public servant or his agency."
 - A public servant in an agency carrying on civil or criminal litigation on behalf of government may not accept any benefit from a person against whom the public servant knows litigation is pending or contemplated by the public servant or his agency.
 - A public servant who exercises discretion in connection with contracts, purchases, payments, claims, or other pecuniary transactions of government may not accept any benefit from a person the public servant knows is interested in or likely to become interested in any contract, purchase, payment, claim, or transaction involving the exercise of his discretion.
- Registered lobbyists are subject to more stringent restrictions.

31

AUSTIN
BRUSSELS
DALLAS
DUBAI
HOUSTON
LONDON
NEW YORK
PALO ALTO
RIYADH
SAN FRANCISCO
SINGAPORE
WASHINGTON

bakerbotts.com

©Baker Botts LLP., 2024. Unauthorized use and/or duplication of this material without express and written permission from Baker Botts LLP. is strictly prohibited. Excerpts and links may be used, provided that full and clear credit is given with appropriate and specific direction to the original content.

32



12 **BREAKOUT SESSION 5:**

SUSTAINABILITY

DISCLOSURE UPDATES

Sustainability Disclosures

Carina Antweil

Ginny King

Aaron Ramcharan

CONFIDENTIAL
© Copyright Baker Botts 2024. All Rights Reserved.



1

Presenters



Carina Antweil

Partner
Houston
P: +1.713.229.1127
carina.antweil@bakerbotts.com



Ginny King

Special Counsel
Houston
P: +1.713.229.1133
virginia.king@bakerbotts.com



Aaron Ramcharan

Associate
Houston
P: +1.713.229.1109
aaron.ramcharan@bakerbotts.com

2

Agenda

- | | | | |
|---|---|---|---|
| 1 | EU Corporate Sustainability Reporting Directive | 5 | Task Force on Climate-Related Financial Disclosures |
| 2 | California's Climate Disclosure Laws | 6 | What Companies Should Do to Prepare |
| 3 | U.S. SEC's Guidance and Proposed Rule | 7 | Questions & Answers |
| 4 | Greenhouse Gas Protocol | | |

3

01

EU CORPORATE SUSTAINABILITY REPORTING DIRECTIVE

4

Overview

- **EU Corporate Sustainability Reporting Directive (“CSRD”)**
 - Incorporated into the EU’s annual financial reporting regime
 - Builds from existing EU regulations, international law, and previously-voluntary frameworks
- **European Sustainability Reporting Standards (“ESRS”)**
 - Implements the requirements of the CSRD
 - Main disclosure requirements exist in Annex I
 - Key definitions exist in Annex II

5

European Sustainability Reporting Standards

- **Divided into 12 standards**
 - ESRS 1 General requirements
 - ESRS 2 General disclosures
 - ESRS E1 Climate change
 - ESRS E2 Pollution
 - ESRS E3 Water and marine resources
 - ESRS E4 Biodiversity and ecosystems
 - ESRS E5 Resource use and circular economy
 - ESRS S1 Own workforce
 - ESRS S2 Workers in the value chain
 - ESRS S3 Affected communities
 - ESRS S4 Consumers and end-users
 - ESRS G1 Business conduct

6

Double Materiality Assessments

- **Two dimensions for assessments**
- **Impact materiality**
 - “A sustainability matter is material from an impact perspective when it pertains to the material actual or potential, positive or negative impacts on people or the environment over the short-, medium-, and long-term... [and] includes impacts connected with the undertaking’s own operations and upstream and downstream value chain, including through its products and services, as well as through its business relationships.”
- **Financial materiality**
 - “A sustainability matter is material from a financial perspective if it generates risks or opportunities that affect (or could reasonably be expected to affect) the undertaking’s financial position, financial performance, cash flows, access to finance or cost of capital over the short, medium, or long term.”

7

Reporting Timing

- **Large companies already reporting under the Non-Financial Reporting Directive (“NFRD”)**
 - Reporting begins in 2025 for the 2024 financial year
- **Large companies not already covered by NFRD**
 - Reporting begins in 2026 for the 2025 financial year
- **Listed small and medium enterprises (except micro-undertakings)**
 - Reporting begins in 2027 for the 2026 financial year
- **Third-country undertakings with EU revenue over €150 million and certain subsidiaries or branches**
 - Reporting begins in 2029 for the 2028 financial year
- The workload associated with these timelines is subject to ongoing debate in the EU

8

Assurance

- **Limited Assurance**

- To begin, reporting entities will need only secure limited assurance

- **Reasonable Assurance**

- After first few years, EU intends to evaluate whether requiring reasonable assurance is feasible
- Will consider feasibility from the perspective of both reporting entities and from the market of assurance providers

02

CALIFORNIA'S CLIMATE DISCLOSURE LAWS



Bill	Brief Description	Who Is Affected?	Timing
SB 253 The Climate Corporate Data Accountability Act	- Report Scope 1, Scope 2, and Scope 3 emissions using the Greenhouse Gas Protocol ("GHGP") standards for measuring emissions - Third-party assurance of reports	"Reporting entities": - U.S. entity - Revenues greater than \$1 billion "Does business in California"	1/1/25: CARB rulemaking 2026: Scope 1 and 2 reporting 2027: Scope 3 reporting (180 days after Scope 1 and 2 reporting)
SB 261 The Climate-Related Financial Risk Act	Biennial disclosures of: - Climate-related financial risk report, aligned with the Task Force on Climate-Related Financial Disclosures ("TCFD") framework - Measures adopted to reduce and adapt to climate-related financial risk	"Covered entities": - U.S. entity (other than insurance companies) - Revenues greater than \$500 million "Does business in California"	1/1/26
AB 1305 Voluntary Carbon Market Disclosures Business Regulation Act	Requires annual disclosure on company website of: Detailed information relating to voluntary carbon offsets	- A "business entity" marketing or selling voluntary carbon offsets within California - An "entity" operating within California that purchases or uses voluntary carbon offsets and "makes claims" - An "entity" operating within California that "makes claims" about achievement of emissions reductions	1/1/24

BAKER BOTTS

Sustainability Disclosures | Baker Botts' 37th Annual Environmental, Safety and Incident Response Seminar

11

11

Chamber of Commerce v. CARB

- Filed January 30, 2024**
 - U.S. Chamber of Commerce and five other organizations filed an action in the U.S. District Court for the Central District of California challenging:
 - Corporate Data Accountability Act (SB 253), and
 - Climate-Related Financial Risk Act (SB 261).
- Alleges that SB 253 and SB 261:**
 - Violate the First Amendment by unconstitutionally compelling speech about entities' emissions and risks associated with climate change;
 - Are preempted by the Clean Air Act; and
 - Are an invalid encroachment on Congress's authority to regulate interstate and foreign commerce.

BAKER BOTTS

Sustainability Disclosures | Baker Botts' 37th Annual Environmental, Safety and Incident Response Seminar

12

12

03

U.S. SECURITIES AND EXCHANGE COMMISSION GUIDANCE AND PROPOSED RULE

BAKER BOTTS 

13

SEC Proposed Climate Disclosures Rule

- **GHG Emissions Disclosure**
 - Scope 1 GHG emissions (i.e., direct GHG emissions from operations owned or controlled by the company) and Scope 2 GHG emissions (i.e., indirect GHG emissions from the generation of purchased or acquired energy consumed by operations owned or controlled by the company)
 - GHG emissions intensity measures also calculated based on emission per economic value
 - Scope 3 GHG emissions (all other indirect GHG emissions not included in Scope 2 that occur in upstream and downstream activities of a company's value chain), if (a) material to the registrant or (b) the registrant has set a GHG emission reduction target that includes Scope 3 GHG emissions
 - Liability safe harbor available
- **Climate-related targets and goals, and transition plans, if any, including the baseline year and the company's progress**
- **Climate-Related Risk Oversight and Management Disclosure**
 - Climate-related physical and transition risks and their actual or likely impact, if material, on the business, strategy and outlook
 - Governance of climate-related risks and risk management process, including (a) the board's oversight and expertise and (b) the process by which the board is informed of climate-related risks and the frequency of discussion
- **Regulation S-X: Climate-related financial statement metrics and related disclosures**
 - Includes financial impacts of severe weather events and other natural conditions and identified climate-related risks
 - Included in audited footnotes if greater than 1% of the financial statement line item

14

SEC Proposed Climate Disclosures Rule

- **Responses to the SEC's proposed rules were generally supportive of the need to improve climate-related disclosures, but concerns were raised around the proposed rules as drafted.**
 - Concerns
 - Financial metrics in footnotes to financial statements and materiality threshold of 1%
 - Deviation from traditional materiality concepts
 - Disclosure of climate experts on the board and in management
 - Transition timing and phase-in periods
 - Support
 - Additional legal safe harbors
 - Filing climate-related disclosures
 - Disclosure of only material Scope 3 GHG emissions
 - Divergence
 - Furnished v. filed reports and presentation of financial metrics (MD&A versus footnotes to the audited financial statements)
 - Inclusion of Scope 3 GHG emissions disclosure, regardless of materiality

15

Existing SEC Environmental Disclosure Requirements

- **Item 101 of Regulation S-K**
 - 17 Code of Federal Regulations ("CFR") 229.101(c)(2)(i)
 - Description of Business
 - Cost of Compliance with Environmental Regulations
- **Item 103 of Regulation S-K**
 - 17 CFR 229.103
 - Legal Proceedings
- **Item 303 of Regulation S-K**
 - 17 CFR 229.303
 - Management's Discussion and Analysis of Known Trends and Uncertainties
- **Item 105 of Regulation S-K**
 - 17 CFR 229.105
 - Risk Factors

16

2010 SEC Guidance on Climate Disclosures

- **A registrant may need to consider:**
 - Impact of legislation and regulation
 - International accords
 - Indirect consequences of regulation or business trends
 - Physical impacts of climate change

17

SEC Comment Letters – Key Issues

- **Climate-related disclosures**
 - In recent years, SEC has issued dozens of comment letters
 - Primarily about inconsistencies between voluntary reports and SEC filings
- **Key Issues**
 - Disclosures are more expansive in voluntary reports than in SEC filings
 - Inconsistency in claims about the importance of emissions reductions
 - Material effects of transition risks that may affect financial conditions
 - Material litigation risks relating to climate change
 - Material past or future capital expenditures related to climate change
 - Access to capital
 - Purchase, sale, or claims about carbon credits or offsets

18

SEC Comment Letters – Form Questions

General

1. We note that you provided more expansive disclosure in your corporate social responsibility report (CSR report) than you provided in your SEC filings. Please advise us what consideration you gave to providing the same type of climate-related disclosure in your SEC filings as you provided in your CSR report.

Risk Factors

2. Disclose the material effects of transition risks related to climate change that may affect your business, financial condition, and results of operations, such as policy and regulatory changes that could impose operational and compliance burdens, market trends that may alter business opportunities, credit risks, or technological changes.
3. Disclose any material litigation risks related to climate change and explain the potential impact to the company.

Management's Discussion and Analysis of Financial Condition and Results of Operations

4. There have been significant developments in federal and state legislation and regulation and international accords regarding climate change that you have not discussed in your filing. Please revise your disclosure to identify material pending or existing climate change-related legislation, regulations, and international accords and describe any material effect on your business, financial condition, and results of operations.

SEC Comment Letters – Form Questions

Management's Discussion and Analysis of Financial Condition and Results of Operations

5. Revise your disclosure to identify any material past and/or future capital expenditures for climate-related projects. If material, please quantify these expenditures.
6. To the extent material, discuss the indirect consequences of climate-related regulation or business trends, such as the following:
 - Decreased demand for goods or services that produce significant greenhouse gas emissions or are related to carbon-based energy sources;
 - Increased demand for goods that result in lower emissions than competing products;
 - Increased competition to develop innovative new products that result in lower emissions;
 - Increased demand for generation and transmission of energy from alternative energy sources; and
 - Any anticipated reputational risks resulting from operations or products that produce material greenhouse gas emissions.

SEC Comment Letters – Form Questions

Management's Discussion and Analysis of Financial Condition and Results of Operations

7. If material, discuss the physical effects of climate change on your operations and results. This disclosure may include the following:
 - Severity of weather, such as floods, hurricanes, sea levels, arability of farmland, extreme fires, and water availability and quality;
 - Quantification of material weather-related damages to your property or operations;
 - Potential for indirect weather-related impacts that have affected or may affect your major customers or suppliers;
 - Decreased agricultural production capacity in areas affected by drought or other weather-related changes; and
 - Any weather-related impacts on the cost or availability of insurance.
8. Quantify any material increased compliance costs related to climate change.
9. If material, provide disclosure about your purchase or sale of carbon credits or offsets and any material effects on your business, financial condition, and results of operations.

04

GREENHOUSE GAS PROTOCOL

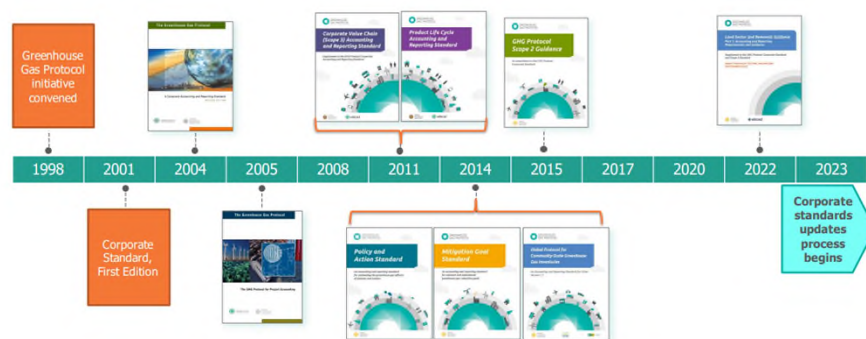
Carbon Accounting Methodology

- **Methodology for SB 253 and other regimes**

- **In conformance with** the Greenhouse Gas Protocol **standards and guidance**, including **the Greenhouse Gas Protocol Corporate Accounting and Reporting Standard and the Greenhouse Gas Protocol Corporate Value Chain (Scope 3) Accounting and Reporting Standard** developed by the World Resources Institute and the World Business Council for Sustainable Development, including guidance for Scope 3 emissions calculations that detail acceptable use of both **primary and secondary data sources**, including the use of industry average data, proxy data, and other generic data in its Scope 3 emissions calculations
- “Scope 3 emissions” means indirect upstream and downstream greenhouse gas emissions, other than Scope 2 emissions, **from sources that the reporting entity does not own or directly control and may include, but are not limited to, purchased goods and services, business travel, employee commutes, and processing and use of sold products**

23

History of GHG Protocol Standards



24

The GHG Protocol – Under Amendment

- **GHG Protocol Corporate Accounting and Reporting Standard (2004):** A standardized methodology for companies to quantify and report their corporate GHG emissions. Also referred to as the Corporate Standard
- **Scope 2 Guidance (2015):** Standardizes how corporations measure emissions from purchased or acquired electricity, steam, heat and cooling
- **GHG Protocol Corporate Value Chain (Scope 3) Accounting and Reporting Standard (2011):** A standardized methodology for companies to quantify and report their corporate value chain (Scope 3) GHG emissions, to be used in conjunction with the Corporate Standard. Also referred to as the Scope 3 Standard



BAKER BOTTS Sustainability Disclosures | Baker Botts' 37th Annual Environmental, Safety and Incident Response Seminar

Homepage | GHG Protocol

25

25

TABLE 1. Financial accounting categories

ACCOUNTING CATEGORY	FINANCIAL ACCOUNTING DEFINITION	ACCOUNTING FOR GHG EMISSIONS ACCORDING TO GHG PROTOCOL CORPORATE STANDARD	
		BASED ON EQUITY SHARE	BASED ON FINANCIAL CONTROL
Group companies / subsidiaries	The parent company has the ability to direct the financial and operating policies of the company with a view to gaining economic benefits from its activities. Normally, this category also includes incorporated and non-incorporated joint ventures and partnerships over which the parent company has financial control. Group companies/subsidiaries are fully consolidated, which implies that 100 percent of the subsidiary's income, expenses, assets, and liabilities are taken into the parent company's profit and loss account and balance sheet, respectively. Where the parent's interest does not equal 100 percent, the consolidated profit and loss account and balance sheet shows a deduction for the profits and net assets belonging to minority owners.	Equity share of GHG emissions	100% of GHG emissions
Associated / affiliated companies	The parent company has significant influence over the operating and financial policies of the company, but does not have financial control. Normally, this category also includes incorporated and non-incorporated joint ventures and partnerships over which the parent company has significant influence, but not financial control. Financial accounting applies the equity share method to associated/affiliated companies, which recognizes the parent company's share of the associate's profits and net assets.	Equity share of GHG emissions	0% of GHG emissions
Non-incorporated joint ventures / partnerships / operations where partners have joint financial control	Joint ventures/partnerships/operations are proportionally consolidated, i.e., each partner accounts for their proportionate interest of the joint venture's income, expenses, assets, and liabilities.	Equity share of GHG emissions	Equity share of GHG emissions
Fixed asset investments	The parent company has neither significant influence nor financial control. This category also includes incorporated and non-incorporated joint ventures and partnerships over which the parent company has neither significant influence nor financial control. Financial accounting applies the cost dividend method to fixed asset investments. This implies that only dividends received are recognized as income and the investment is carried at cost.	0%	0%
Franchises	Franchises are separate legal entities. In most cases, the franchisor will not have equity rights or control over the franchisee. Therefore, franchisees should not be included in consolidation of GHG emissions data. However, if the franchisor does have equity rights or operational/financial control, then the same rules for consolidation under the equity or control approaches apply.	Equity share of GHG emissions	100% of GHG emissions

BAKER BOTTS

NOTE: Table 1 is based on a comparison of UK, US, Netherlands and International Financial Reporting Standards (IFRS, 2009).

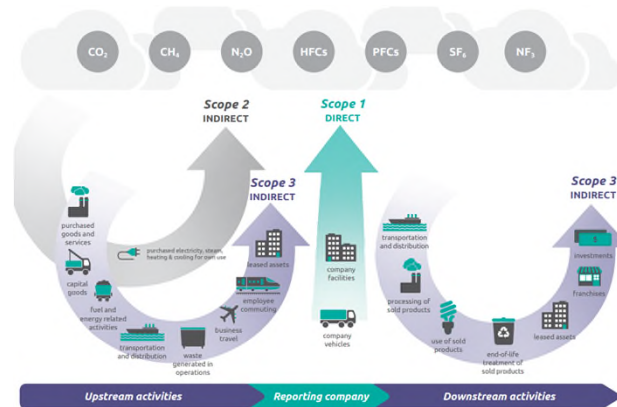
26

GHG Emissions & Organizational Boundaries

- GHG Protocol: Corporate Reporting & Accounting Standard
- Chapter 3: Organizational Boundaries

26

Scope Disclosures



Scope 1	Direct GHG emissions from sources a company "owns or directly controls" (due 2026)
Scope 2	Indirect GHG emissions from purchasing electricity, steam, heating, and cooling (due 2026)
Scope 3	All other indirect upstream and downstream GHG emissions (due 2027)

27

Example Carbon Accounting: Soy-based renewable diesel

Activity	Farmer	Farm Transporter	Crush Plant	Renewable Diesel Plant	Fuel Transporter	Consumer
Farming	38	38 (1)	38 (1)	38 (1)	38	38 (3)
Transport	1 (9)	1	1 (4)	1 (4)	1 (4)	1 (3)
Crush	3 (10)	3 (10)	3	3 (1)	3 (10)	3 (3)
Refining	13(10)	13(10)	13 (10)	13	13(10)	13(3)
Transport	1 (9)	1 (9)	1 (9)	1 (9)	1	1 (3)
Fuel Use	1(11)	1(11)	1(11)	1(11)	1(11)	1
Total	58	58	58	58	58	58

LEGEND

Scope 1 & 2

(Scope 3 Category)

Units: gCO₂e/MJ

Scope 3 UPSTREAM Categories:

1. Purchased goods and services 2. Capital goods 3. Fuel- and energy-related activities (not otherwise included in Scope 1 or Scope 2) 4. Upstream transportation and distribution 5. Waste generated in operations 6. Business travel 7. Employee commuting 8. Upstream leased assets

Scope 3 DOWNSTREAM Categories:

9. Downstream transportation and distribution 10. Processing of sold products 11. Use of sold products 12. End-of-life treatment of sold products 13. Downstream leased assets 14. Franchises 15. Investment

28

Scope 3: Market-based Approach for Primary Data

- **Approaches**

- **Physical Segregation:** Low and high carbon materials are physically segregated in transportation and processing (i.e., ship renewable natural gas ("RNG") in separate pipelines from natural gas ("NG"))
- **Mass Balance:** Low and high carbon materials are commingled in transportation and processing but tracked separately (i.e., 10% RNG is injected into the commingled NG pipeline and physically delivered, then 10% of the fuel use is RNG for Scope 1 and 3 purposes)
- **Book and Claim:** the low carbon material's physical flow and low carbon attribute are completely decoupled (i.e., RNG delivers into facility X who claims only NG GHG emissions, and NG delivers into facility Y who claims only RNG GHG emissions)

- **Market-based approaches**

- Facilitates decarbonization with pace and affordability

- **Mass Balance and Book and Claim market-based approaches not currently recognized by GHG protocol**

05

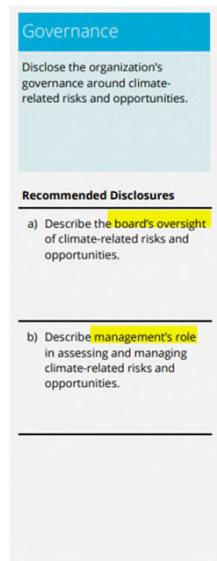
TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES

Incorporating the TCFD

- The TCFD's framework has been incorporated by reference into California's SB 261 and is a major influence in other jurisdictions
- Notably, the TCFD has been recently disbanded and oversight will be carried on by the International Financial Reporting Standards ("IFRS") Foundation
- Transition to IFRS raises questions about prospective incorporation by reference

31

TCFD: Governance

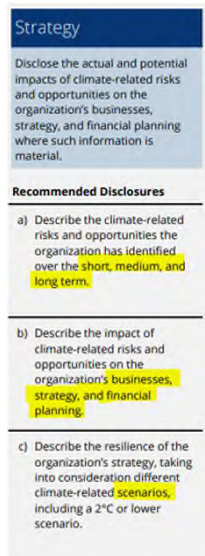


Important Issues

- Spotlight on board of directors
- How can the report ensure that directors' oversight roles are safely described?
- Spotlight on the climate-related credentials of directors and management

32

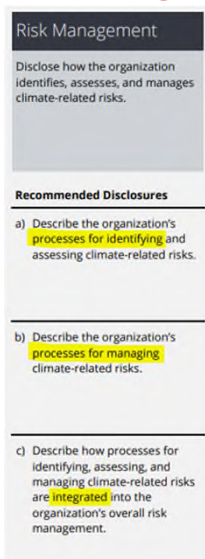
TCFD: Strategy



Important Issues

- The TCFD recommends disclosing how the organization considers climate-related scenarios, including scenarios where warming is limited to 2°C or lower
- Scenario analyses are often benchmarked against highly sophisticated and technical analyses
- For example, the International Energy Agency's World Energy Outlook and the United Nations Intergovernmental Panel on Climate Change's Emissions Scenarios
- How can reporting entities ensure their analysis does not get them in "hot water" with stakeholders?

TCFD: Risk Management



Important Issues

- Spotlight on internal processes
- Will want to ensure consistency with other corporate filings
- Increasing evaluation by the SEC on climate-related disclosures for conformity with other corporate filings, increasing comment letters
- Implicates board of director oversight duties

TCFD: Metrics and Targets

Metrics and Targets

Disclose the metrics and targets used to assess and manage relevant climate-related risks and opportunities where such information is material.

Recommended Disclosures

a) Disclose the **metrics** used by the organization to assess climate-related risks and opportunities in line with its strategy and risk management process.

b) Disclose Scope 1, Scope 2, and, if appropriate, Scope 3 greenhouse gas (GHG) emissions, and the related risks.

c) Describe the targets used by the organization to manage climate-related risks and opportunities and **performance against targets.**

Important Issues

- The TCFD recommends disclosing Scope 1, Scope 2, and, if appropriate, Scope 3 emissions
- Does this apply a Scope disclosure requirement to SB 261?
- If an alternative framework does not involve Scope disclosures, can that framework be "equivalent"?
- Bootstraps the GHG reporting issues already discussed

35

Financial Risk Disclosures

- The TCFD's Strategy guidance for all sectors recommends disclosing "the potential impact of climate-related issues on financial performance (e.g., revenues, costs) and financial position (e.g., assets, liabilities)"
- As yet, companies voluntarily reporting under the TCFD tend to avoid producing concrete revenue or profit data, instead discussing risks more abstractly

Transition risk examples

Financial impacts to client revenue, income, cash flow, assets or collateral due to climate-related policy, legal, technology or market changes, including shift to climate-related investments

- Some companies indirectly include revenue in carbon intensity metrics:

In metric tons of CO ₂ e	2019* (baseline)	2020*	2021	% Change from 2019*
Scope 3				
Emissions Intensity Metrics				
Scope 1 & Scope 2 location-based tCO ₂ e / \$1 million revenue	2.0	1.4	1.2	-40%

36

06

WHAT COMPANIES SHOULD DO TO PREPARE

BAKER BOTTS

37

Takeaways

- As a growing number of jurisdictions worldwide have adopted or are considering adopting climate-related disclosure mandates, the EU's and California's requirements are among the more stringent requirements facing companies.
- The mandate to report Scope 3 emissions without regard to materiality or whether the company has set a Scope 3 emissions target is likely to increase the number of companies reporting such emissions and to increase the demand for the appropriate legal, technical, and accounting expertise needed to comply with increasingly substantive climate-related disclosure mandates.
- Market-based carbon accounting approaches, including the use of RECS, are at risk with the GHG protocol amendment and it is important to stay apprised as more regulatory schemes seek to incorporate this standard
- Following *Chamber of Commerce v. CARB* will remain important
- The EU's CSRD is driving the mandate to report and companies with EU reporting exposure will be looking to conform their reporting across jurisdictions

BAKER BOTTS Sustainability Disclosures | Baker Botts' 37th Annual Environmental, Safety and Incident Response Seminar

38

38

What Companies Should Do to Prepare

- Participate in the rulemaking process
 - Monitor CARB workshops
 - Monitor GHGP amendments
 - Submit comments
- Engage carbon accounting firms to assist with the collection of relevant greenhouse gas emissions data
- Evaluate quality assurance providers capable of meeting your needs
- Conduct internal assessments about:
 - Current sustainability-related data management practices
 - Climate-related risk management practices
 - Board- and management-level governance practices
 - Use of scenario analyses and internal carbon metrics
 - Use or claims about emissions offsets

39

What Companies Should Do to Prepare

- Seek legal counsel to:
 - Determine applicability across jurisdictions and mandates
 - Ensure knowledge of the standards and guidance that form the basis of the laws
 - Evaluate existing climate disclosures and, where needed, update to conform
 - Cohere climate disclosures with other corporate filings
 - Assess exposure to greenwashing claims, shareholder suits, and enforcement
 - Participate in the rulemaking process
 - Gain insight into how your peers are approaching the mandates

40

07

QUESTIONS & ANSWERS

BAKER BOTTS



41

AUSTIN
BRUSSELS
DALLAS
DUBAI
HOUSTON
LONDON
NEW YORK
PALO ALTO
RIYADH
SAN FRANCISCO
SINGAPORE
WASHINGTON

bakerbotts.com

©Baker Botts LLP, 2024. Unauthorized use and/or duplication of this material without express and written permission from Baker Botts LLP, is strictly prohibited. Excerpts and links may be used, provided that full and clear credit is given with appropriate and specific direction to the original content.

42



13 **BREAKOUT SESSION 6:**

ENERGY TRANSITION AND RENEWABLE FUELS

Energy Transition and Renewable Fuels

Shai Sahay

Julie Cress

Janie Kilgore

Scott Novak

CONFIDENTIAL
© Copyright Baker Botts 2024. All Rights Reserved.



1

Presenters



Shai Sahay

Partner
Washington, DC
P: +1.202.639.7745
shailesh.sahay@bakerbotts.com



Julie Cress

Special Counsel
San Francisco
P: +1.415.291.6242
julie.cress@bakerbotts.com



Janie Kilgore

Associate
Washington, DC
P: +1.202.639.7707
janie.kilgore@bakerbotts.com



Scott Novak

Associate
Washington, DC
P: +1.202.639.1316
scott.novak@bakerbotts.com

2

FEDERAL TAX CREDITS AND THE RENEWABLE FUEL STANDARD UPDATES 01

BAKER BOTTS

3

Inflation Reduction Act: Section 45V Clean Hydrogen Production Tax Credit

- Provides a tax credit for each kilogram of clean hydrogen produced at a facility the construction of which begins before January 1, 2023.
 - Credit is available for a 10-year period beginning on the date the facility is originally placed in service.
- Credit is determined by lifecycle greenhouse gas emissions and prevailing wage and apprenticeship requirements.

Emissions Intensity (kg of CO2e per kg of H2)	Maximum credit (\$/kgH2, assuming prevailing wage and apprenticeship requirements are met)
0 - .45kg	\$3.00
.45 - 1.5kg	\$1.00
1.5 - 2.5kg	\$0.75
2.5 - 4kg	\$0.60

4

Inflation Reduction Act: Section 45V Clean Hydrogen Production Tax Credit

- In December, IRS and the Treasury published proposed regulations governing 45V.
- Three “pillars” of clean power:
 - (1) additionality (or “incrementality” in the language of the proposed regulations);
 - Power facilities began commercial operations no more than 36 months before the hydrogen plant is placed in service;
 - (2) temporal matching; and
 - Hourly matching starting January 1, 2028 (annually matching before then); and
 - (3) geographic correlation (or “deliverability” in the language of the proposed regulations).
 - Power producer in the same region as the hydrogen production facility.

5

Inflation Reduction Act: Section 40B Sustainable Aviation Fuel Tax Credit

- Section 40B of the IRA created a SAF tax credit for two years.
 - At the end of 2024, 45Z will take its place for 2025 through 2027.
- SAF must reduce lifecycle greenhouse gas emissions by at least 50 percent.
- Value of credit: \$1.25 plus an additional \$0.01 for each percentage point by which the lifecycle emissions reduction of such fuel exceeds 50 percent.
- CORSIA model or a “similar methodology” that satisfies criteria under the Clean Air Act.

6

Inflation Reduction Act: Section 40B Sustainable Aviation Fuel Tax Credit

- IRS issued guidance in December 2023 stating that the existing Greenhouse Gases, Regulated Emissions, and Energy Use in Technologies Model developed by the Argonne National Laboratory (GREET) does not satisfy the requirements and cannot be used to calculate emissions under Section 40B.
 - An interagency working group is developing a version of GREET that will satisfy the 40B requirements.
- The guidance creates a “safe harbor” for SAF that generates Renewable Identification Numbers (RINs) under the federal Renewable Fuel Standard (RFS).

Inflation Reduction Act: Section 45Z Clean Fuel Production Tax Credit

- o 45Z creates a clean fuel production tax credit for 2025 through 2027.
- o Available tax credit amount is calculated by multiplying a base amount (20 cents for fuel and 35 for SAF) per gallon by “emissions rates.”
- o Treasury must publish “a table which sets forth the emissions rate for similar types and categories of transportation fuels.”
 - The granularity of the table will determine how flexible Section 45Z will be in incentivizing low carbon behaviors in fuel production.
- o The GREET model under 40B provides insight into how Treasury will calculate emissions under 45Z.

Renewable Fuel Standard

- o Under the Clean Air Act, the next RFS rulemaking is required to occur in Fall 2024.
 - o EPA will not meet this deadline.
 - o The next EPA RFS rulemaking will likely include another multi-year renewable volume obligations.
- o Under the RFS, small refineries may petition EPA for exemption from renewable fuel blending requirements (SREs). EPA may grant SREs if EPA determines that compliance with the RFS would cause “disproportionate economic hardship” for the refinery.
 - o In 2021, the Supreme Court held that the EPA can exempt refineries from compliance with the RFS even if the refinery did not receive an exemption each year since the program began in 2011.
- o EPA has granted SREs in the past but current EPA does not anticipate granting future SREs.

Renewable Fuel Standard

SRE Litigation Update

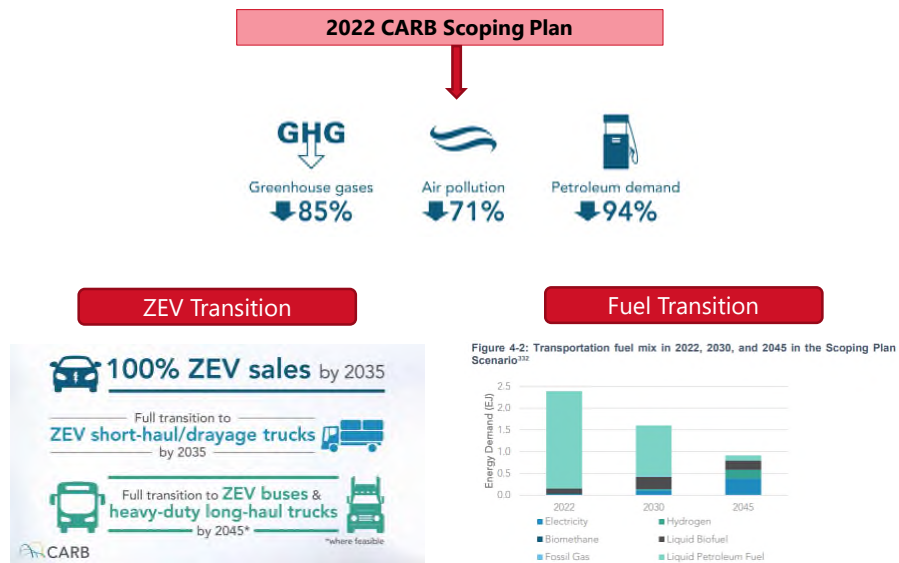
- o In 2022, EPA rejected 105 SRE petitions and there have been numerous legal challenges to these denials.
 - o In general, courts have upheld EPA's denials.
 - o However, a recent 5th Circuit case found that EPA's denial of SREs was impermissibly retroactive and arbitrary and capricious because EPA changed the analysis it used to determine whether to grant SREs in 2021. *Calumet Shreveport Refining LLC, et al. v. EPA*.
 - o On January 22, 2024 the 5th Circuit denied requests for a rehearing of this case.
 - o In its denial, the panel majority rejected EPA's basis for denying RFS waivers, which is based on the agency's “economic hardship” theory that refiners pass on their RFS compliance costs to consumers and are not therefore economically harmed by the program.
- o The DC. Circuit will hear arguments on April 16th in *Sinclair Wyoming Refining v. EPA* which centers on EPA's theory of “economic hardship.”

LCFS UPDATE 02

BAKER BOTTS

11

California's Climate Targets



BAKER BOTTS Energy Transition and Renewable Fuels | Baker Botts' 37th Annual Environmental, Safety and Incident Response Seminar

12

12

2024 LCFS Amendments

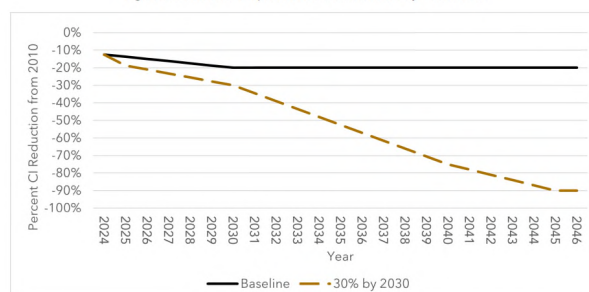
- Carbon Intensity Targets
 - Increased stringency of carbon intensity benchmarks both pre- and post-2030
 - Auto acceleration mechanism to strengthen the carbon intensity benchmarks based on defined market conditions
- Eliminate exemption for intrastate fossil jet fuel
- Biomethane amendments:
 - For projects breaking ground after December 31, 2029, add deliverability requirement for pipeline-injected biomethane;
 - Phase out pathways for avoided methane crediting by 2040 for biomethane used for transportation and 2045 for biomethane used for hydrogen production
- Crop-based fuels
 - Add sustainability requirements for crop- and forestry- based feedstocks
- Programmatic Changes
 - Systematized enforcement
 - Credit True-up

Comments due February 20
Public Hearing: March 21

13

2024 LCFS Amendments--Carbon Intensity Targets

Figure 6: Current and Proposed Annual Carbon Intensity Benchmarks



Auto Acceleration Mechanism
Accelerates CI benchmarks by one year if the following triggers are met:

- Credit bank to average quarterly deficit ratio exceeds three; and
- Credit generation exceeds deficit generation based on the prior year's reporting.

14

2024 LCFS Amendments—Fossil Jet

- Eliminate the exemption for intrastate fossil jet fuel from the LCFS regulation starting in 2028—**fossil jet will generate deficits**
 - Limited to flights that take off and land within the State of California
 - Producers are obligated party

15

Biomethane Amendments

- **Phase out** of biomethane crediting:
 - 2040: Combustion of biomethane (CNG vehicles)
 - 2040/2045: Avoided methane crediting
 - 2040—biomethane as a transportation fuel
 - 2045—biomethane to produce H2
- **Deliverability**—requires physical flow to CA
 - 2041--biomethane for CNG vehicles
 - 2046—biomethane for H2

16

Crop-based Fuels

- *Crop-based fuel sustainability requirement*
 - By 2028, pathway holders must track crop-based and forestry-based feedstocks to point of origin
 - Feedstock cannot be sourced on land that was forested after 2008.
 - Obtain **independent feedstock certification**
 - CARB must approve the certification system
 - Failure to certify=assignment of ULSD CI

Programmatic Changes

- Enforcement—Systematized CI exceedance remedy
 - Over-generated credits returned to CARB
 - Deficit obligation where operational CI > certified CI
 - 4X CI difference X annual fuel quantity
- True-up
 - Credit generation where operational CI < certified CI

CAP-AND-TRADE PROGRAMS UPDATE 03

BAKER BOTTS

19

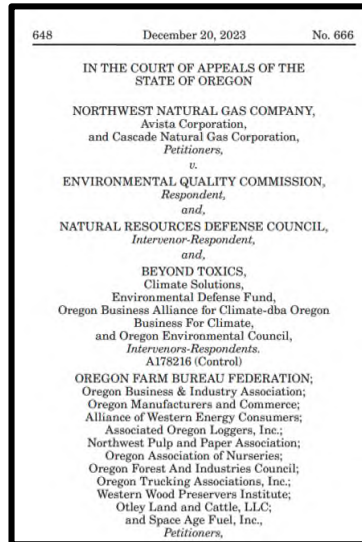
OR Climate Protection Program Summary

Covered Sector	Threshold
Covered fuel suppliers supplying liquid fuels or propane (suppliers of liquid fuels and propane)	Greater than or equal to 200,000 MT CO ₂ e (covered beginning 2022)
	Greater than or equal to 100,000 MT CO ₂ e and less than 200,000 MT CO ₂ e (covered beginning 2025)
	Greater than or equal to 50,000 MT CO ₂ e and less than 100,000 MT CO ₂ e (covered beginning 2028)
	Greater than or equal to 25,000 MT CO ₂ e and less than 50,000 MT CO ₂ e (covered beginning 2031)

- **Adoption**: EQC adopted CPP December 16, 2021, per Executive Order No. 20-04
- **Emissions Goals**: Reduce covered entities' emissions by 50% by 2035 and 90% by 2050 (from 2017-2019 average levels)
- **Compliance**: Free compliance instruments + Community Climate Investment credits
- **Exempt fuels**: Biofuels, aviation fuels
- **First Compliance Period**: 2022-2024

20

OR Climate Protection Program - Litigation



- **December 20, 2023:** Oregon Court of Appeals issued decision invalidating CPP on procedural grounds
- EQC failed to comply with heightened disclosure requirements regarding Clean Air Act Title V sources
- State has not appealed decision and intends to initiate new rulemaking

21

OR Climate Protection Program - Litigation



- Oregon Court of Appeals did not reach substantives issues, including: Does DEQ have power to regulate fuel suppliers as "air contamination sources"?
- Oregon "Air Contamination Source" Definition
 - ORS 468A.005(4): "Air contamination source" means **any source at, from, or by reason of which there is emitted into the atmosphere any air contaminant**, regardless of who the person may be who owns or operates the building, premises or other property in, at or on which such source is located, or the facility, equipment or other property by which the emission is caused or from which the emission comes.

22

OR Climate Protection Program - Litigation

Excerpt from Utility Petitioners' Reply Brief

In contending otherwise, the EQC claims boundless authority to regulate *any* cause of an air contaminant emission, no matter how remote, based on a single term—"by reason of which"—within the Air Contamination Source Definition.¹ But the agency improperly relies on a modern dictionary definition rather than what "by reason of which" meant in 1961 when the statute was enacted. The EQC also ignores other parts of the Air Contamination Source Definition, such as "at" and "from" and "source," that necessitate a direct causal relationship between the source being regulated and the emission being regulated. Tellingly, EQC's newfound authority is inconsistent with the narrower interpretation of "air contamination source" the government has applied for decades.

23

WA Climate Commitment Act Summary

- **Adoption:** Ecology adopted CCA September 29, 2022, per statute
- **Emissions Goals:** Reduce covered entities' emissions by 45% by 2030, 95% by 2050 (from 1990 levels)
- **Coverage:** Fuel suppliers supplying 25,000 or more MT CO₂e fuel within WA
- **Compliance:** Allowances + offsets
- **Exempt fuels:** Biofuels, aviation fuels, watercraft fuels combusted outside of WA
- **First Compliance Period:** 2023-2026

24

The timeline consists of a horizontal red line with four red circular markers. Above the line, from left to right, are the titles for Auction #1 (Feb. 2023), APCR Auction #1 (Aug. 2023), APCR Auction #2 (Nov. 2023), and Auction #4 (Dec. 2023). Below the line, from left to right, are the titles for Auction #2 (May 2023), Auction #3 (Aug. 2023), and Auction #4 (Dec. 2023). Each title is connected to the timeline by a vertical dashed red line. Data points for each auction are listed in the corresponding column.

Auction	Date	Settlement Price	Proceeds
Auction #1	Feb. 2023	\$48.50	\$299,983,267
APCR Auction #1	Aug. 2023	Tier 1 Price: \$51.90 Tier 1 Proceeds: \$27,351,300 Tier 2 Price: \$66.68 Tier 2 Proceeds: \$35,140,360	
APCR Auction #2	Nov. 2023	Tier 1 Price: \$51.90	Proceeds: \$259,500,00
Auction #2	May 2023	Current Auction Settlement Price: \$56.01 Current Auction Proceeds: \$480,845,850 Future Auction Settlement Price: \$31.12 Future Auction Proceeds: \$76,244,000	
Auction #3	Aug. 2023	Settlement Price: \$63.03 Proceeds: \$541,112,550	
Auction #4	Dec. 2023	Current Auction Settlement Price: \$51.89 Current Auction Proceeds: \$370,605,955 Future Action Settlement Price: \$45.00 Future Auction Proceeds: \$110,239,200	

- Initiative Measure No. 2117: Certified for November 2024 ballot.

All state agencies are prohibited from implementing any type of carbon tax credit trading, also known as "cap and trade" or "cap and tax" scheme, including the climate commitment act previously codified as chapter 70A.65 RCW. This prohibition applies whether the resulting increased costs are imposed on fuel recipients or fuel suppliers.

WA Climate Commitment Act Challenges

PacifiCorp v. Watson, No. 3:23-cv-06155 (W.D. Wash.)

- **December 15, 2023**: PacifiCorp filed complaint alleging WA Climate Commitment Act and implementing regulations violates the Dormant Commerce Clause
- **January 4, 2024**: Amended complaint filed
 - Relief sought includes:
 - (1) injunction ordering Ecology to expand availability of no-cost allowances to all Chehalis customers, regardless of state of residence;
 - (2) injunction prohibiting Ecology from enforcing CCA provision requiring PacifiCorp to acquire allowances for out-of-Washington customers receiving power from Chehalis;
 - (3) declaratory order CCA as applied violated the commerce clause or that CCA's no-cost allowance provisions require no-cost allowances for all customers of utilities operating in Washington.
- **January 11, 2024**: Preliminary injunction motion filed

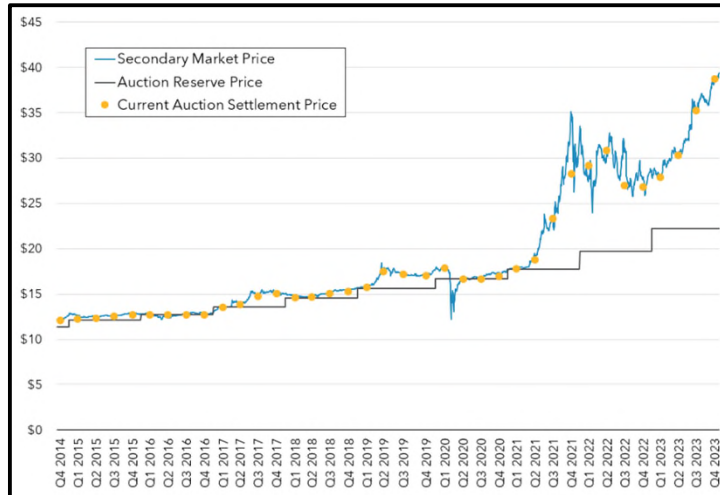
27

CA Cap-and-Trade Program Summary

- **Adoption**: CARB originally adopted in 2010, to be effective in 2012
- **Emissions Goals**: Reduce covered entities' emissions by 40% by 2030, 85% by 2045 (from 1990 levels)
- **Coverage**: Fuel suppliers supplying 25,000 or more MT CO₂e fuel within CA
- **Compliance**: Allowances + offsets (limited)
- **Exempt fuels**: Biofuels

28

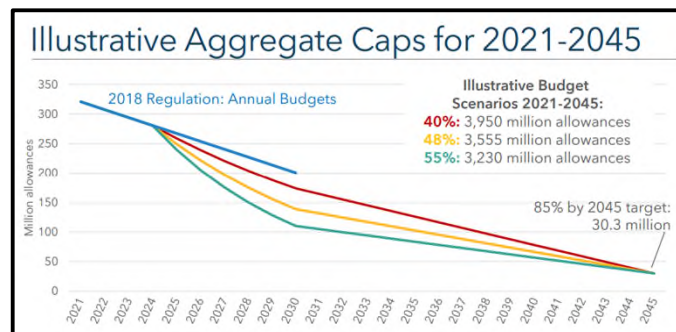
CA Cap-and-Trade Program Auction Prices



29

CA Cap-and-Trade Program

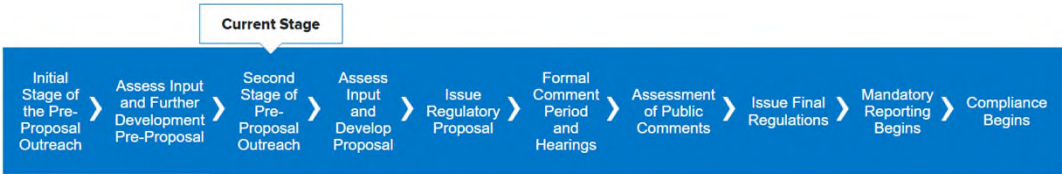
- February 23, 2023:** CARB announced process to inform potential regulatory amendments in light of 2022 Scoping Plan
 - Latest workshop held November 16, 2023
- Considering program stringency of 40%, 48%, or 55% emissions reductions by 2030



30

NY Cap-and-Invest Program

- **December 20, 2023:** Pre-Proposal Outline released
- DEC and NYSERDA seeking feedback on Cap-and-Invest Rule, Mandatory Reporting Rule, and Auction Rule



AUSTIN
BRUSSELS
DALLAS
DUBAI
HOUSTON
LONDON
NEW YORK
PALO ALTO
RIYADH
SAN FRANCISCO
SINGAPORE
WASHINGTON

bakerbotts.com

©Baker Botts LLP, 2024. Unauthorized use and/or duplication of this material without express and written permission from Baker Botts LLP, is strictly prohibited. Excerpts and links may be used, provided that full and clear credit is given with appropriate and specific direction to the original content.



14 **SPEAKER BIOS**

Guest Speakers Bios



DAVID UHLMANN

Assistant Administrator

EPA Office of Enforcement and Compliance Assurance (OECA)

David M. Uhlmann is the Assistant Administrator for EPA's Office of Enforcement and Compliance Assurance (OECA). He previously served from September 2022 to July 2023 as Senior Advisor to the EPA Administrator and as Deputy Assistant Administrator for OECA.

Before joining EPA, Uhlmann was the Jeffrey F. Liss Professor from Practice and the inaugural Director of the Environmental Law and Policy Program at the University of Michigan Law School from 2007 to 2022. During that time, Uhlmann also served as the Counselor to the Independent Monitor and Auditor appointed by the Justice Department and EPA after the Volkswagen diesel scandal. His research and advocacy interests include criminal and civil enforcement of the environmental laws, corporate accountability, and climate change and sustainability.

Uhlmann served from 1990 to 2007 at the U.S. Department of Justice, the last seven years as chief of the Environmental Crimes Section, where he was the top environmental crimes prosecutor in the country. He led an office of approximately 40 prosecutors responsible for the prosecution of environmental and wildlife crimes nationwide and chaired the Justice Department's Environmental Crimes Policy Committee. His work as lead prosecutor in *United States v. Elias*, a knowing endangerment case that left a 20-year-old worker severely and permanently brain-damaged, is chronicled in *The Cyanide Canary*. He received numerous Justice Department and EPA awards for his precedent-setting prosecutions, including the first environmental justice criminal trial.

Uhlmann is a fellow in the American College of Environmental Lawyers and was named a "Conservation Hero" by the Michigan League of Conservation Voters. He received his J.D. from Yale Law School and a B.A. in history and political science with high honors from Swarthmore College. Following law school, he clerked for United States District Court Judge Marvin H. Shoob in Atlanta, Georgia.

Uhlmann is married to Virginia Murphy, a professor in the Residential College at the University of Michigan. They have three adult children and two grandchildren, all of whom love the beaches of Lake Michigan and hiking in the northern Maine woods.



TREY MORRISON

Principal Engineer Exponent

Dr. Morrison applies his expertise as a chemical engineer to provide technical consulting services for a variety of industries including consumer products, industrial equipment, agricultural and food processing, chemical manufacturing, and oil and gas. For over twenty years, he has analyzed a multitude of products, equipment, systems and processes to aid stakeholders including owners, manufacturers, and insurers through incident investigation, fire and explosion investigation, root cause analysis, and evaluation and mitigation of risks.

Dr. Morrison is active in the product safety and chemical process safety communities through standards (NFPA, UL) and technical (LPS, PSMM) committee participation, presentations, and publications. He serves in leadership roles in the field of chemical process safety through conferences sponsored by AIChE in North America and in Latin America. Dr. Morrison has been presented as an expert and advised clients in various adjudicatory venues including federal court, state court, mediation, and international arbitration.



JAMES DANLEY

Former Chairman and Commissioner Federal Energy Regulatory Commission (FERC)

Commissioner James Danly was nominated Commissioner at the Federal Energy Regulatory Commission on February 12, 2020, and confirmed as a Commissioner by the United States Senate on March 12, 2020.

Danly served as Chairman of the Federal Energy Regulatory Commission from November 5, 2020 to January 21, 2021.

Danly formerly served as general counsel to FERC. Prior to joining the Commission, he was a member of the energy regulation and litigation group at Skadden, Arps, Slate, Meagher and Flom LLP.

Prior to this Danly served as law clerk to Judge Danny Boggs at the U.S. Court of Appeals for the Sixth Circuit. He was a managing director of the Institute for the Study of War, a military think tank in Washington, D.C., and served an International Affairs Fellowship at the Council on Foreign Relations. Danly is a former U.S. Army officer who served two tours in Iraq, first with an infantry company in Baghdad and then on staff at Multi-National Force—Iraq, receiving a Bronze Star and Purple Heart.

Danly earned his juris doctor from Vanderbilt University Law School, and his bachelor's degree from Yale University. He is licensed to practice law before the District of Columbia Court of Appeals.



RACHEL MEIDL

Fellow in Energy and Sustainability Baker Institute

Dr. Rachel A. Meidl, LP.D., CHMM, is a distinguished fellow in energy and sustainability at Rice University's Baker Institute for Public Policy and a strategic advisor for Morgan Stanley Capital International. Her research focuses on sustainability; circular economy; life cycle management; environmental justice; safety and environmental regulations of the treatment, storage, disposal, and transportation of hazardous materials and wastes; and understanding the environmental, economic, and social impacts across energy supply chains.

Dr. Meidl was previously appointed as Deputy Associate Administrator of the Pipeline and Hazardous Materials Safety Administration in Washington, D.C. Prior to her service in government, she was Director of Regulatory & Technical Affairs at American Chemistry Council. She has over 27 years of regulatory, public policy, advocacy and technical experience in industry, academia, government, and international relations.

Dr. Meidl holds a Ph.D. in law and public policy from Northeastern University, a master of science in environmental policy and management, a master of education in applied science and technology with certifications in chemistry and physics, and bachelor degrees in conservation biology and zoology & animal physiology from the University of Wisconsin–Madison. Dr. Meidl is also a Certified Hazardous Materials Manager.



TOMÁS CARBONELL

Deputy Assistant Administrator for Stationary Sources EPA Office of Air and Radiation (OAR)

Tomás Carbonell is Deputy Assistant Administrator for Stationary Sources in the EPA's Office of Air and Radiation. From 2012 until January 2021, Tomás Carbonell was an attorney in the U.S. Clean Air Program at the Environmental Defense Fund (EDF), where he most recently served as Senior Counsel and Director of Regulatory Policy. His work included litigation, regulatory, and policy advocacy on a range of climate and clean air issues, including carbon dioxide regulations for power plants; methane regulations for the oil and gas sector; hazardous air pollution from industrial sources; and climate legislation. Prior to arriving at EDF, Tomás was an Associate at Van Ness Feldman, LLP, where he counseled diverse clients on federal legal and regulatory matters related to climate change, clean energy, and environmental and electricity regulation.



KELLY KEEL

Executive Director

Texas Commission on Environmental Quality (TCEQ)

Kelly Keel has served as the Executive Director of the Texas Commission on Environmental Quality (TCEQ) since December 2023. In her role, she is responsible for managing the agency's day-to-day operations, which includes approximately 2800 employees, 16 regional offices, and an annual budget of approximately \$558 million.

Ms. Keel is a 22-year veteran of the TCEQ, where she has served in a variety of roles throughout the agency. Most recently, Ms. Keel served as the Director for the Office of Administrative Services, where she oversaw the agency's budgetary, financial, information technology, and human resources functions. Ms. Keel began her TCEQ career in 2001 with the agency's Office of Air where she was instrumental in the state's efforts to improve air quality. In 2008, she was promoted to Director of the newly-formed Water Quality Planning Division. As Director, Ms. Keel transformed the process for improving water quality for impaired water bodies. In 2010, Ms. Keel joined the Executive Office, serving as the Executive Assistant to the then-Deputy Executive Director. Beginning in 2012 and continuing until 2018, Ms. Keel served as the Office of Compliance and Enforcement's Area Director for the Coastal & East Texas Area. In this capacity, she was responsible for overseeing four of TCEQ's 16 regional offices, which include Tyler, Beaumont, Houston, and Corpus Christi. During Ms. Keel's time as the Area Director, she oversaw the fulfillment of routine investigations, responses to citizen complaints, and the agency's response to events occurring in her area, including disasters and emergency and drinking-water events.

A native Texan, Ms. Keel earned a Bachelor of Science in Economics from Texas A&M University and a Master of Public Service and Administration from the Bush School at Texas A&M University. Ms. Keel lives in Austin and enjoys spending her free time with family. She has a nine-year-old daughter and a six-year-old son. Ms. Keel also enjoys snow skiing, water skiing, and going to the beach.

Baker Botts Speaker Bios



CARINA L. ANTWEIL

Partner | Houston

+1.713.229.1127 | carina.antweil@bakerbotts.com

Carina Antweil is the Deputy Chair of the Houston Corporate Department. Carina represents public and private companies in a broad range of corporate matters, including mergers and acquisitions, divestitures, joint ventures and spin-offs. Carina also counsels issuers, investment banking firms and other investors in registered offerings and private placements of equity and debt securities, including initial public offerings, follow-on and secondary public offerings and 144A offerings. Carina's practice includes general corporate matters, including ESG matters, securities laws, Exchange Act reporting, takeover defense and corporate governance practices.

Carina has substantial experience across industries, with a particular focus in energy, petrochemicals and residential homebuilders.

Carina also serves as external pro bono general counsel to Communities in Schools of Houston, the largest provider of campus-based counseling and support services to students throughout the Greater Houston Area.



MEGAN H. BERGE

Partner | Washington

+1.202.639.1308 | megan.berge@bakerbotts.com

Megan Berge supports clients in all applications of environmental law, including civil litigation, rulemaking and permit appeals, regulatory advocacy, and compliance counseling. She partners with companies to develop creative strategies for difficult sustainability, Clean Air Act and climate issues including navigation of fuels and emissions-based credit regimes, and asset transitions. Megan recently argued and won a landmark climate case before the Washington Supreme Court [*Ass'n of Wash. Bus. v. Dep't of Ecology*, 95885-8 (Wash. Jan. 16, 2020)].



GREG DILLARD

Partner | Houston

+1.713.229.1348 | greg.dillard@bakerbotts.com

From the moment a workplace experiences a major accident, Greg Dillard is there to direct the legal response. He provides on-site support after accidents, managing the full spectrum of regulatory and legal obligations and focusing on all sectors of the upstream, midstream and downstream energy and chemical industries. Greg also leads internal investigations, litigates regulatory enforcement actions brought by government agencies and advises on health, safety and environmental compliance to prevent future liability.

Greg has a wide range of litigation experience before administrative law judges at OSHA, BSEE and other state and federal agencies.



ALEXANDRA DAPOLITO DUNN

Partner | Washington

+1.202.639.1324 | alexandra.dunn@bakerbotts.com

With over 28 years of practice at the local, state, and federal levels of government, Alexandra Dunn brings to clients an extensive institutional knowledge and keen ability to help solve regulatory and permitting problems companies may face. Her deep relationships across the nation and reputation for transparency, fairness, and equity with state and federal regulators make her an effective presence in the most difficult of settings.

Since coming to Baker Botts in early 2021, she has worked with companies of all sizes – from multi-national corporations to startups – and with national organizations on environmental justice and risk communication, sustainability, settlement of enforcement cases, the regulation and management of emerging contaminants, site cleanup and restoration, chemical regulation compliance, enforcement and compliance assistance, and risk communication.

Alexandra previously served as the Assistant Administrator for the U.S. Environmental Protection Agency's Office of Chemical Safety and Pollution Prevention, in which she led the Agency in the creation of national policies implementing federal laws governing chemicals, pesticides, and pollution prevention. Prior to that, she was the EPA Administrator for New England (Region 1).

Drawing upon her agency background, Alexandra provides clients with an "EPA insider" perspective on regulations and management of emerging contaminants, particularly integrated per- and polyfluoroalkyl substances (PFOS/PFAS), and has decades of risk communication and risk management experience to offer clients on chemicals of concern.



SCOTT A. ELLIOTT

Partner | Houston

+1.713.229.1344 | scott.elliott@bakerbotts.com

Scott Elliott advises a wide range of clients on environmental, health and safety issues. Scott routinely counsels clients in the chemical and energy industries on matters involving major industrial accidents, crisis response, process safety incidents and workplace fatalities. Scott counsels clients with regards to compliance obligations under the U.S. Environmental Protection Agency (EPA)'s Risk Management Program (RMP) regulations issued under the Clean Air Act (CAA), and Process Safety Management (PSM) program regulations by the Occupational Safety & Health Administration (OSHA). He routinely counsels clients on conducting internal investigations. Additionally, Scott also advises clients on enforcement matters involving the Bureau of Safety and Environmental Enforcement (BSEE).

Scott has helped clients respond to investigations by OSHA, the EPA, the Chemical Safety Board (CSB), the Department of Justice (DOJ), the BSEE and state regulatory agencies.



JOSHUA B. FRANK

Partner | Washington

+1.202.639.7748 | joshua.frank@bakerbotts.com

Joshua Frank is a seasoned litigator who handles a wide variety of complex, high stakes environmental litigation matters arising in all media (air, water and waste) under major environmental statutes and regulatory programs. His work has included Clean Air Act litigation; Clean Water Act litigation; and cost recovery, contribution and natural resource damage litigation under CERCLA and related state statutes. He has extensive experience in defending citizen suits and government enforcement actions under these statutes. He also represents clients in appellate challenges to environmental regulations at both the state and federal level and defends environmental permits against challenge.

A substantial focus of Josh's practice is the defense of mass torts and class actions alleging environmental property damage, personal injury, and interference with use and enjoyment of property. In this context, he has also defended claims regarding alleged defective products including claims of design defect, failure to warn, breach of warranties, unfair trade practices, fraud, and unjust enrichment.

Because his work often involves complicated scientific and engineering issues, Josh draws upon his background in the sciences to help his clients defend against such claims.

In addition to litigation, he also handles hazardous waste site remediation issues and regularly counsels clients regarding regulatory issues falling under a broad range of environmental statutes and regulations.



DEBRA J. JEZOUIT

Partner | Washington

+1.202.639.7728 | debra.jezouit@bakerbotts.com

Debra Jezouit is widely recognized for her experience in Clean Air Act and Climate Change issues, representing clients in multiple industries, including electric generating companies, cement manufacturers, iron and steel foundries, pharmaceutical companies and chemical companies. She handles such matters as New Source Review and New Source Performance Standard compliance counseling, applicability determinations and enforcement, counseling on hazardous air pollutant requirements, acid rain compliance, emissions monitoring issues, air permitting at the state and federal level, the development of and compliance with emissions trading programs, and emerging issues including environmental justice and Civil Rights Act Title VI complaints.



ALLISON WATKINS MALLICK

Partner | San Francisco

+1.415.291.6269 | allison.mallick@bakerbotts.com

Allison Watkins Mallick advises clients facing complex environmental challenges, focusing on litigation, regulatory advocacy, and compliance counseling. She assists companies and industry coalitions across multiple sectors, including energy, cement, manufacturing, chemical processing, and agricultural processing. Her work includes defense of environmental permits for new projects and existing facilities, federal and citizen enforcement suits, class actions, and toxic tort claims. As a regulatory advocate, Allison develops strategies for working with agencies and local communities, helps clients participate in state and federal decision-making processes, advises on compliance issues, and handles appeals of agency rules. Allison has litigated cases not only in California but in state and federal venues across the country, including in Arkansas, Iowa, Louisiana, Montana, Oregon, and Washington.

Allison's work covers a wide variety of issues, including environmental justice and climate change. She has experience across all environmental media (air, water, and waste) and has particular experience in air-related issues, having defended Clean Air Act enforcement actions and citizen suits, developed plans for compliance with Regional Haze obligations, and drafted comments on over fifty EPA rulemakings under the Clean Air Act.



STERLING MARCHAND

Partner | Washington

+1.202.639.1113 | sterling.marchand@bakerbotts.com

Sterling Marchand's practice focuses on complex litigation, including environmental and commercial matters, as well as corporate investigations and white-collar criminal defense.

Sterling represents corporate and individual clients at trial in state and federal courts in matters involving contractual disputes, allegations of price fixing, and the Clean Air Act.

Sterling counsels corporate clients in investigations by government agencies, in both criminal and civil contexts, including FCPA, fraud, securities, and antitrust investigations. He also assists in conducting internal investigations and advising clients on risk management and compliance.

Additionally, Sterling guides clients on federal and state political and election law, including campaign finance, ethics, and lobbying compliance. He has assisted corporate clients with investigations by the FEC and in establishing and administering a PAC.



KENT MAYO

Partner | Washington

+1.202.639.1122 | kent.mayo@bakerbotts.com

Kent Mayo handles a wide variety of environmental matters, with a focus on environmental litigation and enforcement defense and strategic regulatory compliance. He represents clients in toxic tort and class action litigation arising from environmental issues. His litigation work also includes serving as lead counsel in multiple enforcement actions brought by the United States, states and citizen groups under the Clean Air Act and other statutory programs.

In the regulatory sphere, Kent counsels clients on rulemakings and regulatory compliance and works with clients to develop broad strategies for working with regulators. He assists clients in compliance investigations and audits addressing multiple statutory schemes, including the Clean Air Act, RCRA (coal ash) and the SDWA. Kent also works with clients to prepare for and respond to environmental crisis events, including working with responders and regulators such as EPA, Chemical Safety Board and state agencies to protect the client's interests.

Kent previously worked as a trial lawyer in the Environmental Enforcement Section of the U.S. Department of Justice, where he led teams in complex environmental litigation, settlement negotiations and mediations across a broad range of civil environmental actions, including cases involving Clean Water Act and Clean Air Act violations and cases arising under CERCLA's remedial, cost recovery and natural resource damages provisions.



STEPHANIE BERGERON PERDUE

Partner | Austin

+1.512.322.2544 | stephanie.bergeron.perdue@bakerbotts.com

Stephanie Bergeron Perdue brings two decades of agency experience to her practice from her time spent with the Texas Commission on Environmental Quality (TCEQ), where she served in various capacities including Deputy Executive Director. During her time with the agency, she worked on a wide range of issues including National Ambient Air Quality Standards (NAAQS)/State Implementation Plan (SIP) development, NSR Air Permitting, TPDES water quality permitting, water rights and RCRA hazardous waste issues. She worked extensively with internal agency emergency response staff, as well as the Office of the Attorney General on responses to natural disasters, such as Hurricane Harvey. She also had an active role in the agency's 2001 and 2011 Sunset Review process and implementation. Stephanie interacted with Environmental Protection Agency Region 6 staff throughout her tenure on federal programmatic issues, including TPDES, RCRA and NSR.

More recently in her current practice, Stephanie's work has ranged from contested case hearing affected person analysis to public information requests briefings. She has also been actively involved on environmental justice developments. Stephanie has been extensively engaged in TCEQ-enforcement related regulatory developments as well as represented clients in the favorable resolution of administrative enforcement matters. She is also tracking the current Sunset Review of the TCEQ, which includes Sunset staff recommendations to address affected person analyses. Stephanie continues to maintain positive working relationships with both state and federal government counterparts.



SHAILESH SAHAY

Partner | Washington

+1.202.639.7745 | shailesh.sahay@bakerbotts.com

Shai Sahay previously served as in-house counsel to the largest renewable fuels producer in the world, and as an acting general counsel of the largest renewable fuels trade association. He directs legal and policy strategy on climate, environmental, sustainability issues at the federal, state, and international levels.

Shai also actively advises clients on community and stakeholder engagement relating to Native American and environmental justice groups, among others.

Shai represents clients in a variety of industries, helping them shape laws through legislative and regulatory advocacy, then helping them maximize value under established legal frameworks by obtaining regulatory approvals and ensuring regulatory compliance.



MARTHA S. THOMSEN

Partner | Washington

+1.202.639.7863 | martha.thomsen@bakerbotts.com

Martha Thomsen is an experienced environmental litigator and advisor who helps clients navigate complex litigation and evolving regulations.

Environmental Litigation Work

Martha's litigation practice extends from pre-litigation resolutions through all stages of lawsuits, including discovery, motions practice, trial, and appeal. Martha has particular experience in highly technical suits involving waste and water issues, including claims arising under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA). As part of her litigation and CERCLA work, Martha engages with experts and consultants on cost, allocation, and remediation issues.

Select recent cases include: arguing and winning a motion to dismiss a state's natural resource damages (NRD) claims against a manufacturing company; participating on the CERCLA trial team for one of the country's first ever trials that was converted from in-person to virtual mid-spring 2020 and securing cost recovery from the Government on behalf of an oil-and-gas company; and representing several companies in ongoing litigation addressing responsibility for cleanup costs at a Superfund Site estimated to cost more than \$2 billion.

Regulatory Compliance and Engagement with State and Federal Agencies

Martha also helps clients navigate compliance with evolving state and federal environmental laws and represents clients before environmental agencies. She takes a holistic approach to regulatory compliance issues that accounts for short-term and long-term client planning, agency and other stakeholder positions, and technical compliance criteria and requirements. As part of this work, Martha engages directly with state and federal agencies to advocate on behalf of clients, clarify agency positions, and engage in formal and informal dispute resolution.

This work spans a variety of environmental statutes, including CERCLA and RCRA as well as the Clean Water Act (CWA), wildlife, and state laws. She also works with clients on renewable and clean energy projects.

Particular areas of experience include coal combustion residuals (CCR) liability and regulatory issues, PFAS, and as well as renewable and clean energy projects. With respect to CCR work, Martha helps power companies navigate a constantly shifting regulatory landscape through counseling, risk management, advising on prospective regulation, and agency engagement.

Select recent work includes: advising numerous power companies on CCR regulatory compliance; representing several power companies on CCR Part A/Part B applications; representing a power company in dispute resolution with a state agency regarding the scope of CCR-related cleanup and associated financial assurance, resulting in a significant reduction in financial assurance requirements;

and advising several companies in a variety of industries on ongoing state and federal cleanups.



PAULINA WILLIAMS

Partner | Austin

+1.512.322.2543 | paulina.williams@bakerbotts.com

Paulina Williams advises clients across industrial and commercial sectors on complex environmental matters. Paulina's experience spans water quality, water rights, waste, air, and natural resources issues. She has worked extensively on environmental permitting, including contested case hearings, cross-agency consultations, and permit defense in state and federal court actions. She advises clients on environmental compliance, including guiding clients under the Texas Environmental, Health, and Safety Audit Privilege Act and helping with enforcement actions. In addition, Paulina litigates environmental claims and provides transactional support in deals involving significant environmental permits, liabilities, or risks.



JEFFREY H. WOOD

Partner | Washington

+1.202.639.7732 | jeff.wood@bakerbotts.com

Drawing from two decades of experience in senior government, in-house corporate, and private law firm roles, Jeff Wood helps clients with federal enforcement, compliance, litigation, permitting, and policy challenges primarily in the energy and environmental fields.

Prior to joining Baker Botts, Jeff served for almost two years as the Acting Assistant Attorney General (AAG) for the Justice Department's Environment and Natural Resources Division (ENRD). In that capacity, Jeff led ENRD and its more than 600 attorneys and staff representing EPA, Departments of the Interior, Energy, and Defense, and other agencies in civil and criminal enforcement and defensive environmental, energy, and natural resources litigation.



JULIE CRESS

Special Counsel | San Francisco

+1.415.291.6242 | julie.cress@bakerbotts.com

Julie Cress is a seasoned environmental lawyer with California regulatory experience having spent time working for the Bay Area Air Quality Management District and the California Air Resources Board as well as on the private side managing environmental, health, and safety programs. Julie has over 15 years of experience in California and federal environmental laws with a primary focus on air quality and climate change, assisting clients on regulatory, rulemaking advocacy, incident response, and compliance and enforcement matters. She has represented companies in various sectors including traditional energy and energy transition, auto and auto parts manufacturers, retailers, distributors, and transportation companies.

While primarily focused on California's regulatory structure including air district permitting (new source review and Title V), compliance and enforcement advice, and hearing board disputes as well as rulemaking advocacy and compliance and enforcement counseling associated with CARB rules such as the Low Carbon Fuel Standard, Cap-and-Trade Regulation, and mobile source regulations impacting transportation fleets, Julie also supports clients complying with federal fuels (traditional and Renewable Fuel Standard) and aftermarket defeat device programs. Julie also counsels clients on various emissions-based credit regimes including compliance and voluntary carbon markets with a specific emphasis on Low Carbon Fuel Standard credit generation opportunities such as CCS, RNG, and hydrogen, registration for compliance and credit trading in the Cap-and-Trade Program, and advising clients on emission credit transaction documents.

Julie's prior government experience, and her interpersonal nature with her clients and government regulators allows her to effectively and efficiently counsel clients in the day-to-day, and the not so day-to-day environmental regulatory programs with which they must comply.



CHRISTOPHER DANLEY

Special Counsel | Washington

+1.202.639.7842 | christopher.danley@bakerbotts.com

Chris Danley handles a range of environmental litigation matters which include CERCLA, the Clean Air Act, the Clean Water Act and various state law claims based on environmental statutes and common law. The clients he represents include companies in the manufacturing, energy and mining industries.



GINNY KING

Special Counsel | Houston
+1.713.229.1133 | virginia.king@bakerbotts.com

Ginny King focuses on sustainability ratings and reporting as well as strategies to monetize carbon reductions.

Prior to joining Baker Botts, Ginny served as the Sustainability Director and Assistant General Counsel at a leading *Fortune 50*, integrated downstream energy company.



STEVEN P. SOLOW

Senior Counsel | Washington
+1.202.639.7833 | steve.solow@bakerbotts.com

Steve Solow focuses his practice on business crimes, internal investigations, corporate compliance and security programs and environmental civil and criminal litigation. He represents and counsels corporations and business associations regarding their legal and regulatory obligations, develops integrated compliance programs that address corporate and government expectations and represents both corporate and individual clients in white collar cases.

Steve advises chemical, energy, utility, homebuilding, construction, pipeline, shipping and technology companies on a range of regulatory matters, including enforcement defense, internal investigations, litigation, compliance issues and homeland security matters. He counsels senior management and corporate boards of directors on corporate best practices. Major energy companies seek Steve's advice on the regulatory standards applicable to all energy sources and he also provides experienced representation to major international shipping concerns in connection with maritime and environmental matters involving the U.S. Coast Guard and other agencies.

Steve was recently appointed by a U.S. Federal District Court Judge to serve as the Court Appointed Monitor (CAM) over the world's largest cruise line company following the company's plea to criminal charges related to vessel pollution.



JEFFREY S. WETTENGEL

Senior Associate | Washington
+1.202.639.1333 | jeff.wettengel@bakerbotts.com

Jeffrey Wettengel is a senior associate in the firm's Environmental, Safety and Incident Response ("ESIR") group. His practice focuses on complex litigation arising under federal environmental laws, which often involves navigating highly technical issues and engaging with experts and consultants on a variety of related matters.

Jeff also has experience defending against putative class action lawsuits, representing parties in multi-district litigation, and performing environmental due diligence for transactions involving real estate.



TIFFANY W. CHEUNG

Associate | New York

+1.212.408.2575 | tiffany.cheung@bakerbotts.com

Tiffany Cheung is an associate with the firm's Environmental, Safety and Incident Response ("ESIR") group. Based in the firm's NYC office (and formerly in Washington D.C.), Tiffany works closely with the ESIR group in D.C. on environmental litigation and regulatory compliance matters at the state and federal levels. Tiffany's litigation experience spans across environmental, white collar, and general commercial litigation matters - including trial work arising from air permitting and civil RICO.

In addition to her litigation work, Tiffany advises individual clients on Toxic Substances Control Act and Clean Air Act issues. She regularly reports to the electric generating and manufacturing industry coalitions on regulatory and litigation developments pertaining to wildlife, air, and workplace safety. Tiffany also assists with their participation in federal rulemaking proceedings, including on Endangered Species Act and Clean Air Act regulations.

Tiffany is dedicated to providing pro bono assistance. She actively represents clients in child custody and domestic violence matters before the D.C. Superior Court.



CHLOE GRAHAM

Associate | Washington

+1.202.639.1118 | chloe.graham@bakerbotts.com

Chloe Graham's practice in the firm's Washington, D.C. Environmental, Safety and Incident Response group focuses on environmental litigation, regulatory, and compliance matters at the state and federal levels.



KATIE JEFFRESS

Associate | Austin

+1.512.322.2687 | katie.jeffress@bakerbotts.com

Katie Jeffress' practice focuses on a range of environmental issues at the state and federal level, including regulatory compliance, permitting, and litigation. Her experience includes air and water permitting, waste issues, and enforcement matters.

Following graduation from law school, Katie clerked in the Texas Western District with Judges Lee Yeakel and Robert Pitman. Before law school, Katie worked for a

non-profit in Jalisco, Mexico, and twice interned with the Texas Commission on Environmental Quality under the Mickey Leland Environmental Internship Program.



TERESA S. JONES

Associate | Houston

+1.713.229.1630 | teresa.jones@bakerbotts.com

Teresa Jones advises clients on environmental issues in litigation, regulatory, corporate due diligence matters as well as safety and incident response.

Prior to joining Baker Botts, Teresa clerked at the Environmental Protection Agency in the Office of General Counsel during her final semester of law school. While in law school, Teresa was selected to serve as a Business Law Fellow and Thad Cochran Scholar.



JANIE KILGORE

Associate | Washington

+1.202.639.7707 | janie.kilgore@bakerbotts.com

Janie Kilgore is an associate in the Washington, D.C. Environmental, Safety and Incident Response practice at Baker Botts. Prior to joining Baker Botts, Janie served as in-house counsel to the largest renewable fuels producer in the world. Her experience involves developing regulatory and legislative positions on climate, environmental, and sustainability matters at the federal, state, and international levels. She advises clients on environmental compliance, federal grant applications involving renewable energy, and environmental justice. Janie also works on renewable and low-carbon energy development.



SCOTT NOVAK

Associate | Washington

+1.202.639.1316 | scott.novak@bakerbotts.com

As an Associate in the firm's Washington D.C. Environmental, Safety and Incident Response group, Scott Novak advises clients on litigation, regulatory, and compliance matters, focusing on climate and sustainability issues in particular.

Scott maintains an active LGBTQ+ pro bono practice through the Baker Botts Pride in Action initiative.

Prior to joining Baker Botts, Scott worked as a Fellow at the Georgetown Climate Center to assist states in developing the Transportation and Climate Initiative Program, a regional cap-and-invest policy for on-road transportation fuels.



AARON RAMCHARAN

Associate | Houston

+1.713.229.1109 | aaron.ramcharan@bakerbotts.com

Aaron Ramcharan advises clients on key environmental issues in litigation, regulatory, and compliance matters, focusing especially on climate and sustainability issues.

Prior to joining Baker Botts, Aaron received his LL.M. in Global Environment and Climate Change Law from Edinburgh Law School with Merit and his J.D. from The University of Texas School of Law with Honors.

While in law school, Aaron served as a Dean's Fellow and as Chair of Academics in the Thurgood Marshall Legal Society at UT Law. He also served as the class representative to the faculty while at Edinburgh Law School. As a student, Aaron was published in the EU-based international law publication, *Völkerrechtsblog*, the *Texas Environmental Law Journal*, and the *Texas Law Review*.

Prior to law school, Aaron worked as an Assistant Dean of Admission at Reed College. While a student at Reed, he served as Chair of the Student Committee for Academic Policy and Planning, Senior House Advisor, Chair of the Peer Academic Advising Program, Head Tutor in Epistemology and Logic, and as President of the Philosophical Society.



DAY ROBINS

Associate | San Francisco

+1.415.291.6283 | day.robins@bakerbotts.com

As an associate in the firm's San Francisco Environmental, Safety and Incident Response group, Day focuses her practice on regulatory advocacy and litigation for clients facing complex environmental challenges.

Day is also committed to pro bono and has experience representing asylum seekers.

During law school, Day served as a judicial extern for U.S. District Judge Tanya S. Chutkan and for U.S. Magistrate Judge Robert M. Illman. Day earned her Bachelor of Arts degree in Political Science in 2017. Prior to law school, Day worked as a structured products analyst in New York, and translated cases for Spanish-only U-Visa clients.

AUSTIN
BRUSSELS
DALLAS
DUBAI
HOUSTON
LONDON
NEW YORK
PALO ALTO
RIYADH
SAN FRANCISCO
SINGAPORE
WASHINGTON

bakerbotts.com

CONFIDENTIAL Copyright© 2024 Baker Botts L.L.P.

All rights reserved. No part of this presentation material may be reproduced or transmitted in any form or by any means — electronic, mechanical, photocopy or other — without the prior written consent of Baker Botts L.L.P. The information contained may be considered attorney advertising in certain jurisdictions. Prior results do not guarantee a similar outcome.