SELECTED LEGAL TOPICS AND LITIGATION CASES

AIR AND RADIATION

1. *West Virginia v. EPA*, No. 24-1120 (D.C. Cir.) (Carbon Pollution Standards Litigation)

In May 2024, EPA finalized the Carbon Pollution Standards (CPS), a set of rules under Clean Air Act (CAA) section 111. The CPS mandates that states require existing coal-fired power plants to reduce carbon dioxide emissions based on their ability to implement carbon capture and storage (CCS) or natural gas co-firing, depending on how long the plants intend to continue operating. The CPS also mandates that new gas-fired turbines reduce their carbon dioxide emissions based on their ability to implement carbon capture and storage, improve their efficiency, or take other steps, depending on their level of electricity generation. Several groups of states and industry have challenged the CPS. They unsuccessfully sought a stay before the D.C. Circuit and U.S. Supreme Court. In the merits litigation, they argue that EPA did not establish a proper basis for the reduction requirements. They primarily focus on CCS, arguing that it does not meet CAA section 111 requirements because it is not adequately demonstrated or cost-effective. They also argue that EPA did not give covered sources sufficient time to comply. They also argue that the requirements would force existing coal-fired power plants to shut down and preclude new builds of gas-fired combustion turbines, and thereby jeopardize the reliability of the electricity system. They also argue that the CPS is invalid under the major question doctrine because the shutdowns and limitations on new gas-fired turbines will shift generation to renewables. This issue is covered in more detail in a separate briefing paper.

2. *Texas v. EPA*, No. 24-1054 (D.C. Cir.) (Oil and Gas Rule Litigation)

In March 2024, EPA finalized the Oil and Gas Rule under the Clean Air Act (CAA) sections 111(b) and (d). The Rule regulates emissions of greenhouse gases and volatile organic compounds from sources in the oil and natural gas sector. The final action includes several independent rules, including new source performance standards under CAA section 111(b), emission guidelines for states to regulate existing sources under CAA section 111(d), actions stemming from the June 30, 2021, joint resolution of Congress under the Congressional Review Act, and a final protocol for leak detection. Various state, industry, and non-governmental organization parties challenged the Oil and Gas Rule in the D.C. Circuit Court of Appeals. Briefing is schedule to commence in later November, with EPA's merits brief due in February 2025. This issue is covered in more detail in a separate briefing paper.

3. *West Virginia v. EPA*, No. 24-1009 (D.C. Cir.) (Clean Air Act Section 111(d) Implementing Regulation Litigation)

In November 2023, EPA finalized revisions to the implementing regulations for Clean Air Act (CAA) section 111(d). These revisions were in part a response to the D.C. Circuit's vacatur of an earlier set of revisions, in 2019, to the same implementing regulations. Included in EPA's 2023 final action were updates to the timelines that govern submission of state plans to implement CAA section 111(d) emission guidelines for existing sources and EPA's review and action on those submissions; the addition of several flexible mechanisms for EPA action on state plans; and revisions to the framework under which states may provide variances from EPA's guidelines for particular existing sources. The updated implementing regulations apply to the recently finalized CAA section 111(d) emission guidelines for greenhouse gas emissions from existing fossil fuel-fired electric generating units and from existing sources in the oil and natural gas sector. Briefing in this case will be complete at the end of October 2024. An oral argument date has not yet been scheduled.

4. *Western States Trucking v. EPA*, No. 23-1143 (D.C. Cir.) (Clean Air Act Section 209 California Waiver Litigation)

In April 2023, EPA granted California's request for a waiver of preemption under Clean Air Act section 209 for the Advanced Clean Trucks (ACT) program and other California heavy-duty vehicle and engine regulations. Various States and industry groups filed petitions for review in the D.C. Circuit. These petitions were consolidated under the lead case *Western States Trucking v. EPA*, No. 23-1143 (D.C. Cir.). Petitioners filed their opening briefs in November 2023. The case has been put in abeyance pending the D.C. Circuit's resolution of *Ohio v. EPA*, No. 22-1081, and *Texas v. EPA*, No. 22-1031.

The D.C. Circuit has since rejected the challenges in *Ohio v. EPA*, which sought review of EPA's reinstatement of the Advanced Clean Car I preemption waiver. Petitions for certiorari were filed in *Diamond Alternative v. EPA*, No. 24-7, and *Ohio v. EPA*, No. 24-13. The *Diamond Alternative* petition presents two questions: (1) whether a party may establish the redressability component of Article III standing by relying on the coercive and predictable effects of regulation on third parties; and (2) whether EPA's preemption waiver for California's greenhouse-gas emission standards and zero emission-vehicle mandate is unlawful. The *Ohio* petition presents one question: whether Congress may pass a law under the Commerce Clause that empowers one State to exercise sovereign power that the law denies to all other States. These petitions remain pending before the Supreme Court.

Texas v. EPA, a challenge to EPA's 2021 light-duty vehicle greenhouse gas rule, was argued before the D.C. Circuit in fall 2023 and a decision remains pending.

5. *Kentucky v. EPA*, No. 24-1087 (D.C. Cir.)

In April 2024, EPA promulgated a final Clean Air Act rulemaking establishing multipollutant standards for light- and medium-duty vehicles. The rulemaking also established new durability and warranty requirements relating to electric vehicles, and revised various regulations relating to compliance and enforcement. Various States, industry groups, and other groups filed challenges in the D.C. Circuit. Other States, industry groups, NGOs, and other groups intervened in support of EPA. EPA's brief is due November 26, 2024. See the separate briefing paper for more details.

6. *Nebraska v. EPA*, No. 24-1129 (D.C. Cir.)

In April 2024, EPA promulgated a final Clean Air Act rulemaking establishing greenhouse gas standards for heavy-duty vehicles. The rulemaking also established new durability and warranty requirements relating to electric vehicles, and revised various regulations relating to compliance and enforcement. Various States, industry groups, and other groups filed challenges in the D.C. Circuit. Other States, industry groups, NGOs, and other groups intervened in support of EPA. EPA's brief is due January 14, 2025. See the separate briefing paper for more details.

7. *Utah v. EPA*, No. 23-1157 (D.C. Cir.)

In March 2023, EPA promulgated the Good Neighbor Plan, establishing Federal Implementation Plan requirements for the 2015 ozone NAAQS, fulfilling good neighbor obligations under Clean Air Act section 110(a)(2)(D)(i)(I). Numerous petitions for review were filed on the Good Neighbor Plan in the D.C. Circuit, as

well as a number of stay motions. After the D.C. Circuit denied stay motions from various litigants, four sets of parties submitted emergency applications for a stay of some or all of the GNP's requirements to the United States Supreme Court in October 2023. In a 5-4 opinion issued on June 27, 2024, the Supreme Court granted the emergency applications and ordered that "[e]nforcement of [the Good Neighbor Plan] against the applicants shall be stayed" while judicial review proceeds on the merits, first in the D.C. Circuit and then potentially in the Supreme Court. EPA has subsequently obtained a remand of the record from the D.C. Circuit, to address comments that the Supreme Court found EPA likely had not responded to. On October 18, 2024, Ohio, Indiana, Kentucky, and West Virginia filed a Petition for Writ of Certiorari on the D.C. Circuit's remand of the record. While the D.C. Circuit merits litigation is fully briefed, the case is in abeyance while EPA completes its remand of the record, pending Supreme Court action on the Cert Petition. See the separate briefing paper for more details.

8. Venue Litigation (S.Ct.) - *EPA v. Calumet Shreveport Refining, et al.*, No. 23-1229; *Oklahoma, et al. v. EPA, et al.*, No. 23-1067; and *Pacificorp, et al. v. EPA, et al.*, No. 23-1068

On October 21, 2024, the Supreme Court granted petitions for writs of *certiorari* to review two Court of Appeals decisions reaching contrary conclusions on the meaning of the Clean Air Act's venue provision in 42 U.S.C. § 7607(b)(1). The question presented in all three petitions is whether the challenged actions must be reviewed in the D.C. Circuit or in a regional circuit court under § 7607(b)(1). In *Calumet Shreveport Ref., L.L.C. v. EPA*, 86 F.4th 1121 (5th Cir. 2023), a divided Fifth Circuit panel denied EPA's motion to dismiss or transfer the challenge to the D.C. Circuit, rejecting EPA's conclusion that the action is "nationally applicable" or based on a "determination of nationwide effect." EPA filed a petition for a writ of *certiorari* on May 20, 2024 (*EPA v. Calumet Shreveport Refining, et al*., No. 23-1229), and industry litigants filed an opposition on August 27, 2024. In *State of Oklahoma, et al., v. EPA,* 93 F. 4th 1262 (10th Cir. 2024), a unanimous Tenth Circuit panel granted EPA's motion to transfer challenges to the D.C. Circuit, finding EPA's action was "nationally applicable." State and industry litigants filed petitions for *certiorari* on March 28, 2024 (*Oklahoma, et al. v. EPA, et al.,* No. 23-1067 and *Pacificorp, et al. v. EPA, et al.,* No. 23-1068), and EPA filed an opposition on May 21, 2024.

9. *North Dakota v. EPA*, No. 24-1119 (D.C. Cir.) (MATS Litigation)

In May 2024, EPA issued a Clean Air Act final rule to amend national emission standards for hazardous air pollutants (NESHAP) for coal- and oil-fired electric utility steam generating units (EGUs), commonly known as the Mercury and Air Toxics Standards (MATS), pursuant to a review of EPA's 2020 residual risk and technology review. In 2020, EPA had completed a residual risk and technology review pursuant to CAA sections 112(f)(2) and (d)(6), and had determined not to make changes to MATS. Upon review of the 2020 rule, EPA finalized updates to MATS under the technology review provisions of CAA section 112(d)(6), finding there were developments in practices, processes, and control technologies that warranted revising the filterable particulate matter (fPM) surrogate emission standard for non-mercury metal hazardous air pollutants (HAPs) for coal-fired EGUs, requiring particulate matter continuous emissions monitoring systems (PM CEMS) for coal- and oil-fired EGUs for compliance demonstration with the fPM surrogate standard, and

revising the mercury emission standard for lignite-fired EGUs (a subcategory of coal-fired EGUs that was subject to a less stringent mercury standard under the original 2012 MATS rulemaking). Additionally, EPA finalized changes to the definition of "startup" for the source category. EPA did make any changes to the 2020 residual risk review. Several states and industry groups challenged the revised MATS in the D.C. Circuit (*North Dakota v. EPA*, no. 24-1119), and sought and were denied an emergency stay in the D.C. Circuit and Supreme Court (*NACCO Natural Resources v. EPA*, no. 24A178). Petitioners filed their opening merits brief in the D.C. Circuit on October 1, 2024, EPA's response brief is due November 12, 2024, and final briefs are due December 10, 2024. Oral arguments have not yet been scheduled in the case.

10. *Calif. Comm. Against Toxics v. EPA*, No. 24-1178 (D.C Cir.) (Commercial Sterilization Facilities NESHAP)

In April 2024, EPA amended the NESHAP for Commercial Sterilization Facilities after conducting a residual risk review under Clean Air Act section 112(f)(2) and a technology review under CAA section 112(d)(6). Although EPA had conducted a technology and risk review for this source category in 2006, EPA's IRIS program updated the cancer unit risk estimate for ethylene oxide (EtO) in 2016. Out of concern that the 2006 assessment might have underestimated the EtO risks from this source category, EPA conducted another risk review for the source category based on the updated EtO cancer risk value, along with a technology review in the 2024 rule. The rule is challenged by the Ethylene Oxide Sterilization Association (EOSA) and several environmental organizations led by California Communities Against Toxics. EOSA alleges that the CAA does not authorize a second risk review and the standards are arbitrary and capricious. The environmental organizations allege that the rule unlawfully provided a two-year deadline for meeting the risk standards under CAA section 112(f)(4).

CIVIL RIGHTS AND FINANCE

1. Flint Litigation

In nine separate Federal Tort Claims Act (FTCA) lawsuits before the United States District Court for the Eastern District of Michigan, Plaintiffs argue that EPA should have acted sooner to protect the citizens of Flint, Michigan from the lead contaminants that leached into their drinking water supply after the City of Flint switched their drinking water supply source from the Detroit Water & Sewage Department to the Flint River in 2014. Specifically, Plaintiffs allege that EPA was aware, as early as October 2014, that the City of Flint had not utilized the necessary pipe corrosion control technology to prevent lead contaminants from leaching into the drinking water supply, but did not take any formal enforcement action under the Safe Drinking Water Act until January 14, 2016.

2. Jackson, Mississippi Drinking Water Emergency Funding

In August 2022, the City of Jackson public water system experienced a drinking water emergency, resulting in the President issuing an emergency declaration under the Stafford Act, 42 U.S.C. § 5121 et seq. On November 1, 2022, the EPA Administrator issued an emergency determination under Section 1442(b) of the Safe Drinking Water Act (SDWA). On December 29, 2022, as part of the Consolidated Appropriations Act, 2023 (P.L. 117-328), Congress appropriated $150 million under Section 1442(b) of SDWA, and $450 million

under the Drinking Water State Revolving Fund program under Section 1452 of SDWA, to assist with the drinking water emergency. This was the first instance that Congress appropriated funds using Section 1442(b) authority, though this authority has been a longstanding part of SDWA. The funding is being administered on behalf of the public water system by an Interim Third Party Manager, Edward "Ted" Henifin, operating as JXN Water, Inc. This ITPM was appointed by an Interim Stipulated Order entered into between the EPA (through the Department of Justice), the City of Jackson, and the Mississippi Department of Health. This Interim Stipulated Order is a result of an EPA enforcement action under SDWA led by EPA Region 4 and is separate from the administration of grant funding for the City of Jackson. This issue is covered in more detail in a separate single-issue briefing paper prepared by Region 4.

3. *State of Louisiana v. EPA et al.*, No. 2:23-cv-00692 (W.D. LA.)

The State of Louisiana filed suit on May 23, 2023, challenging EPA's and DOJ's longstanding disparate-impact regulations under Title VI of the Civil Rights Act of 1964. The lawsuit alleged, in principal part, that Federal government disparate-impact regulations lack authority under Title VI and the Spending Clause of the Constitution for imposing disparate-impact-based liability under Title VI. The lawsuit also alleged that EPA imposed new "extra-regulatory requirements" (e.g., cumulative-impacts assessment) without compliance with Administrative Procedure Act rulemaking procedural requirements. On August 22, 2024, the court issued its final judgment permanently enjoining EPA and DOJ from: 1) enforcing disparate-impact regulations (40 CFR § 7.35(b) and (c) and 28 C.F.R. § 42.104(b)(2)) within the State of Louisiana or requiring compliance with those sections as a condition of past, existing, or future awards of financial assistance to any entity in the State of Louisiana, and 2) enforcing against any entity in the State of Louisiana any EPA disparate-impact requirement under Title VI or cumulative-impact-analysis requirement under Title VI that has not been ratified by the President pursuant to 42 U.S.C. § 2000d-1 and is not contained in the EPA regulations implementing Title VI within 40 C.F.R. Part 7. Louisiana filed a motion to amend the judgment on September 19, 2024, seeking nationwide vacatur of EPA and DOJ's disparate impact regulations. The motion has been fully briefed, and the court's decision is pending. Once the court rules, each party has 60-days to file a notice of appeal.

4. Ecority Dispute

Ecority is an entity that applied for funding under the National Clean Investment Fund (NCIF) and the Clean Communities Investment Accelerator (CCIA), two grant programs under the Greenhouse Gas Reduction Fund (GGRF, 42 U.S.C. 7434). Ecority did not receive funding under either program and opened an administrative dispute under each grant program in April 2024. The Grants Competition Dispute Decision Official (GCDDO) joined the two disputes, and at this time, both Ecority and the Office of the Greenhouse Gas Reduction Fund (OGGRF) have each completed the administrative briefing process, and a final decision from the GCDDO is expected by the end of October 2024. Ecority's two main arguments in this dispute raise: 1) whether EPA conducted fair and unbiased competitions for the NCIF and CCIA grant programs; and 2) whether EPA's interpretation of the word "deposits" in the GGRF statute would withstand *Loper Bright*, and if not, whether a majority of grantees under NCIF and CCIA are not eligible to receive the grant funds. In early August 2024, counsel for Ecority reached out to EPA to begin settlement discussions. OGC and DOJ met with Ecority twice for opening settlement discussions. On Oct. 4, 2024, however, Ecority notified OGC that it planned to withdraw its original settlement offer on Oct. 9, 2024. OGC accepted the withdrawal.

SELECTED LEGAL TOPICS AND LITIGATION CASES

CROSS-CUTTING ISSUES

1. *Alaska v. United States*, No. 24-396 (Fed. Cl.)

On March 14, 2024, the State of Alaska filed a complaint in the U.S. Court of Federal Claims alleging breach of contract and takings claims related to EPA's 2023 Final Determination issued under the Clean Water Act Section 404(c). This Final Determination prohibits certain discharges that would result from a planned gold and copper mine at the Pebble Deposit at the headwaters of Bristol Bay, Alaska. Alaska alleges that this action constitutes a breach of contract and breach of covenant of good faith and fair dealing under the Cook Inlet Land Exchange and the Alaska Statehood Act. Alaska also alleges that this action constitutes a permanent categorical taking, a permanent non-categorical taking, and a temporary taking under the Fifth Amendment. This case is currently stayed pending resolution of related challenges to the Final Determination in the U.S. District Court for the District of Alaska.

2. *Northern Dynasty Minerals Ltd. v. United States*, No. 24-397 (Fed. Cl.)

On March 14, 2024, Northern Dynasty Minerals Ltd., Pebble Limited Partnership, Pebble West Claims Corp., and Pebble East Claims Corp ("PLP") filed a complaint in the U.S. Court of Federal Claims seeking just compensation for the alleged taking of their property related to EPA's 2023 Final Determination issued under the Clean Water Act Section 404(c). This Final Determination prohibits certain discharges that would result from a planned gold and copper mine at the Pebble Deposit at the headwaters of Bristol Bay, Alaska. The complaint alleges that this action constitutes a categorical taking, or in the alternative an ad hoc permanent taking, because it blocks any economically viable use of PLP's mineral rights. The complaint also alleges that the action constitutes a temporary taking even if it were to be withdrawn or vacated. This case is currently stayed pending resolution of related challenges to the Final Determination in the U.S. District Court for the District of Alaska.

3. Proposed Reorganization of the National Tribal Caucus

EPA is proposing to reorganize the National Tribal Caucus (NTC) as a Federal Advisory Committee (FAC) under the Federal Advisory Committee Act (FACA) and to increase the proportion of elected or traditionally appointed Tribal leaders that serve on the group. The proposed reorganization is intended to clarify the process by which EPA receives Tribal leadership recommendations on technical programs and budget planning, elevate the NTC as the preeminent group of Tribal representatives that provides advice directly to EPA leadership on items of national significance under EPA's purview, and strengthen EPA's ongoing commitment to collaboration and partnership with Tribes and the government-to-government relationship. On April 11, 2024, EPA's American Indian Environmental Office initiated a 60-day tribal consultation period on this proposal to reorganize the NTC. On April 30, EPA extended the consultation period for an additional 60 days, with consultation ending on August 9, 2024.

4. *Public.Resource.Org, Inc. v. Federal Communications Commission*, No. 23-1311 (D.C. Cir.)

On November 8, 2023, Public.Resource.Org, Inc., iFixit Inc., and Make Community, LLC filed a petition for review of a Federal Communications Commission (FCC) final rule updating FCC regulations to incorporate by reference four new and updated technical standards pertinent to equipment testing. The petition alleges that the FCC violated the Administrative Procedure Act (APA) because it failed to publish the text of the standards in the *Federal Register* and the standards were not otherwise reasonably available.

5. *Loper Bright Enters. v. Raimando*, 144 S.Ct. 2244 (2024)

On June 28, 2024, the Supreme Court issued decisions in *Loper Bright* and *Relentless*, overruling the deference framework established in *Chevron v. NRDC*, 467 U.S. 837 (1984). The Court held that courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as required by section 706 of the Administrative Procedure Act. The decision noted that careful attention to the judgment of the Executive Branch may help inform the court's inquiry, and that when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation while ensuring that the agency acts within it.

6. *Corner Post, Inc. v. Bd. Of Governors of the Fed. Rsrv. Sys.*, 144 S.Ct. 2440 (2024)

On July 1, 2024, the Supreme Court issued a decision in *Corner Post*, holding that an Administrative Procedure Act (APA) claim does not accrue for purposes of the general six-year statute of limitations for suits against the United States (28 U.S.C. 2401(a)) until the plaintiff is injured by a final agency action. The default statute of limitations for suits against the United States requires "the complaint [to be] filed within six years after the right of action first accrues." 28 U.S.C. 2401(a). The Court held that a right of action accrues when the plaintiff has "a complete and present cause of action," i.e., the right to file suit in court and obtain relief; and that in the case of the APA, the APA right to action accrues when the plaintiff is injured by the final agency action.

7. The Paperwork Reduction Act

The Paperwork Reduction Act is a law governing how federal agencies collect information from the public. With certain exceptions, it applies when the agency conducts or sponsors a collection of information from ten or more people within a 12-month timeframe. When the Paperwork Reduction Act applies to an information collection, EPA must submit and obtain approval of an Information Collection Request (ICR) from the Office of Management and Budget (OMB). EPA currently has 144 ICRs pending approval at OMB.

GENERAL LAW

1. *America First Legal Foundation v. U.S. Dep't. of Agriculture, et.al.*, 23-5173 (D.C. Cir.) (Presidential Communications Privilege)

In this appeal from AFLF v. EPA, Case No. 22-3029 (D.D.C.), AFLF seeks to overturn the district court's decision that the presidential communications privilege applies pursuant to Freedom of Information Act

("FOIA") Exemption 5 to agency strategic plans created pursuant to Section 3(b) of Executive Order 14019 on Promoting Access to Voting. Oral argument occurred September 4, 2023. EPA and 13 other agency defendants await a decision.

2. Confidential Business Information Regulations and Security Manual Updates

Based on recommendations stemming from a 2022 stakeholder assessment, EPA's Office of Mission Support, in conjunction with the Office of General Counsel, is currently revising EPA's Confidential Business Information (CBI) regulations (40 C.F.R. Part 2, Subpart B) and consolidating and revising EPA's CBI Security Manuals. The revisions will resolve needs, gaps, and risks identified during the assessment, including updating the regulations to align with current Supreme Court case law, addressing inconsistent internal procedures, and modernizing and streamlining electronic handling of CBI at EPA. The effort to revise the regulations and security manual includes two workgroups comprised of agency legal and security experts across EPA programs and regions. Workgroup efforts will conclude in November 2024 and OMS expects to publish a Notice of Proposed Rulemaking in early 2025.

NATIONAL FOIA OFFICE

1. Automated BOTs Submitting FOIA Requests

Between March and October 2024, the National FOIA Office received over 1,500 FOIA requests from three requesters who submitted them by automated BOTs. Essentially, a BOT program auto-fills the agency's online FOIA request form, attaches a fee waiver justification, and then clicks "Submit." The automated BOTs file 3 requests per second, and the resulting volume greatly increases the agency FOIA workload. During this period, BOT requests were 26% of the total requests received by the agency. Other agencies are similarly impacted. The situation has garnered media interest.

2. East Palestine Train Derailment

NFO's FOIA Expert Assistance Team (FEAT), along with staff from Regions 5 and 3, the Office of the Administrator (AO), the Office of Mission Support (OMS), and OGC's litigation and emergency response attorneys, has been addressing the public's need for transparency and access to EPA records regarding the train derailment in East Palestine, Ohio. The train derailment's release of hazardous substances on February 3, 2023 resulted in 98 FOIA requests for EPA records and FOIA litigation (*Heritage Foundation et al v. EPA*, 1:23-cv-00748-JEB (D.C. Cir.); *GAP v. EPA*, 4:23-CV-01828 (N.D. Ohio)). The EPA team has closed 77 of the FOIA requests and is processing the remaining 21. The responses are posted on EPA's website for public access. The GAP case was dismissed in October of 2024, and the final GAP production is due December 31, 2024. The D.C. Circuit Court in the Heritage case was favorable to EPA, denying arequest for a preliminary injunction and stating: "EPA has thus far been a constructive partner to [the Plaintiffs] and other FOIA requesters seeking information about the incident: it has proactively released information to the public, compiled more than 14,000 records in an effort to expeditiously comply with requests, and worked productively with Plaintiffs here to facilitate document production. The Court commends such actions."

SELECTED LEGAL TOPICS AND LITIGATION CASES

PESTICIDES AND TOXIC SUBSTANCES

1. *Texas Chemistry Council, et al. v. EPA*, No. 24-11206 (5th Cir.) (TSCA Asbestos Litigation)

On March 28, 2024, EPA finalized its risk management rule for chrysotile asbestos pursuant to Section 6(a) of the Toxic Substances Control Act (TSCA). The rule eliminates unreasonable risk of injury to health identified in the agency's December 2020 risk evaluation under TSCA Section 6(b)(4)(A). The rule has a phased ban of chrysotile asbestos, with the first ban set as of the effective date of the rule and the final ban set in 13 years. The rule includes worker protection during the phase-out period. Several petitions were filed challenging this rule and they were consolidated in the Fifth Circuit Court of Appeals. EPA has received all briefs from petitioners. The industry brief seeks vacatur and argues: (1) the risk evaluation relied on overly conservative assumptions; (2) EPA was required to refer its unreasonable risk determination to OSHA under TSCA Section 9(a); (3) EPA went too far by banning it instead of just requiring workplace controls, (4) EPA effectively failed to consider an alternative regulatory action as required by TSCA Section 6(c)(2(A)(iv)(II); (5) EPA's authority under TSCA Section 6(d)(2) to set different compliance dates for different persons is an unconstitutional delegation of legislative authority; and (6) EPA erred in setting different compliance dates for the chlor-alkali industry. NGO petitioners argue that EPA failed to assess certain uses of asbestos in its risk evaluation, erred in not applying interim workplace controls more broadly, and erred in setting ban compliance dates too far in the future. EPA's response brief is due January 17, 2025.

2. *East Fork Enterprises, et al., v. EPA*, No. 24-60227 (5th Cir.) (TSCA Methylene Chloride Litigation)

On May 8, 2024, EPA finalized its TSCA section 6(a) risk management rule for methylene chloride pursuant to TSCA Section 6(a). This rule eliminates the unreasonable risk of injury to health identified in the agency's June 2020 risk evaluation, as amended in November 2022, under TSCA Section 6(b)(4)(A). The rule prohibits consumer uses and most industrial and commercial uses including as paint removers. An earlier 2019 rule prohibited consumer paint removal. The rule includes worker protection requirements. Multiple petitions were filed challenging this rule and they were consolidated in the Fifth Circuit Court of Appeals. EPA has received all briefs from petitioners. The industry brief requests vacatur and argues that: (1) EPA improperly treated any health risk as per se unreasonable; (2) the whole chemical risk determination is inconsistent with the statute; (3) the exposure scenarios in the risk evaluation were not representative of the actual "conditions of use"; (4) the Existing Chemical Exposure Limits (ECELs) were not supported by the record; (5) EPA lacked evidence that businesses couldn't meet the ECELs; (6) EPA was required to refer the matter to OSHA under TSCA section 9; (7) the alternatives analysis was inadequate; (8) EPA ignored heavy costs on small businesses; and (9) the rule is overbroad such that it effectively prevents access to methylene chloride even for allowed uses. The NGO brief seeks remand without vacatur and argues that the assessments for fenceline communities and ozone depletion are deficient. EPA's response is due December 13, 2024.

3. *United Steel, et al v. EPA*, 24-1151 (D.C. Cir.) (TSCA Risk Evaluation Revised Framework Rule litigation)

On May 3, 2024, EPA finalized amendments to the TSCA procedural framework rule for conducting risk evaluations. The framework rule provides (1) an overall risk determination whether a chemical presents an unreasonable risk (*i.e.*, whole chemical approach); (2) evaluation of all conditions of use and exposure pathways; (3) assumptions that workers will remove personal protective equipment (PPE); and (4) addition of overburdened communities to "potentially exposed or susceptible subpopulations" (PESS). Industry

groups and union groups filed challenges to the rule in multiple circuits and they were consolidated in the D.C. Circuit. NGOs intervened on behalf of EPA. Industry seeks vacatur of the rule and challenges most of the above features. EPA's response brief is due December 20, 2024.

4. Endangered Species Act (ESA)

Many FIFRA pesticide actions (*e.g.*, registration and registration review decisions) are also "agency actions" that trigger the Endangered Species Act (ESA) section 7(a)(2). Historically EPA has struggled to meet ESA obligations, in large part because of the volume of pesticide actions every year. The ESA consultation process can take years for a single pesticide action. In the past decade, EPA had over 20 lawsuits involving 1,000 pesticides. EPA has lost or settled many of these lawsuits, with payment of over $4 million in attorney fees. Courts are increasingly willing to vacate registrations or require EPA to comply with the ESA on very tight timelines. Currently, there aren't any cases actively being briefed.

5. Endocrine Disruptor Screening Program (EDSP)

The Federal Food, Drug, and Cosmetic Act (FFDCA) in Section 408(p) requires EPA to screen pesticides for endocrine effects. EPA's implementation of this program was challenged in 2022. In October 2024, EPA public noticed a proposed partial settlement agreement for public comment. Written comments are due November 12, 2024.

6. Treated Seed Petition Litigation

Center for Food Safety challenges in ND CA the denial of its petition to determine that neonicotinoid-treated seeds do not qualify for a FIFRA exemption for treated articles. The case raises whether the court has jurisdiction over the claims, whether petitioner instead should have challenged agency review of the pesticide registration, and whether the exemption can apply here. Oral argument is scheduled for November 8.

7. Paraquat litigation

Farmworker NGOs challenge EPA's interim registration review decision for paraquat pesticide. The case is stayed at request of the parties to allow EPA to review the issues raised in the NGOs' brief, which argues that EPA dismissed risks of Parkinson's disease, failed to assess risks to bystanders, and did not properly balance risks and benefits. The abeyance requires EPA to issue a final document on those issues, and any necessary next steps, by January 17, 2025.

8. TSCA Risk Evaluation Deadline Suit

In December 2019, EPA designated 20 chemicals as "high-priority" and initiated risk evaluations for them under TSCA section 6. On January 2, 2020, EPA granted an industry request that EPA conduct risk evaluations of DIDP and DINP, and initiated risk evaluations for them. The TSCA deadlines for EPA to complete risk evaluations for the 20 high-priority chemicals was June 20, 2023, and for DIDP and DINP it was July 2, 2023. *See e.g.* 15 U.S.C. § 2605(b)(4)(G). Plaintiffs filed a complaint to enforce the deadlines under TSCA section 20(a)(2). EPA has yet to file an answer. EPA has published for public comment two proposed consent decrees that would resolve all issues in both cases, with the following deadlines:

- Draft risk evaluations for at least seven chemicals, including 1,3-butadiene, by December 31, 2024;
- Final risk evaluations for TCEP, formaldehyde, DIDP, DINP and 1,1-dichloroethane by December 31, 2024;
- Final risk evaluations for seven chemicals, including 1,3-butadiene, by December 31, 2025; and
- Final risk evaluations for ten chemicals by December 31, 2026.

9. *Cherokee Concerned Citizens v. EPA*, 23-1096 (D.C. Cir)

Plaintiffs petition for review of a consent order with Chevron on 18 premanufacture notices (PMNs) for plastic-based fuel feedstock (sometimes called biofuels) under TSCA section 5(e). The Agency filed a motion for remand, requesting that the Court send the section 5(e) consent order back to the agency, where it will be withdrawn and the PMNs reconsidered. The motion is pending.

10. *CEH/PEER v. EPA*, 24-2194 (D.C. Cir.) (4(f) Litigation)

Plaintiffs' deadline suit alleges the Agency failed to issue a TSCA Section 6 rule for PFOA which is formed from fluorinating plastic containers during a process employed by Inhance Technologies, Inc. Plaintiffs also allege that the Agency must bring a TSCA section 7(a)(2) enforcement action against Inhance. The company has moved to intervene. The Agency moved to dismiss as moot, because the Agency initiated a TSCA Section 6 action by publishing a related information request in the Federal Register.

11. *USWAG v. EPA*, 23-1300 (D.C. Cir.)

The Utility Solid Waste Activities Group filed a petition challenging a rule amending TSCA PCB cleanup and disposal regulations. The rule allows performance-based cleanup. The case is in abeyance for settlement discussions.

SOLID WASTE AND EMERGENCY RESPONSE

1. *City Utilities of Springfield, Mo. v. EPA, et al.*, No. 24-2100 (D.C. Cir.) (Legacy CCR Landfills and Surface Impoundments Litigation)

The case concerns EPA's May 8, 2024, rule revising the national minimum criteria for coal combustion residuals (CCR) landfills and CCR surface impoundments. This rule responds to an August 21, 2018, U.S. DC Circuit Court of Appeals vacatur of an exemption for inactive surface impoundments at inactive facilities (legacy CCR surface impoundments) that had been included in EPA's 2015 national minimum criteria. *See Utility Solid Waste Activities Group, et al. v. EPA*, 901 F.3d 414 (D.C. Cir. 2018). The 2024 rule EPA also established requirements for CCR management units at active CCR facilities and at inactive CCR facilities with a legacy CCR surface impoundment.

2. *REACH v. EPA*, 18-cv-02260-TJK (D.D.C)

NGOs challenge a 2019 rule that exempts the reporting of air emissions at farms under EPCRA. The rule tracks the analogous 2018 Fair Agricultural Reporting Method Act (FARM Act) which exempts such reporting under CERCLA. The court granted EPA's November 2021 motion to remand for reconsideration. While EPA initially issued an advanced notice of proposed rulemaking, in July 2024 EPA determined that it was not prepared to proceed with such a rulemaking. The parties jointly moved to rescind the remand and propose a briefing schedule. On August 27, 2024, the NGOs moved for summary judgment and sought vacatur of the rule. EPA and Intervenors filed cross motions for summary judgment. The Plaintiffs will file their reply by October 22, 2024, and EPA will file its reply by November 5, 2024.

3. Notice of Intent to Sue (USDOE's Oak Ridge TN facility)

In August 2024, several organizations sent a Notice of Intent to Sue for CERCLA violations resulting from a 2022 Record of Decision (ROD) signed by EPA, USDOE, and Tennessee for a new landfill at USDOE's Oak Ridge Reservation near Oak Ridge, Tennessee. The landfill is designed to facilitate cleanup of the site. The 2022 ROD followed a 2020 decision by then-Adm'r Wheeler resolving a dispute on appropriate wastewater discharge limits and technologies for two landfills at the site.

4. *Chamber of Commerce v. EPA*, 24-1193 (D.C. Cir.)

On May 8, 2024, EPA issued a CERCLA rule designating two PFAS chemicals—perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), including their salts and structural isomers—as "hazardous substances" under CERCLA section 102(a). Industry groups filed petitions for review. The case is in briefing.

WATER

1. *James Farmer, et al. v. EPA*, No. 1:24-cv-01654 (D. D.C.) (Biosolids Litigation)

Petitioners allege that EPA is required to identify 18 PFAS chemicals for regulation in sewage sludge (*i.e.*, biosolids) and issue a rule imposing controls for 12 of them, under CWA section 405(d)(2)(C). On September 9, EPA moved to dismiss for lack of jurisdiction based on lack of a mandatory duty to take these steps. The motion has been briefed and the parties await the court's decision. A motion to intervene by the National Association of Clean Water Agencies is also pending.

2. PFAS Drinking Water Rule Litigation

Industry and municipal ass'ns and Chemours filed in DC Circuit challenges to an April 2024 rule establishing national drinking water standards for five PFAS contaminants and for mixtures of two or more of four specific PFAS contaminants. These regulations are the first time that EPA has regulated new contaminants

under the 1996 Safe Drinking Water Act Amendments. NGOs intervened to defend the rule. EPA brief is due December 23, 2024.

3. Lead Drinking Water Rule Litigation

In October 2024, EPA issued a rule revising the 2021 and 1991 drinking water rules designed to minimize lead and copper in drinking water. The centerpiece of this new rule is the requirement for water systems to replace their lead drinking water service lines within 10 years regardless of any tap sampling results. Any challenges to this rule must be filed in the D.C. Circuit Court of Appeals by December 14, 2024. Existing consolidated challenges to the 2021 lead rule are currently in abeyance in the D.C. Circuit.

4. Class VI UIC (Carbon Sequestration) Litigation

NGOs filed in the Fifth Circuit challenges to a January 2024 revision to Louisiana's Underground Injection Control (UIC) program to add permitting authority for Class VI (carbon sequestration) injection wells. The revision makes Louisiana the primary implementor. The case has been fully briefed but not argued. There also is a pending appeal to the EPA Environmental Appeals Board (EAB) of a Class VI permit for the Wabash facility.

5. WOTUS Litigation

In January 2023, EPA and the Army issued a rule re-defining the term "waters of the United States" (WOTUS), which is a key jurisdictional term under the Clean Water Act (CWA). That rule was challenged in several district courts resulting in stays of the rule in 26 states. Then in May 2023 the U.S. Supreme Court issued its *Sackett* decision on WOTUS. Shortly after, in September 2023, EPA amended the WOTUS rule to codify *Sackett*. As to remaining WOTUS litigation, cases have been fully briefed in the District of North Dakota (plaintiffs are a coalition of States led by West Virginia) and the Southern District of Texas (plaintiffs are the State of Texas and the American Farm Bureau Federation). Two other cases are pending in district courts in Kentucky (plaintiff is the Commonwealth of Kentucky) and North Carolina (plaintiff is an individual). Litigation over the definition of WOTUS is also pending in other courts where EPA or the Army is implementing or seeking enforcement of CWA permit requirements.

6. Pebble Mine Litigation

In January 2023, EPA issued a final determination under Clean Water Act (CWA) Section 404(c) to prohibit and restrict certain discharges into "waters of the United States" that would result from a planned gold and copper mine at the Pebble deposit at the headwaters of Bristol Bay, Alaska. This is one of the few times that EPA has issued a "veto" of a pending permit under Section 404 of the CWA. EPA found that the proposed discharges would have an "unacceptable adverse effect" on the fisheries of these headwaters; Bristol Bay and its tributaries are critical habitat supporting the salmon fisheries in Alaska. The Army subsequently denied the discharge permits under Section 404. There are two sets of pending challenges to these agency

actions: 1) three challenges to the determination and permit denial are in the District Court in Alaska, filed by the State of Alaska, Pebble Limited Partnership (PLP) and the Iliama Natives, with merits briefing expected to begin in early 2025; and 2) two cases alleging takings of property under the Fifth Amendment have been filed in the federal Court of Claims by PLP and Alaska, and they are on hold pending decision on the first set of cases.

7. Steam Electric ELG Litigation

Industry, state and NGO petitioners filed in several Circuits challenges to a May 9, 2024 rule revising technology-based effluent limitations guidelines and standards for steam electric power generating plants. The rule addresses flue gas desulfurization wastewater, bottom ash transport water, and legacy wastewater at existing sources, and combustion residual leachate at existing and new sources. The rule responds in part to a remand from the Fifth Circuit in *Southwestern Electric Power Co. v. EPA*, 920 F.3d 999 (5th Cir. 2019). The Judicial Panel on Multidistrict Litigation consolidated these challenges to the 2024 rule in the Eighth Circuit, which denied a stay motion on October 10. The parties are discussing a briefing schedule.

8. Tribal Reserved Rights Rule Litigation

States filed in North Dakota district court a challenge to an April 2024 rule under CWA 303(c) that revised water quality standards to provide consideration of Tribal reserved rights where Tribes assert them. A motion for stay or preliminary injunction is pending. EPA's motion for summary judgment is due January 3, 2025.

9. CWA 401 Rule Litigation

States and industry groups for oil, natural gas, and hydropower filed a challenge in WD of Louisiana to a September 2023 rule implementing CWA section 401 on water quality certification. Other States and NGOs filed motions to intervene to defend the rule. The court denied a motion for a partial preliminary injunction. Merits briefing on cross-motions for summary judgment is expected to conclude in October 2024.