Environment, Energy, and Resources Law

The Year in Review 2015

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Introduction

The Year in Review: 2015 is the thirty-second annual summary of developments in environmental, energy, and resources law. It is again being made available without charge as a benefit to members of the Section of Environment, Energy, and Resources of the American Bar Association.

The Year in Review reflects the dedication and hard work of many individuals. Typically, members of a Section committee draft a report of the prior year's developments within that committee's area of expertise. The contributions are then transmitted to the committee's *Year in Review* vice chair or designated primary author, who compiles and reviews the manuscript before sending it to The University of Tulsa College of Law for further review and editing by our law students. Among the students deserving special thanks this year are Executive Editors Susan Cunningham, Adrian Ordoñez, and Chase Snodgrass. Thank you also to the students on *The Year in Review* staff for their assistance in editing and for their dedication to this publication. The time and effort put forth in such a compressed period demonstrates a commitment to quality and to providing information regarding substantive developments in law of the area. The result of this process is a concise, comprehensive, and timely analysis of current developments in areas of law that are of crucial interest to Section members.

A final thank you must be extended to Mary Ellen Ternes, Chair of the Special Committee on *The Year in Review*; Erin Potter Sullenger, Vice Chair of the Special Committee on *The Year in Review*; and Ellen Rothstein, Section Publications Manager. Their time and efforts were instrumental in making the editing and publication process run smoothly.

All of us associated with *The Year in Review* are proud of our work and pleased to be of service to our profession.

Lauren Colpitts
Student Editor-in-Chief

Robert Butkin
Faculty Advisor

Tulsa, Oklahoma
April 7, 2016

HIGHLIGHTS OF THE YEAR IN REVIEW 2015[1]

Hot Dry Drones and Clean Power Wars—WO-To-US

I. INTRODUCTION

In addition to being the "year of the drone," 2015 was once again a "hottest year on record." But 2015 also saw what may be the most actual progress to date in addressing climate change, with the Twenty-first Council of the Parties (COP21) to the United Nations Framework Convention on Climate Change (UNFCCC) in Paris, and the signing of the Paris Agreement. To support its position with the Paris Agreement, the United States relied on the Environmental Protection Agency's (EPA) most significant Climate Action Plan (CAP) rulemaking to date, addressing greenhouse gas emissions contributing to climate change with its promulgation of the final carbon pollution regulations for new power plants, and the Clean Power Plan (CPP) for existing power plants. While EPA's power plant rulemakings have been challenged in the D.C. Circuit, and stayed by the United States Supreme Court, many states continue to proceed with development of State Implementation Plans (SIPs), as well as pursue their state or regional action plans addressing carbon emissions. In parallel with ongoing international sustainability and adaptation efforts, ongoing national efforts continue with the federal, state, and local governments pursuing measures to include sustainability and adaptation considerations in contracting and planning efforts, with President Obama's executive orders impacting all federal agencies and contractors, federal funding, including extension of renewable energy tax incentives and release of barriers to infrastructure funding, in addition to significant regional, state, and local collaboration and planning efforts. Corporate shareholders have filed shareholder petitions in record numbers seeking corporate action on climate change, sustainability, and adaptation, and asset managers are collaborating and developing better tools for evaluating carbon asset and climate change risks. At the same time, 2015 saw the unprecedented methane release in Porter Ranch, California, the Volkswagen emission defeat device debacle, and scrutiny of fossil fuel producers regarding historical knowledge regarding the science of climate change.

Also significant was EPA's promulgation of the final Waters of the United States (WOTUS) Clean Water Rule, also challenged and stayed by the Sixth Circuit, the effective date for the mandatory use of the ASTM E1527-13 Standard for All Appropriate Inquiry to ensure availability of Comprehensive Environmental Response Compensation and Liability Act (CERCLA) Landowner Liability Protections pursuant to 40 C.F.R. part 312, and EPA's release of two helpful vapor intrusion guidance documents.

[1]These highlights of the following committee reports were prepared by Mary Ellen Ternes, Shareholder, Crowe & Dunlevy, Oklahoma City, Oklahoma, Chair of the ABA SEER Special Committee on *The Year in Review*, allowing some augmentation for current events, with thanks to Erin Potter Sullenger, Crow & Dunlevy, YIR Vice Chair and former YIR Editor-in-Chief. No citations to authority are provided in this Highlights chapter, which is provided as a mere preview to the committees' complete discussion. While several committees may have covered the same case or event, each committee offers its own perspective such that each committee discussion is helpful.

A. Agricultural Management

The Agricultural Management Committee focuses on cutting-edge issues in managing the environmental impacts of agriculture, including developments in biotechnology, livestock, pollution, sustainability, food safety, zoology, and biodiversity.

Top trends in Agriculture Management include concentrated animal feeding operation (CAFO) solid waste, genetically modified crops, urban agriculture, and drone data farm privacy issues. In *Community Association for the Restoration of the Environment v. Cow Palace*, a federal district court in Washington State found manure, where it leaks from containment or runs off fields, can be a Resource Conservation and Recovery Act (RCRA) solid waste, prompting resolutions, including more stringent containment, management, and monitoring. In *In re Reichmann Land & Cattle, LLP*, the Supreme Court of Minnesota found a federal Clean Water Act (CWA) permit was not required for manure runoff from livestock feeding fields that are seasonally vegetated, though a state permit was required. In *Zook v. EPA*, the D. C. Circuit Court of Appeals held that EPA is not mandated to regulate CAFO emissions ammonia and hydrogen sulfide as criteria pollutants.

Significant litigation impacting U.S. agriculture includes continuing Syngenta litigation where it faces claims of nuisance, negligence, and others, arising from its decision to market two biotech corn products (Viptera™ and Duracade™) prior to China's import approvals, and where in 2015, the U.S. District Court for the District of Kansas denied most of Syngenta's motion to dismiss. The U.S. Department of Agriculture (USDA) reported that more than 90% of U.S. grown soybean, upland cotton, and corn use biotech traits, while approving a non-browning apple and considering sweet corn. The U.S. Food and Drug Administration (FDA) finally approved the first genetically modified animal, Aquabounty's fast-growing salmon, only to face challenge by the Center for Food Safety. Developing nations are expanding their use of biotech crops genetically modified to withstand drought, despite recent activity regarding bans and tolerances in the European Union and Canada. National battles regarding labeling of genetically modified crops, food, and feed rage on, while the White House announced plans to revise U.S. biotech product regulation. State and local authorities around the U.S. continue to develop authority incorporating urban agriculture, including small-scale production and roof-top farms, small farm animals, and honey bees, particularly in Sacramento and Santa Clara County, California; Pittsburgh, Pennsylvania; Savannah, Georgia; and Long Island City, New York.

Finally, in 2015, the Federal Aviation Administration (FAA) issued more than one thousand exemptions authorizing the use of drones for commercial purposes, and also proposed its rule, *Operation and Certification of Small Unmanned Aircraft Systems* (UAS or drones). Widespread drone use is having a significant impact on agricultural operations, as well as numerous other areas. Farmers opting into precision agriculture programs utilizing drone data are concerned about privacy, ownership, and control issues, which the Farm Bureau Federation attempted to address with its guidance issued in November 2014.

B. Air Quality

The Air Quality Committee addresses Clean Air Act (CAA) judicial, legislative, and administrative developments

CAA developments in 2015 took center news with the CPP and related litigation, perspectives which continue to develop with the U.S. Supreme Court stay and Justice Scalia's passing.

Regarding national ambient air quality, EPA was quite busy defending its State and Federal Implementation Plan (SIP and FIP) decisions for Kansas, Montana, Ohio and Indiana (both addressing Cincinnati), Illinois, Pennsylvania, and California. EPA conceded in a Sierra Club citizen suit that it had failed its nondiscretionary duty to timely require "Good Neighbor" SIPs from twenty-five states to mitigate interstate pollution transport under the 2008 ozone National Ambient Air Quality Standards (NAAQS). Significantly, EPA finalized its new NAAQS for ozone, and also proposed a NAAQS for lead.

In judicial developments, the Sixth Circuit confirmed its view that the CAA does not preempt state common law claims. The oil and gas sector saw significant judicial and regulatory developments impacting air permitting. In *Citizens for Pennsylvania's Future v. Ultra Resources, Inc.*, a federal district court in Pennsylania held that defendant's eight separately permitted compressor stations were not "adjacent" under Pennsylvania law, and thus were not a single stationary source for purposes of air permitting. Subsequently, in September 2015, EPA proposed a new rule clarifying the definition of "adjacent" as used in the definitions for "building, structure, facility, or installation" used in the oil and gas industry sector, in addition to proposing New Source Performance Standards (NSPS) for oil and gas sector emissions of methane and volatile organic compounds (VOCs) from equipment, processes, and activities.

EPA proposed and finalized rulemaking conforming the Prevention of Significant Deterioration (PSD) and Title V operating permit rules to the Supreme Court's decision in *Utility Air Regulatory Group (UARG) v. EPA* in which Justice Scalia, writing for the Court, vacated the tailoring rule (after citing to the ABA's SEER's Clean Air Act Handbook).

Regarding greenhouse gas (GHG) emissions, in October 2015, EPA promulgated its final "Carbon Pollution Standards," carbon dioxide NSPS for new power plants pursuant to the CAA section 111(b), and its final "Clean Power Plan" (CPP) carbon dioxide emission guidelines for existing power plants pursuant to the CAA section 111(d). With the final CPP, EPA also proposed its FIP for the CPP. These regulations have been challenged in the D.C. Circuit by more than twenty states and industry, consolidated into *West Virginia v. EPA*, with implementation stayed by the U.S. Supreme Court.

For hazardous air pollutants, EPA issued rulemakings for boilers, polyvinyl chloride and copolymers, steam generating units, off-site waste and recovery operations, ferroalloys production, portland cement plants, mineral wool and fiberglass, primary and secondary aluminum petroleum refinery and aerospace industries. Included in these rulemakings, EPA revised several NESHAP standards to remove start-up, shutdown, and/or malfunction exemptions or affirmative defenses.

In July 2015, EPA proposed endangerment and cause or contribute findings regarding greenhouse gas emissions from certain aircraft emissions pursuant to CAA section 231.

C. Endangered Species

The Endangered Species Committee focuses on the Endangered Species Act (ESA), especially ESA sections 7 and 9 requirements, habitat conservation plan developments and use, integrating ESA compliance with other environmental requirements and effects of major listing decisions on species, habitat, and development.

The primary developments in the area of endangered species were administrative and judicial. Administrative developments include ongoing Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) implementation of their administrative reform agenda, including a final rule amending incidental take statement provisions for section 7 consultations, and revision of regulations regarding petitions to list, delist, and reclassify species and to revise critical habitat designations. Also impacting ESA mitigation was the November 2015 Presidential Memorandum on natural resources mitigation requiring FWS to revise its policies regarding ESA mitigation and credit for pre-listing conservation credit.

Judicial developments include *Permian Basin Petroleum Association v. Department of the Interior*, where the U.S. District Court for the Western District of Texas found that FWS violated its Policy for Evaluation for Conservation Efforts When Making Listing Decisions (PECE) when listing the lesser prairie chicken as a threatened species by underestimating conservation benefits from conservation actions. Additional decisions addressed FWS's decision to not designate a distinct population segment of the marbled murrelet, the meaning of "significant portion of the range" as it impacted FWS's decision to not list the Gunnison's prairie dog, and Administrative Procedure Act violations compelling republication of the final rule designating critical habitat for the woodland caribou. Several judicial decisions focused on section 7(a)(2) consultation standards and procedures, and section 11 enforcement, particularly in the Ninth and D.C. Circuits. The Fifth Circuit widened the split in the circuits regarding scope of the Migratory Bird Treaty Act (MBTA) to prohibit unpermitted incidental take of covered species, finding that the prohibition is limited to those deliberate acts done directly and intentionally, such as to exclude deaths of birds landing in uncovered oil tanks.

D. Environmental Disclosure

The Environmental Disclosure Committee tracks legally mandated Securities and Exchange Commission (SEC) and financial statement disclosure of environmental matters, the relationship between such disclosures, voluntary corporate sustainability, and social responsibility disclosures of environmental matters to stakeholders, as well as issues arising from product-related environmental disclosures in the commercial marketplace.

In 2015, oil and natural gas industry companies were accused of covering up knowledge regarding impacts of fossil fuels on climate change, involving the Obama Administration, the SEC, Congress, and the New York State Attorney General, with additional congressional action pursuing information regarding publicly held companies' disclosures of material risk related to climate change. Shareholders continue to actively focus on false statements regarding environmental and safety compliance, including Plains All American Pipeline LP regarding pipeline integrity, Duke Energy Corp. regarding coal ash, Lumber Liquidators Holdings for formaldehyde, among others. Remarkable news of Volkswagen's emission defeat devices triggered the filing of investor lawsuits, while several security class action lawsuits arose involving environmental liabilities, including truck engine emission compliance, mining construction, an oil company's liquidity following post-Deepwater Horizon drilling moratoriums, and other assorted misstatements regarding environmental compliance and liability.

Shareholder resolutions regarding environmental and social issues continued to set records in 2015, focusing on climate change risks, rail transportation of oil and gas, deforestation, board diversity and CEO compensation, and significantly, future demand for carbon assets signaling preparation for significant reduction in future demand. Many resolutions sought sustainability reports and requested tying CEO pay to sustainability

metrics, while many more targeted hydraulic fracturing. Shareholders prevailed where Chesapeake Energy named an environmental professional to its board, and Lowe's agreed to phase out products containing neonicotinoids.

Several international entities progressed voluntary standards, including the Global Reporting Initiative's Sustainability and Reporting 2025 and Global Sustainability Standards Board (GSSB), the United Nations' Sustainable Development Goal Target 12.6 and UN Guiding Principles Reporting Framework, the Climate Disclosure Standards Board's (CDSB) 2010 Reporting Framework update, and the World Federation of Exchanges' (WFE) 2015 report on global stock exchanges and Enhanced Sustainability Guidance (ESG) metrics for stock exchanges.

E. Environmental Enforcement and Crimes

The Environmental Enforcement and Crimes Committee reports specific developments and trends in criminal and civil environmental enforcement, as well as practical issues.

EPA's 2015 enforcement action statistics follow its 2014-2018 Strategic Plan, with generally fewer but more significant enforcement actions compared to 2014, including 2380 civil actions (4.48% increase) with $205 million in penalties and $7.3 billion for environmental projects, initiation of 213 criminal cases (21.4% decrease) with $200 million in fines and restitution, $4 billion in environmental projects, 129 years of incarceration, and 15,400 inspections (1.28% decrease).

EPA has set the following 2016 enforcement targets: reducing air pollution from the largest sources, cutting hazardous air pollutant emissions, use of Next Generation technologies and techniques to better ensure compliance by the energy extraction and production sector, reducing pollution from mining and mineral processing, preventing discharges of sewage and contaminated stormwater to surface water, and preventing animal waste from contaminating surface and groundwater.

EPA achieved significant settlements, including Anadarko Petroleum Corporation's remarkable $4.4 billion for environmental restoration, as well as the RCRA settlement with Mosaic Fertilizer LLC to properly dispose of wastewater. EPA continued progress regarding final settlement of BP oil spill restoration issues and its investigation of Volkswagen's diesel vehicle emission control defeat devices.

Significant EPA civil enforcement cases concluded for Noble Energy for air emission violations ($4.95 million penalty), Citgo Petroleum for oil spills ($81 million penalty), Continental Carbon for air emission violations ($650,000 penalty), Anadarko for Deepwater Horizon oil discharge violations ($159.5 million penalty), ExxonMobil for pipeline failure and resulting release ($1,045,000 penalty), and Arizona Public Service Company for air emission violations ($1.5 million penalty).

Significant EPA criminal enforcement cases concluded for Duke Energy Progress for its 2014 coal ash and wastewater release ($68 million fine); Nancy Stein for stockpiling 24,000 gallons of toxic waste, RCRA violations, and fraud ($17 million restitution and 72-month imprisonment); Matson Navigation for allowing molasses to leak into Honolulu Harbor ($400,000 fine); and James Jariv, Alexander Jariv, and Nathan Stoliar for selling fraudulent biodiesel credits, each receiving terms of imprisonment.

In *Hawkes Co., Inc. v. U.S. Army Corps of Engineers (USCOE)*, the Eighth Circuit split with the Fifth Circuit in concluding that the USCOE's determination that property qualifies as a "waters of the U.S." is a final agency action subject to judicial review. The U.S. Supreme Court granted certiorari review.

Finally, in *McGinnes Industrial Maintenance Corporation v. The Phoenix Insurance Company and The Travelers Indemnity Company*, the Supreme Court of Texas held that an EPA potentially responsible party letter inviting contribution and settlement

under CERCLA constitutes a "suit" within the meaning of the plaintiff's standard-form commercial general liability insurance policy.

F. Environmental Litigation and Toxic Torts

The Environmental Litigation and Toxic Torts Committee covers all aspects of environmental litigation, but it focuses on tort actions involving potential exposure to toxic substances.

Considering the priority given by the press for all stories related to oil and gas production and hydraulic fracturing, it is no surprise that these areas dominated litigation and toxic torts in 2015. Courts in Colorado and Pennsylvania issued decisions narrowing use of *Lone Pine* orders sought by defendant hydrocarbon extraction companies in cases brought by neighboring plaintiff citizens based on tort allegations. The Oklahoma Supreme Court held in *Ladra v. New Dominion, LLC*, involving allegations of damage from earthquakes alleged to have been caused by wastewater injection, that Oklahoma district courts have jurisdiction to hear disputes between private persons, while the Oklahoma Corporation Commission's exclusive jurisdiction over oil and gas operations is limited solely to the resolution of public rights. The Supreme Court of Texas held in *Environmental Procession Systems, L.C. v. FPL Farming Ltd.*, that plaintiffs in a suit for trespass related to wastewater injection have the burden of demonstrating lack of consent to the trespass.

Several 2015 cases highlight the importance of properly connecting expert witness testimony to parties' allegations or defenses regarding causation. Regarding punitive damages, the U.S. District Court for the Eastern District of Pennsylvania decided to let the jury consider whether a gas station operator or its environmental consultant recklessly failed to notify a plumber that the excavated pit he was working in was contaminated with petroleum.

In class actions, with *Allen v. Boeing*, the Ninth Circuit narrowly defined the "local event" exception to the Class Action Fairness Act (CAFA) limiting it to single tortious event, creating a split between the Third and Ninth Circuits. In *Smith v. ConocoPhillips Pipeline Co.*, the Eighth Circuit reversed the lower court's class certification based on nuisance claims arising from mere "fear" of groundwater contamination where there was no evidence of such contamination. In *Bell v. Cheswick Generating Station*, the U.S. District Court for the Western District of Pennsylvania rejected plaintiff's class action claims for damages from power plant emissions where class membership would turn on the substantive merits, and subjectivity of injury preempted "definiteness" of the class. In *Elsea v. U.S. Engineering Co.*, a Missouri appeals court reversed the trial court, maintaining the appropriate standard or class certification is whether there is evidence in the record, which if taken as true, would satisfy each and every requirement for class certification, regardless of conflicting expert testimony and evidence offered by the defense.

Regarding statute of limitations, a Louisiana appellate court held in *Ned v. Union Pacific Corp*, that a 1983 perchloroethylene spill could not be the source of a continuing trespass, and thus claims of a continuing tort were barred by the one-year statute of limitations.

The DuPont ammonium perfluorooctanoate (C-8) drinking water contamination litigation progressed in Ohio and West Virginia, consolidated for pre-trial purposes in multi-district litigation, with DuPont winning summary judgment on several individual claims of product liability, consumer protection, conspiracy, trespass on a person, ultrahazardous or abnormally dangerous activity, and negligence per se. However, an Ohio federal jury awarded a plaintiff $1.8 million in compensatory damages for kidney cancer alleged to have been caused by C-8.

Finally, in the litigation arising from the Freedom Industries, Inc. spill of 4-methylcyclohexanemethanol (MCHM) into the Elk River near Charleston, West Virginia, the U.S. District Court for the Southern District of West Virginia dismissed a private nuisance, but not a public nuisance claim, and then certified a class for purposes of determining liability, denying certification for damages.

G. Environmental Transactions and Brownfields

The Environmental Transactions and Brownfields (ETAB) Committee works on environmental issues arising in business, energy, or real estate transactions, including mergers and acquisitions, asset-based transactions, fossil and renewable energy projects, and remediation and redevelopment of brownfields.

2015 was the year of drones (unmanned aircraft systems or UAS), the Paris Agreement under the United Nations Framework Convention on Climate Change (UNFCCC), and management of carbon asset risks, discussed above and herein, which factor significantly into environmental transactions and Brownfields. EPA's Office of Solid Waste and Emergency Response (OSWER) issued another fact sheet responsive to its 2014 Climate Change Adaptation Implementation Plan, addressing climate change impacts on superfund soil, sediment, and groundwater remedies.

There were several noteworthy bankruptcy cases in 2015, including *Town of Lexington v. Pharmacia Corp.*, in which Solutia, not a manufacturer of PCBs but having accepted its predecessor PCB manufacturer's environmental liabilities in Solutia's prior Chapter 11 reorganization, was found subject to direct claims by the Town of Lexington. Also, in *Howard v. Final Oil and Chemical Co.*, the court agreed that the trustee's abandonment of contaminated property under 11 U.S.C. § 554 was warranted despite the debtor's claims regarding abandonment's impact on the remediation and the debtor's liability because the property was burdensome and had minimal value, and that the trustee had no duty to remediate the property for the debtor's benefit.

Several environmental insurance cases were decided as well, including the *McGinnes* case discussed above with the Environmental Enforcement and Crimes report, in addition to *In re Deepwater Horizon, No. 13-0670*, in which the Texas Supreme Court held BP could not look to Transocean or its insurer for payment of BP's underwater pollution because Transocean's insurance policies did not cover subsurface pollution. Then with *SI Venture Holdings, LLC v. Catlin Specialty Ins.*, the U.S. District Court for the Southern District of New York held that environmental insurance contracts requiring consent by the insurer before expending funds for remediation are enforceable and not void as against public policy.

Brownfields legislative action by the U.S. House of Representatives included H.R. 2002, the "Brownfields Redevelopment Tax Incentive Reauthorization Act of 2015," and H.R. 3098, the "Brownfield Redevelopment and Economic Development Innovative Financing Act of 2015." State brownfields legislation was enacted in Connecticut and Oregon, with several developments affecting New York's Brownfield Cleanup Program.

As of 2015, the correct Phase I standard is ASTM E1527-13, which has now replaced ASTM E1527-05. With E1527-13, erstwhile bona fide prospective purchasers (BFPPs) will need to conduct a vapor intrusion screen. In 2015, EPA's OSWER issued two vapor intrusion guidance documents, including *Technical Guide for Assessing and Mitigating the Vapor Intrusion Pathway from Subsurface Vapor Sources to Indoor Air*, which can be used for all volatile organic compounds, and also, the *Technical Guide for Addressing Petroleum Vapor Intrusion at Leaking Underground Storage Tank Sites*. Many states have adopted regulation and/or guidance regarding risk-based approaches to assessing and mitigating vapor intrusion, as well as EPA Regional offices. Vapor

intrusion continues to serve as a significant source of class and mass tort litigation, including common law trespass, nuisance and common law negligence claims, and CERCLA and RCRA citizen suit claims.

In 2015, EPA also proposed revisions to its Lead Renovation, Repair, and Painting (RRP) rule, and announced seventy-five RRP enforcement actions over the past year. EPA also announced the National Radon Action Plan, building on the Federal Radon Action Plan.

To assist with implementation of institutional controls which may be used to mitigate vapor intrusion, the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) published its report, *State Approaches to Management Institution Controls and Ensuring Long-Term Protectiveness at Leaking Underground Storage Tank (LUST) Sites*.

H. Pesticides, Chemical Regulation, and Right-To-Know

The Committee on Pesticides, Chemical Regulation, and Right-to-Know addresses a wide range of federal, state, and international regulatory matters arising with respect to products, particularly chemical and biological pesticides, industrial and consumer chemicals, and plant and microbial products of biotechnology.

Congress made some progress on reform of the Toxic Substances Control Act (TSCA), with the House of Representatives passing the TSCA Modernization Act of 2015, while the Senate bill passed a more comprehensive revision. EPA moved forward implementing its *TSCA Work Plan for Chemical Assessments*, focusing on n-methylpyrrolidone (NMP); flame retardant chemicals; and 1,4-dioxane; and proposed a Significant New Use Rule (SNUR) for trichloroethylene (TCE), reaching a phase-out agreement with the last U.S. manufacturer of TCE-containing products. EPA finalized a SNUR for hexabromocyclododecane, a flame retardant, and proposed a SNUR for long-chain perfluoroalkyl carboxylate (LCPFAC), subject to a voluntary industry phase-out, which also amends a SNUR for perfluoralkyl sulfonate (PFAS). EPA proposed a SNUR for toluene diisocynates and related compounds, as well as revoked a 1990 SNUR for two flame retardants with inherently low toxicity.

Significantly, EPA proposed its first rule governing nanoscale materials as a generic class, a TSCA section 8(a) rule that would impose reporting and recordkeeping requirements on manufacturers and processors of selected nanoscale materials with finalization anticipated in 2016. EPA also issued SNURs for polymer-nanotube combination and graphene nanoplateletes.

Regarding the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) developments, the Ninth Circuit found EPA's decision to unconditionally register sulfoxaflor was not supported by substantial evidence and remanded the registration to EPA. EPA's decision had been made pursuant to its Pollinator Risk Assessment Framework, but it was challenged by commercial bee keepers and related organizations. EPA also issued its second registration for a nanosilver pesticide product, "Nanosilva."

The U.S. FDA issued a final guidance document, *Guidance for Industry: Use of Nanomaterials in Food for Animals*, and the USDA National Organic Program issued its own engineered nanomaterial guidance document.

President Obama directed federal agencies by executive order to comply with Emergency Planning and Community Right to Know Act (EPCRA) reporting requirements and required agency contractors to assist. EPA issued new guidance for calculating EPCRA sections 311 (Tier I) and 312 (Tier 2) thresholds for regulated chemicals in non-consumer lead-acid batteries, and announced its intent to add natural gas processing facilities within EPCRA section 313 (Tier 3, Form R, Toxic Release Reporting, or TRI), and its intent to review and modernize the Clean Air Act section

112(r) Risk Management Planning program (CAA RMP). EPA also added 1-bomopropane to the EPCRA section 313 reporting list.

EPA settled EPCRA violations with Tonowanda Coke Corporation, resolving its failure to report the "manufacture" of benzene and ammonia above reportable thresholds for $12 million; pursued many other EPCRA enforcement actions along with accompanying CAA section 112(r)) and CERCLA section 103 reporting violations, and implemented many improvements supporting EPCRA compliance efforts.

In addition to the many other new regulations, interpretations, and proposed rules expanding requirements for the oil and gas extraction and production industry sector, EPA changed the restricted use pesticide (RUP) applicator certification regulations to include a "limited use" category contemplating hydraulic fracturing fluids. Also, EPA's Office of Inspector General issued its review of EPA's regulation of hydraulic fracturing, while EPA issued its long awaited review of hydraulic fracturing on drinking water resources and its final guidelines regarding management of UIC Class II disposal wells to minimize impacts of induced seismicity. Individual states have also been active in this industry sector, enacting legislation and adopting new regulations, as discussed within the scope of other committee reports.

Regarding biotech, Genetically Modified Organism (GMO) foods saw an improved regulatory landscape, with the USDA Animal and Plant Health Inspection Service (APHIS) approving six petitions for deregulation and the FDA denying a petition to require labeling on GMO foods, where no evidence supported distinguishing GMO-derived from non-GMO-derived foods, along with other GMO related federal and state developments.

Finally, EPA's greenchemistry "Design for the Environment Program" is now the "Safer Choice Program," with updated eligibility criteria.

H. Superfund and Natural Resources Damages Litigation

The Superfund and Natural Resources Damages Litigation Committee focuses on federal and state law cases and policy developments arising with respect to CERCLA Superfund sites and natural resource damages (NRD), especially regarding assignment of liability, cost allocation, enforcement and interactions between regulatory agencies, natural resource trustees, and potentially responsible parties. The Committee also covers settlement options, litigation techniques, and technical issues.

There were relatively fewer developments in this area, though significantly, in *Anderson v. Teck Metals, Ltd.*, the U.S. District Court for the Eastern District of Washington ruled that CERCLA supplants federal common law public nuisance claims for damages.

Several decisions regarding CERCLA arranger liability include *Vine Street LLC v. Bork Warner Corp*, rejecting once again CERCLA arranger liability on behalf of a dry cleaning equipment and solvent vendor for releases of solvent from the dry cleaning equipment by the operator; *Consolidation Coal Co. v. Georgia Power Co.*, rejecting CERCLA arranger liability on behalf of a used transformer vendor for PCB releases from the transformer reconditioning company; and *United States v. Dico, Inc.*, rejecting CERCLA arranger liability on behalf of a seller of PCB contaminated buildings. In each case, the reviewing court looked to the intent that the contaminant hazardous substance be disposed of as a result of the sale.

In *ASARCO, LLC v. Celanese Chemical Co.*, the Ninth Circuit rejected attempts to restart the CERCLA section 113(g) statute of limitations following bankruptcy. In *The Peoples Gas Light and Coke Co. v. Beazer East, Inc.*, the Seventh Circuit found a 1920 contract provision allowing the purchaser to assume operation "without liability of any character" to constitute a broad indemnity foreclosing successor liability for CERCLA

contribution claims. In *Florida Power Corp. v. FirstEnergy Corp.*, the Sixth Circuit addressed pre-2005 consent order conditional language regarding EPA's covenant not to sue, finding no resolution of liability and thus no trigger for statute of limitations on contribution claims. In Wisconsin's Fox River litigation, the U.S. District Court for the Eastern District of Wisconsin rejected NCR's divisibility defense and claim for apportionment of remediation costs.

I. Waste and Resource Recovery

The Waste and Resource Recovery Committee focuses on "cradle-to-cradle" management of solid and hazardous waste, from generation through disposal, as well as recycling, beneficial use, source reduction, and conservation. The Committee tracks statutory, regulatory, and judicial developments in waste management, especially new definitions of solid and hazardous waste, recycling, permitting flow control, waste bans, waste conversion technologies, and environmental justice.

Significantly in 2015, in *Eppenstein v. Berks Products Corp.*, the U.S. District Court for the Eastern District of Pennsylvania reviewed the jurisdictional nature of citizen suit notice, finding lack of notice to not be a jurisdictional defect. In *Community Association for Restoration of the Environment v. Cow Palace*, the U.S. District Court for the Eastern District of Washington found that animal waste may be characterized as RCRA solid waste when over-applied to soil or when leaking out of lagoons. Similarly, in *Chart v. Town of Parma*, the U.S. District Court for the Western District of New York found that soil contaminated with pesticide residue scraped from a former apple orchard and sold to Parma to use in building a ball field, resulted in "discard" of the pesticide residue, which rendered the residue RCRA solid waste. Further, in *Little Hocking Water Association, Inc. v. E.I. du Pont de Nemours and Company*, the U.S. District Court for the Southern District of Ohio held that air emissions containing perfluorooctanoic acid (PFOA or C8), resulting in deposition of PFOA on adjacent public water supply wellfields which leached into the groundwater, constituted disposal of solid waste under RCRA.

In *Carbon Sequestration Council v. EPA*, the D.C. Circuit Court of Appeals held that entities utilizing carbon dioxide in enhanced oil recovery had no standing to challenge EPA's determination that supercritical liquid carbon dioxide injected into Safe Drinking Water Act (SDWA) permitted Underground Injection Control (UIC) Class VI wells for permanent geologic sequestration is RCRA "solid waste."

In 2015, EPA proposed the *Hazardous Waste Generator Improvements Rule*, including allowances for episodic waste generation and inter-generator waste transport, enhanced documentation and recordkeeping requirements and mandatory arrangements with Local Emergency Planning Committees. EPA also proposed its *Management Standards for Hazardous Waste Pharmaceuticals*, impacting pharmacies, hospitals, and retailers, among others, and providing relief regarding approved reverse distribution arrangements. EPA finalized its rule regarding *Disposal of Coal Combustion Residuals from Electric Utilities* (CCR Rule), allowing regulation of coal combustion residuals as a RCRA solid waste, rather than a hazardous waste. Finally, EPA issued its final rule on RCRA's *Definition of Solid Waste*, revising many RCRA recycling provisions.

Regarding electronic waste, EPA's e-waste enforcement efforts resulted in settlement with ECO International, LLC for a $9,180 civil penalty for improper management of 26 million pounds of lead-containing cathode ray tubes (CRTs) and crushed glass, in addition to criminal conviction of a Michigan e-waste broker who conspired to fraudulently export e-waste including CRT monitors. Texas and Vermont also resolved RCRA delegated state program e-waste violations. Finally, Illinois, Hawaii, and California adopted e-waste legislation.

J. Water Quality and Wetlands

The Water Quality and Wetlands Committee focuses on judicial, legislative, and regulatory developments under the CWA, especially emerging issues such as federal jurisdiction, water quality, total maximum daily load regulations, and citizen suit litigation.

Perhaps the biggest development in 2015 regarding water quality was the EPA's final *Clean Water Rule*, providing the controversial definition for "waters of the United States" (WOTUS), only to be challenged, and then stayed nationwide, by the Sixth Circuit. However, there were other notable developments.

Several courts reviewed CWA section 303 Water Quality Standards (WQS), including the Eleventh Circuit, upholding a consent decree regarding Florida's nutrient standards; the U.S. District Court for the Middle District of Florida, upholding EPA's approval of Florida's Impaired Waters Rule; the Fifth Circuit, finding that the CWA provides EPA with discretion to deny a necessity determination request; and the U.S. District Court for the Eastern District of Pennsylvania, finding that EPA has no mandatory duty to review a Pennsylvania statute for its impact on anti-degradation.

Several courts reviewed CWA section 303(d) Total Maximum Daily Loads, including the Third Circuit, upholding an EPA TMDL plan for discharges of nutrients and sediment from surrounding states into the Chesapeake Bay; the California Court of Appeals, upholding a TMDL for a small lake based on the concentration of pollutants in the lake bed sediment; and the U.S. District Court for the Western District of Washington, requiring that EPA submit a TMDL for PCBs in the Spokane River. Pursuant to CWA sections 304 and 306, the Second Circuit remanded portions of the 2013 Vessel General Permit based on claims that EPA was arbitrary and capricious in setting technology and water quality based effluent limitations (TBELs and WQBELs) for ballast water discharge.

Several enforcement actions under CWA section 309 resulted in significant penalties, including XTO Energy, Inc., with $2.3 million civil penalty and $3 million to restore sites following unpermitted discharges of dredge and/or fill material to waters in construction of natural gas extraction facilities; XPLOR Energy SPV-1, with sentencing of three years of probation and $3.1 million penalty for knowingly discharging brine to the Gulf of Mexico; and the Duke Energy Progress coal ash and wastewater discharge related criminal violations and $68 million fine discussed above. Additionally, Tap Root Dairy, LLC was fined $80,000 and given four years probation for failing to maintain waste lagoons which spilled into the French Broad River, and Mississippi Phosphates Corp. pleaded guilty to felony CWA violations for discharging acidic and oily wastewaters.

The courts reviewed several cases involving National Pollutant, Discharge, and Elimination System (NPDES) permits and permit shields. In *Sierra Club v. ICG Hazard, LLC*, the Sixth Circuit upheld a general permit shield in the case of a mining company's selenium discharge. In *Alaska Eskimo Whaling Commission v. EPA*, the Ninth Circuit generally upheld a permit authorizing discharge by oil and gas exploration facilities into the Beaufort Sea. The Eighth Circuit affirmed violations of NPDES permits in *United States v. STABL, Inc.*, upholding the district court finding of more than 1,500 CWA violations based on the permittee's Discharge Monitoring Reports (DMRs), assessing a $2.2 million civil penalty.

Additionally, several courts found violations where there were no CWA permits. Of note, in *Ohio Valley Environmental Coalition v. Pocahontas Land Corp.*, the U.S. District Court for the Southern District of West Virginia found CWA discharge permits could be required if valley fill constituted a point source, even if the fill was placed there

historically and was not being actively managed. Similarly, in *PennEnvironment v. PPG Indus., Inc.*, the U.S. District Court for the Western District of Pennnsylvania found a permit was required where stormwater and groundwater passed through buried slurry and solid waste, discharging contaminants.

Regarding CWA section 404, wetlands determinations, as referenced above, in *Hawkes Co., Inc. v. U.S. Army Corps of Engineers (USCOE)*, the government was granted certiorari to resolve the split between the Eighth and Fifth Circuits regarding availability of judicial review for wetlands determination.

In *Black Warrior Riverkeeper v. U.S. Army Corps of Engineers (USCOE)*, the Eleventh Circuit remanded the USCOE's Nationwide Permit 21, allowing coal mining operations to discharge dredged or fill materials into waters of the United States, back to the district court to remand back to the USCOE for CWA and National Environmental Policy Act (NEPA) reconsideration. However, Nationwide Permit 12 withstood challenges arising from the Gulf Coast Pipeline.

Several citizen suits were filed and survived initial challenges, including *San Francisco Herring Association v. Pacific Gas and Electric Co.*, where the court held the plaintiff fishermen had standing even if their injury was not directly related to the affected navigable water. In *California Communities Against Toxics v. Weber Metals, Inc.*, the court held the plaintiff does not need to understand the cause of the violation. In *Sierra Club v. Virginia Electric and Power Co.*, the court allowed plaintiff's claims that the CWA violations arose from discharges to groundwater that reached surface water. In *Ohio Valley Environmental Coalition, Inc. v. Fola Coal Co.*, the court allowed plaintiff's claims that the CWA violations arose from excessive discharges of ionic pollution, including conductivity and sulfates.

In administrative rulemaking, again, in addition to the Clean Water Rule, EPA published its CWA section 303 final *Water Quality Standards Regulatory Revisions.* Pursuant to CWA sections 304 and 306, EPA issued several proposed and final criteria, guidelines and performance criteria, including the *Proposed Rule for Effluent Limitation Guidelines for the Oil and Gas Extraction Point Source Category*, the *Final Updated Ambient Water Quality Criteria for the Protection of Human Health*, and the *Final Rule on Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category.* EPA also issued its final NPDES Multi-Sector General Permit (MSGP) for stormwater discharges, which replaces the former MSGP which expired in 2013.

III. ENERGY AND RESOURCES COMMITTEES

A. Energy and Natural Resources Litigation

The Energy and Natural Resources Litigation Committee (ENRL) focuses on litigation, especially electricity litigation with an emphasis on energy law of electric and natural gas conveyance, natural resource litigation and natural resources damage issues, and oil and natural gas litigation.

With its report, the ENRL Committee provides detailed discussion regarding several interesting and quite complex cases with significant histories. In *Ministry of Oil and the Republic of Iraq v. 1,032,212 Barrels of Crude Oil Aboard the United Kalavrvta*, the U.S. District Court for the Southern District of Texas reviewed a dispute between Iraq and Kurdistan regarding ownership of a million barrels of crude oil stored in a tanker off the coast of Galveston, Texas, considering issues of political question, application of the Foreign Sovereign Immunities Act, scope of admiralty jurisdiction, and the act of the state doctrine. In *PDV Sweeny, Inc. v. ConocoPhillips, Co.*, the U.S. District Court for the Southern District of New York confirmed the International Court of Arbitration award

resolving a dispute arising from a crude oil refining joint venture. In *Writt v. Shell Oil Co.*, the Texas Supreme Court reversed the Texas Court of Appeals in finding that Shell's act of providing an internal report to the Department of Justice regarding its contractor's possible violation of the Foreign Corrupt Practices Act was absolutely privileged communication and not merely conditionally privileged.

The Committee reports several cases involving international companies and operations testing the scope of United States courts' jurisdiction, including *International Energy Ventures Management, LLC (IEV) v. United Energy Group, Ltd. (UEG)*, in which the Fifth Circuit found sufficient contacts to allow personal jurisdiction over UEG in IEV's breach of contract claims arising from its marketing of BP's Pakistani assets to UEG, a Chinese oil and gas company in Bejing. In *Brenham Oil and Gas, Inc. v TGS-NOPEC Geophysical Company*¸ the Texas Court of Appeals upheld the trial court's finding of no personal jurisdiction in Brenham's claims of tortious interference with its efforts to reach an oil production agreement with the Republic of Togo, finding TGS had insufficient contacts with Texas.

Regarding other litigation, with *In re SemCrude L.P.*, the U.S. District Court for the District of Delaware adopted the bankruptcy court's findings to dismiss oil producers' lien claims against downstream oil purchasers, finding that the jurisdiction in which the debtor is located governs the issue of perfection, determining the level of knowledge sufficient to constitute actual knowledge of a lien under the UCC section 1-202(b), and applying the UCC's definition of "person" as seller of the goods to the corporate entities in the subject case. In *Phillips v. Carlton Energy Group, LLC*, the Texas Supreme Court reviewed many issues on appeal from the Texas Court of Appeals, upholding in part, reversing in part, and remanding for further proceedings, recognizing Texas law that a contract need not be signed to be executed, and extended the Texas rule for lost profits, recoverable as consequential damages upon reasonable certainty of proof, to the market value of the property for which recovery is sought.

In *Schell v. OXY USA Inc.*, the Tenth Circuit found that relief achieved through litigation regarding assets that are subsequently sold during the pendency of appeal rendered the appeal moot because any further determination of the issues would no longer have any effect in the real world. Further, because the defendant's voluntary action rendered the appeal moot, it would not disturb the lower court's decision. In *Ring Energy, Inc. v. Hullum*, the U.S. District Court for the Northern District of Oklahoma held that pretrial discovery can be used to obtain commercial data that was sought as part of the ultimate relief in the lawsuit; as long as discovery was limited, the data could not be used outside the litigation, including negotiation of renewals or extensions of oil and gas leases. In *Grynberg v. Kinder Morgan Energy Partners, L.P.*, the Tenth Circuit held that for purposes of federal court diversity jurisdiction, a master limited partnership's citizenship is represented by the citizenship of its unitholders.

B. *Forest Resources*

The Forest Resources Committee focuses on all legal, policy, and practice issues relevant to both private and public forest lands.

Of the many interesting developments reported by the Forest Resources Committee, only a few are summarized here. Regarding national forest roadless area management, in *Organized Village of Kake v. U.S. Department of Agriculture*, after a tumultuous history, the Ninth Circuit reinstated the 2001 Roadless Area Conservation Rule, known as the Clinton rule, in Alaska's Tongass National Forest. In separate rulemaking, the Department of Agriculture is reinstating the North Fork Coal Mining Area exception to the Colorado Roadless Rule.

In *W.E. Partners II, LLC v. United States*, the Federal Claims Court upheld the Department of Treasury's limited reimbursement of costs for biomass facility construction to just those costs attributable to production of electrical energy, deferring to the Department's interpretation of the Recovery Act section 1603. In *Cottonwood Environmental Law Center v. U.S. Forest Service*, the Ninth Circuit affirmed the lower court's decision, finding the Forest Service violated the ESA section 7 by not reinitiating consultation after the FWS revised the critical habitat designate for the Canada Lynx, but it denied injunctive relief. In *Pit River Tribe v. Bureau of Land Management*, involving geothermal leases, the Ninth Circuit reversed the lower court's summary judgment decision for the United States, based on its determination that plaintiff's claims did not fall within the lease-continuation provision of the Geothermal Steam Act, whereas the Ninth Circuit found the plaintiff's claims did fall within the Act's lease-extension provision.

The states were active as well, where in *State of Wyoming v. Black Hills Power, Inc.*, Wyoming adopted the free public service doctrine, and in *State of Washington Department of Natural Resources v. Public Utility District No. 1 of Klickitat County*, Washington affirmed a trial court's decision that a municipal corporation such as a public utility district is a "person" for purposes of a state fire cost recovery statute.

Administrative developments include EPA's *Notice of Opportunity to Provide Information on Existing Programs that Protect Water Quality from Forest Road Discharges*, responding to Ninth Circuit litigation. The Forest Service issued its final Forest Service Manual and Handbook implementing the 2012 Panning Rule. Finally, the Forest Service withdrew its 2014 proposed Groundwater Management Directive.

C. Hydro Power

The Hydro Power Committee reports on developments and issues most relevant to hydroelectric projects, which provide renewable energy from flowing water, as well as provide flood control, navigation, and storage of water for multiple uses.

In *Western Minnesota Municipal Power Agency v. Federal Energy Regulatory Commission*, the D.C. Circuit Court of Appeals rejected the Federal Energy Regulatory Commission's (FERC) interpretation of the Federal Power Act (FPA) section 7(a) limiting the scope of municipalities granted preference in original licensing for hydroelectric projects to only those municipalities located close to the project, finding that the FPA was not ambiguous regarding preference subject to the "equally well adapted" requirement and was silent as to proximity, calling FERC's FPA issue "manufactured ambiguity."

North Carolina litigation continues to delay the relicensing of the Yadkin Project, and while North Carolina issued the required CWA section 401 certification in 2015, litigation continues regarding the licensee's ownership of the river bed.

Administrative developments include interim rules by the Departments of Agriculture, Interior, and Commerce for evidentiary hearings, and submission of alternative conditions under the FPA sections 4(e) and 18, addressing burden of proof and standing issues.

Also in 2015, the Confederated Salish and Kootenai Tribes of the Flathead Reservation in Polson, Montana, became the first Native American Tribe to own and operate a hydroelectric dam in the United States.

D. Marine Resources

The Marine Resources Committee focuses on issues impacting the oceans, including climate change, exploration, and production of marine natural resources, offshore wind power, aquaculture, marine transportation, and other issues.

Significant judicial developments impacting Marine Resources law, specifically fisheries, include the *Yates v. United States*, a United States Supreme Court determination of the applicable scope of the term "tangible object" as limited to objects one can use to record and preserve information, specifically not including under sized grouper fish, for purposes of the Sarbanes Oxley Act's prohibition against destruction of such items in obstructing a federal investigation. Additional cases include *Glacier Fish Company LLC v. Pritzker*, where the U.S. District Court for the Western District of Washington upheld the National Marine Fisheries Service's computation of a cost recovery program under the Trawl Rationalization Program, using its own formula which did not conform to the Pacific Fisheries Management Council's formula. Also, in *Conservation Council for Hawaii v. National Marine Fisheries Service*, the U.S. District Court for the District of Hawaii held that the international Conservation and Management Measures resolution of the Western and Central Pacific Fisheries Commission can be considered in the context of "quota shifting" allegations if reviewing the issue of whether an agency's regulations violated the CCMs. Additional reported cases reaffirmed the Lacey Act exemption for U.S. fisheries subject to a Marine Safety Act Fisheries Management Plan, as well as found more stringent California shark fin law not preempted by the MSA shark finning prohibition.

Major legislative progress in fisheries occurred in 2015, with enactment of the Illegal, Unreported, and Unregulated Fishing Enforcement Act of 2015, amending the Tuna Conventions Act. Administratively the NMFS was quite active, significantly adopting a regulation requiring Vessel Monitoring Systems on all vessels fishing tuna or similar species under the jurisdiction of the Inter-American Tropical Tuna Commission.

Regarding marine mammals, with *Conservation Council for Hawaii v. NMFS*, the U.S. District Court for the District of Hawaii remanded the NMFS authorization of the U.S. Navy's incidental take of marine mammals in the Southern California Training and Testing area of the Pacific Ocean as unsupported and thus arbitrary and capricious. In *Alaska Wilderness League v. Jewell*, the U.S. District Court for the District of Alaska upheld the FWS incidental take regulation for Pacific walrus in the Chukchi Sea from oil and gas exploration activities. Additional cases addressed incidental takings of whale, impacts from termination of the translocation program of the southern sea otter, and the NMFS denial of the Georgia Aquarium's permit under the MMPA to import eighteen beluga whales. Several bills were introduced regarding marine mammals, but none were adopted. However, administrative actions included the NFMS final rule governing the unintentional taking of marine mammals incidental to training and testing activities conducted in the Northwest Training and Testing Study Area, in addition to proposed rules regarding humpback whales and Atlantic large whales.

E. *Mining and Mineral Extraction*

The Mining and Mineral Extraction Committee (MME) focuses on the natural resource, energy, and environmental issues arising with hardrock and coal-mining industries, including sustainable development and climate change.

Three cases discussed in Water Quality above are also particularly significant developments for the MME Committee, including *Black Warrior Riverkeeper, Inc. v. USCOE*, addressing dredge and fill activities related to surface coal mining; *Sierra Club v. ICG Hazard, LLC*, regarding selenium discharges and effective scope of the NPDES permit shield; and *Ohio Valley Environmental Coalition v. Fola Coal Co.*, addressing

NPDES permit violations as ionic pollution measured as conductivity. As reported by the MME Committee, West Virginia has remedied its CWA permit shield.

Regarding mining on public lands, mine claim validity determinations were clarified with *Freeman v. U.S. Department of the Interior (DOI)*, where the court upheld the BLM's use of its Mineral Commodity Price (MPC) Policy in determining the commodity price relevant to claim development. Regarding conflicting mining claims, in *Clayton Valley Minerals, LLC*, the DOI's Interior Board of Land Appeals (IBLA) found Bureau of Land Management's (BLM's) decision to deny Clayton Valley Minerals potassium prospecting permit application, based on poor likelihood of success and potential to interfere and to be unsupported, where the prospecting stage was too early for such determinations and interference could be managed.

Regulatory developments include EPA's promulgation of the coal combustion residuals (CCR or Coal Ash) as a solid, and not hazardous, waste pursuant to RCRA Subtitle D. Also, the Office of Surface Mining and Reclamation and Enforcement (OSMRE) proposed a new stream protection rule with many protections beyond the 100-foot buffer, and the DOI undertook additional measures to limit mining on federal lands, including withdrawal of ten million acres throughout six states and requiring BLM to prepare programmatic environmental impact statements to review the federal coal program, halting issuance of thermal coal leases.

F. Native American Resources

The Native American Resources Committee focuses on current and emerging environmental, energy, land use, resource, and environmental justice issues of interest to lawyers representing tribes, tribal entities, indigenous peoples, and businesses engaged in development or other commercial activities around Indian country, Alaska Native villages, and other lands of indigenous peoples.

Many case developments occurred regarding the Indian Child Welfare Act (ICWA), the Fair Labor Standards Act, elections in Hawaii, and marijuana legalization in Indian Country. The U.S. Supreme Court is set to hear cases regarding use of tribal court convictions for domestic abuse for subsequent federal court punishment, scope of tribal jurisdiction over non-members on non-Indian fee lands, equitable tolling of claims, and determination of intent to diminish reservation land so as to prevent enforcement of an alcohol tax.

Appellate court developments address religious freedom of Native American inmates to wear long hair, scope of fishing rights within reservations, scope of "Indian" for purposes of the Indian Major Crimes Act (IMCA), and validity of state taxes as applied to non-Indian business lessees located in tribal casinos. District court developments reviewed "one person, one vote" under the Equal Protection Clause in the case of school board elections, the Trademark Trial and Appeal Board (TTAB) decision to cancel the "Redskins" trademark registration under the Lanham Act's "may disparage" provision, and the jurisdiction of tribal court to review disputes regarding "payday loan" company agreements forum selection and arbitration clauses. Finally, in Oklahoma, the Court of Civil Appeals upheld the Cheyenne and Arapaho Tribe's sovereign immunity claims regarding bank account disputes over the Bank's contract provisions due to the underlying issue of a tribal government dispute.

Legislative developments include the Fixing America's Surface Transportation (FAST) Act, creating the Department of Transportation's (DOT's) Tribal Self-Governance Program, which extends to DOT Title V of the Indian Self-Determination and Education Assistance Act (ISDEAA) and provides funding increases for the Tribal Transportation and Tribal Transit Programs. Executive developments include the DOI's new regulations regarding grants for right of ways across Indian and BIA lands and new

ICWA regulations to ensure compliance and guidelines updating procedures for child custody proceedings. Finally, the BIA promulgated a rule amending regulations governing Secretarial elections.

G. Nuclear Law

The Nuclear Law Committee focuses on legal issues arising with nuclear power and nuclear materials, including the nuclear fuel cycle, fuel production, storage and disposal, as well as licensing and operation of power plants.

The Tenth Circuit split from other circuits in its Rocky Flats "downwinder" litigation decision, *Cook v. Rockwell International Corp.*, allowing recovery under a state law cause of action despite failure to prevail on radiation claims under the Price-Anderson Act (PAA). Also, in *Brodsky v. Nuclear Regulatory Commission (NRC)*, the U.S. District Court for the Southern District of New York upheld NRC exemptions granted to Entergy regarding the Indian Point Nuclear Power Plant Unit 3 fire safety program, despite lack of a NEPA environmental assessments considering impacts of a terrorist attack.

The NRC's 2014 Continued Storage Rule faced continued challenges in 2015, which the Commission rejected. The Commission continued to address post-Fukushima response activities, including Fukushima-related lessons learned. Finally, 2015 was relatively active regarding new plant licenses, with NRC issuing an operating license for the Watts Bar Unit 2, issuing a combined license for the Fermi Unit 3, and holding a hearing for the South Texas Project Units 3 and 4 combined licenses. Finally, the NRC denied Sierra Club hearing rights based on oversight activities at the Fort Calhoun Station asserted to constitute de facto license amendments. The NRC referred to a Board a similar decision, whereby the Board denied the Friends of the Earth hearing rights based on the NRC's failure to suspend PG&E's license considering Diablo Canyon's seismic issues.

H. Oil and Gas

The Oil and Gas Committee focuses on those issues that impact the practice of law within the oil and gas industry, including the business of exploring for and producing oil and natural gas and the future of the domestic and international industry.

The Committee reports legislative, judicial, and administrative developments in Alaska, Arkansas, California, Colorado, Kansas, Louisiana, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, Texas, West Virginia, and Wyoming, focusing primarily on taxation and financial incentives impacting production, judicial decisions regarding statutory and contract interpretation, and state administrative developments. Practitioners in these states are urged to read the Committee's report.

Of significant interest to environmental practitioners include developments in Alaska regarding the DOI's review of Alaska's plan for exploration in the Arctic National Wildlife Refuge (ANWR), wetlands determinations in the National Petroleum Reserve – Alaska, approval of oil spill response plans for development in the Beaufort and Chukchi seas, Greenpeace's continued attempts to interfere with Shell Offshore, Inc.'s development activities, and judicial remand to EPA of its determination that non-contact cooling water discharges will not unreasonably degrade the marine environment. Developments in California to watch include legislation and rulemaking regarding injection wells, pipelines, hydraulic fracturing, groundwater monitoring, and implementation of the California Environmental Quality Act (CEQA) in permitting oil and gas wells. In addition to the Committee's reported California developments, California's Aliso Canyon natural gas leak stole headlines as an unprecedented example

of failures in the nation's natural gas infrastructure, causing the evacuation of 2000 residents of Porter Ranch, California, and resulting in release of 96,000 metric tons of methane (8 million metric tons of carbon dioxide equivalents), estimated to constitute more than a quarter of California's greenhouse gas emissions for 2015.

In Colorado, continued developments included local government bans on hydraulic fracturing, as well as precautions undertaken to address geological hazard areas and floodplain development. Kansas adopted additional controls limiting injection rates and pressures for Class II injection wells for several counties to address induced seismicity. In New Mexico, local development bans were soundly addressed with a 199-page opinion in *SWEPI, LP v. Mora County, New Mexico*, where plaintiffs failed in obtaining a preliminary injunction based on NEPA inadequacies, and the New Mexico Conservation Commission replaced its Rule 34 providing new provisions governing recycling produced water.

In Oklahoma, referenced above in the Environmental Litigation and Toxic Torts report, was the Oklahoma Supreme Court decision in *Ladra v. New Dominion, LLC*, involving allegations of damage from earthquakes alleged to have been caused by wastewater injection, holding that Oklahoma district courts have jurisdiction to hear disputes between private persons, while the Oklahoma Corporation Commission's (OCC's) exclusive jurisdiction over oil and gas operations is limited solely to the resolution of public rights. In addition to the Committee's reported Oklahoma developments, in 2015 the OCC's Oil and Gas Conservation Division responded to increased seismicity with implementation of volume reduction plans for oil and gas wastewater disposal wells disposing into the Arbuckle formation in impacted areas. In Pennsylvania, the new Treated Mine Water Act encourages the use of recycled mine water in natural gas drilling operations, providing limited immunity and clarifying liabilities. In addition to many decisions involving local ordinances asserted as restricting oil and gas development, the Supreme Court of Pennsylvania announced that it will again hear oral arguments regarding Act 13, challenging the decision that a regulator cannot review local drilling ordinances as well as Act 13's health professional "gag order" regarding composition of fluids used in drilling, natural gas shippers' power to use eminent domain and scope of notification required following an oil or gas related spill.

In 2015, West Virginia repealed most of its Alternative and Renewable Energy Portfolio Standard, leaving in place its provision regarding net metering, and revised the scope of West Virginia aboveground storage tank statute to remove blanket exemptions for any particular industry. West Virginia also enacted a statute regarding action in response to the EPA's CAA section 111(d) rule, i.e., the CPP, while also issuing a new General Permit G70-B for natural gas production facilities capping air pollutant emissions. Finally, Wyoming enacted legislation protecting surface owners from liability for oil and gas pipeline spills and contamination, and also legislation allowing enhanced recovery operators utilizing carbon dioxide certification that the EOR resulted in carbon dioxide geologic sequestration. Additionally, the Wyoming Oil and Gas Conservation Commission revised oil and gas well setbacks to 500 feet from an occupied structure, with notice required at 1000 feet.

I. Petroleum Marketing

The Petroleum Marketing Committee addresses a broad range of issues relevant to petroleum marketing practitioners, including those arising under the Federal Petroleum Marketing Practice Act (PMPA); pricing statutes and regulations; impact of anti-trust and federal and state consumer laws; cross-franchising; the Americans with Disabilities Act; and impacts on operations, zoning ordinances, and other issues.

In 2015, the U.S. District Court for the Southern District of New York addressed termination notices and adequacy of grounds supporting termination, finding in *Scarsdale Central Services, Inc. v. Cumberland Farms, Inc.* that franchisor's otherwise lawful Petroleum Marketing Practices Act (PMPA) termination based on franchisee's rejection of its right of first refusal due to franchisor's bona fide offer, including absorption of pollution remediation expense was not wrongful, thus upholding the franchise termination. The U.S. District Court for the Eastern District of New York upheld another lease termination in *Amophora Oil and Gas Corp. v. Cumberland Farms, Inc.*, clarifying the scope of PMPA requirements for franchisor offers to assign options to franchisees, as well as offers to extend leases underlying the franchise relationship or purchase the marketing premises. In *Hillmen, Inc. v. Lukoil North America, LLC*, the U.S. District Court for the Eastern District of Pennsylvania found no wrongful termination when the franchisee failed to both to pay rent and to operate the station, rejecting franchisee's claims that franchisor increased franchisee's rent, the cost of petroleum, and made improper debits, thereby excusing franchisee's nonperformance. The same court followed with *Wynn v. Lukoil N.A., LLC*, based on similar facts, but considered relative hardships between franchisor and franchisee. Similarly, in *MS & BP, LLC v. Big Apple Petroleum, LLC*, the U.S. District Court for the Eastern District of New York found no wrongful termination where franchisee failed to timely pay for fuel deliveries over franchisee's claims that franchisor failed to define "late payment."

In *Transbay Auto Service, Inc. v. Chevron USA Inc.*, the Ninth Circuit vacated the trial court's decision, finding no franchisor bona fide offer based on exclusion from evidence of the franchisor's premises appraisal, and determining on appeal that the appraisal was wrongfully excluded and remanding for a new trial. In *Fabbro v. DRX Urgent Care, LLC*, the Third Circuit referenced the PMPA in reviewing New Jersey's franchise statute. Finally, in *Lukoil N.A. LLC v. Turnersville Petroleum, Inc.*, the U.S. District Court for New Jersey, following the Third Circuit, held that the PMPA only preempts state laws that "limit the permissible substantive reason that a petroleum franchisor can terminate a franchise."

J. *Public Land and Resources*

The Public Land and Resources Committee focuses on federal land issues, including matters regarding the BLM, U.S. Forest Service (FS), National Park Service (NPS), Wildlife Refuge Management system, recreation, wilderness, wildlife open space, grazing, species conservation, conventional energy, renewable energy, mining, and other uses of public lands.

In 2015, after years of administrative review in *Rags Over the Arkansas River, Inc. v. BLM*, the U.S. District Court for the District of Colorado determined that Christo and Jean-Claude's art installation project over the Arkansas River survived plaintiff's administrative challenges to BLM's approval under the Federal Land Policy Management Act (FLPMA).

Regarding standing to bring lawsuits related to public lands, in *Swanson Group Manufacturing, LLC v. Jewell*, involving timber sales pursuant to the Oregon and California Lands Act of 1937, the D.C. Circuit found no case or controversy and no standing where plaintiffs' claims were based solely on conclusory allegations of injury.

Regarding further interpretation of the important historical public lands statute, the Federal Revised Statute 2477 (R.S. 2477) of 1866, repealed in 1976, in *United States v. Lyman*, the court held that a BLM map indicating a public right of way could not be relied upon by the criminal defendants in their defense against conviction for violating federal law by operating vehicles on BLM lands closed to such use as the road had not been adjudicated as an R.S. 2477 right-of-way pursuant to the Quiet Title Act (QTA). In

North Dakota v. United States, the U.S. District Court for North Dakota considered applicability of the federal limitations period considering alternative authority in a R.S. 2477 QTA action challenging federal rights-of-way through federal grasslands, followed by the Eighth Circuit's review and rejection of plaintiff's petitions to intervene as of right or for permissive intervention. In *Abdo v. Reyes*, the U.S. District Court for the District of Utah reviewed applicability of state and federal limitations periods in another R.S. 2477 QTA action.

In *Pit River Tribe v. Bureau of Land Management (BLM)*, the Ninth Circuit reviewed standing and procedural issues arising with BLM leasing decisions under the Geothermal Steam Act (GSA). Finally, the U.S. Supreme Court denied certiorari for *Kane County Utah v. United States*, regarding the disputed title requirement QTA as applied to R.S. 2477, and also for *United States v. Hammond*, regarding mandatory minimum sentencing for arson—intentionally setting grass fires—on federal land.

K. Renewable, Alternative, and Distributed Energy Resources (RADER)

The RADER Committee focuses on those issues that affect expansion of markets for renewable and distributed energy resources, including stimulation of development, measures for commoditization and value maximization, constraints of current energy policy, environmental legal requirements, and structuring finance.

The year 2015 saw impressive commitments by the federal and state governments toward renewables and grid resilience. Hawaii committed to generating 100% of its electrical sales from renewable resources by 2045, California followed with commitments of 33% by 2020 and 50% by 2030, and New York with 50% by 2030. New York's 2014 Reforming the Energy Vision (REV) advanced in 2015 with its Track One, a Distributed System Platform, and Track Two, an examination of ratemaking practices and revising its utility business model.

Congress remarkably achieved consensus with the Consolidated Appropriations Act of 2016, with something for everyone, extending both solar Investment Tax Credits (ITC) and wind Production Tax Credits (PTC), while also lifting the forty-year ban on oil exports. While incentives continued for solar investment, net metering took hits in Hawaii and Nevada, though Colorado, California, and New York continue to see positive net metering developments. Offshore wind projects progressed with the first completed wind farm, DeepWater Wind's Block Island Wind Farm, 30 megawatts and five turbines, off the coast of Rhode Island. The Bureau of Ocean Energy Management issued leases off the coast of Massachusetts and New Jersey, adding to the inventory of existing off-shore leases.

The Department of Energy (DOE) Office of Energy Efficiency and Renewable Energy (EERE) approved $75 million for solar energy accessibility, $14 million for community solar plans, and $30 million for hydropower, while EERE's Fuel Cell Technologies offices reported 580 patents and other technologies resulting from EERE's funding. DOE's Advanced Research Projects Agency-Energy (ARPA-E) announced additional funding available through its newest program, Network Optimized Distributed Energy Systems (NODES), targeting virtual energy storage systems coordinating load and generation on the grid, reducing wasted energy and increasing grid utilization of renewables. Microgrid integration is gaining momentum, with investment by New York, Pennsylvania, and Colorado, in addition to a privately funded project in Lancaster, Texas, called the Oncor microgrid. Finally, 2015 is the northeast Regional Greenhouse Gas Initiative third three-year control period, with RGGI states reporting 96% compliance.

L. Water Resources

The Water Resources Committee focuses on substantive and practice developments impacting water allocation and availability for all water users, particularly including: state water law; federal and tribal water law; issues arising under the Endangered Species Act and the Clean Water Act; interstate allocation of water; the Public Trust and Prior Appropriation Doctrine; reserved water rights; state, local, and municipal water supply; water rights transfers; and federal reclamation law. The Committee is particularly focusing on issues driven by water scarcity including interdependence of water uses by all economic sectors and the connection between water quantity and water quality.

The Water Resources Committee provides a unique summary of water rights, resource planning, and conservation developments tracking state legislation, administrative decisions and caselaw in Alaska, Arkansas, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming, with summaries for the Eastern States and the Great Lakes as well. The state and regional summaries are best read in their entirety.

Federal developments in 2015 include the agreement reached by Colorado, Kansas, and Nebraska regarding additional flexibility under the Republican River Compact and continued developments in the Montana and Wyoming dispute regarding the 1950 Yellowstone River Compact. Litigation regarding water use from Nevada's Walker River continued with *United States v. Walker River Irrigation District*, while federal legislation is pending in the House and Senate that would amend the U.S. Food, Drug, and Cosmetic Act to prohibit sale or distribution of cosmetics with microbeads to protect surface waters and the environment including the Great lakes.

III. CROSS PRACTICE AREAS

A. *Alternative Dispute Resolution*

The Alternative Dispute Committee focuses on all aspects of alternative dispute resolution (ADR) affecting environmental, energy, and resource issues.

In 2015, federal courts in California reviewed mediation agreements in three Superfund cases involving multiple party remediation of contaminated property and a shipyard, and state cost recovery for remediation of a wood preserving operation. Additionally, the case *McGinnes Industries Maintenance Corporation v. Phoenix Insurance Company*, reported above, is significant for this Committee as well, as it found that an insurer has a duty to defend in response to an EPA CERCLA enforcement demand for a good-faith offer of settlement.

Decisions regarding alternative dispute resolution processes were issued by federal courts in several states: in Florida, holding that failure to provide a settlement demand is not failure to mediate in good faith absent a requirement for such a demand; in Pennsylvania, emphasizing confidentiality of mediation communications; in California, allowing communications prepared for mediation to be privileged but allowing waiver if express; and in Ohio, finding that while a federal common law privilege did not apply, the state's Uniform Mediation Act protected mediation communication absent exemption or waiver. State courts in Illinois, Oregon, and Arizona reviewed the states' mediation statutes' scope of confidentiality and privilege, as well as necessary elements for their preservation. A California appellate court addressed a law firm's vicarious disqualification arising from a single firm lawyer's voluntary participation in a settlement panel, while a federal district court in Arizona reviewed the reasonableness of attorney's fees due to failure of two separate mediation sessions, and a New York appellate court upheld a fee agreement providing a premium rate for a single mediation session. A New

Jersey appellate court reviewed the impact of ex parte communications between the arbitrator and opposing counsel.

Regarding regulation of mediators, the Arizona Supreme Court amended its rules to clarify that serving as a mediator is not the practice of law and requiring mediators who are not active members of the state bar to be certified to prepare mediation agreements if not supervised by an attorney.

In addition to a summary of mediation activities to resolve various environmental issues, the Committee provides several case studies of significant settlements, including: the Montana Confederated Salish and Kootenai Tribes of the Flathead Reservation water rights settlement; the California negotiations to reintroduce spring-run Chinook salmon or steelhead trout to the North Yuba River; the Alabama, Georgia, and Florida Apalachicola-Chattahoochee-Flint Basin sustainable water management plan; the Gulf of Mexico BP Oil Spill; the California and Nevada Truckee River Operating Agreement; and the California and Oregon Klamath River Basin Restoration Agreements.

C. Climate Change, Sustainable Development and Ecosystems

The Climate Change, Sustainable Development, and Ecosystems Committee focuses on the regulatory and legal aspects of climate change, sustainability concepts, and relevance to law, corporate governance, and environmental practice areas, as well as ecosystem-based approaches to environmental protection and regulation.

2015 was once again the hottest year on record, and unlike prior years, it was also the year which may have seen the most productive response to climate change to date, with the United Nations Framework Convention on Climate Change (UNFCCC) Twenty-first Session of the Conference of the Parties (COP21) in Paris. The United States agreed to reduce its emissions by 26-28% below 2005 levels by 2025, relying on reductions that would be achieved with EPA's 2015 power plant regulations. The Paris Agreement was reached by 195 countries on December 12, 2015, after two weeks of negotiations; it will become enforceable upon ratification by fifty-five countries and effective in 2020.

Meanwhile, in separate actions by individual countries, the Hague District Court ordered the Netherlands to reduce its greenhouse gas emissions, and the Lahore High Court ordered the Pakistan to begin implementing its climate change policies. Cap-and-trade programs continue to be proposed, including Canada's program with Quebec and California, and China, which is already operating seven pilot programs in its provinces. The Under 2º Memorandum of Understanding (MOU) is another group of 123 states and regions committing to reducing greenhouse emissions. Finally, along with these multiple fronts of global commitment to greenhouse gas emission reductions, the Vatican released Pope Francis' 184-page encyclical on climate change and the environment.

In 2015, the Twenty-seventh Meeting of the Parties (MOP27) for the Montreal Protocol was also held, pursuant to which ozone depleting chemicals have been eliminated or reduced globally, many of which have very high carbon dioxide equivalents, including hydrofluorocarbons (HFCs). The parties could not reach an agreement at MOP27 regarding HFC reductions, but many parties have proposed reductions and agreement may be reached in 2016.

Also addressed by the Air Quality Committee, this Committee reports on EPA's most significant greenhouse gas regulations to date, limiting new and existing power plant emissions, in addition to additional methane emission control regulations for the oil and gas sector, new fuel efficiency standards for medium to heavy trucks, and an endangerment finding supporting aircraft emission regulations. Also in 2015, the Obama Administration denied a permit for the Keystone XL pipeline. In addition to several other bills introduced to defeat EPA's GHG authority, Congress passed resolutions under the Congressional Review Act disapproving the NSPS for EGUs and the CPP, which

President Obama vetoed. The Committee summarizes regional activities, including the Western Climate Initiative including California, Quebec, Ontario, and Manitoba; RGGI, discussed above; the Transportation and Climate Initiative (TCI); a new northeastern collaboration facilitated by the Georgetown Climate Center; and the International Zero-Emission Vehicle Alliance. Additionally, several states continued individual action to reduce GHG emissions including, California, Hawaii, New York, Oregon, Vermont, and West Virginia.

Regarding adaptation to climate change, the Paris Agreement also progressed efforts to address adaptation to the adverse effects of climate change, with Article 9 requiring financial support by developed nations for developing nations' adaptation efforts, and continued support of the Warsaw International Mechanism for Loss and Damage from climate change impacts. Also in 2015, the Green Climate Fund (GCF), the UNFCCC's financial mechanism, became fully operational. In the United States, President Obama signed Executive Order 13690, issuing the Federal Flood Risk Management Standards, which extends requirements to climate change and sea level rise, while the USCOE released its North Atlantic Case Comprehensive Study providing adaptation strategies for storm surges and sea level rise. The Federal Highway Administration proposed regulations requiring state transportation agencies to consider current and future conditions, including extreme weather and climate change, and the Federal Emergency Management Agency released its State Hazard Mitigation Plan Guidance. Additionally, fifteen states now have comprehensive adaptation plans along with New York City, the metro-Boston area, and Miami-Dade County in Florida.

Regarding sustainable development, in 2015, the UN General Assembly adopted a resolution setting seventeen new global sustainability goals for 2015-2030. Stock exchanges in thirty-one countries joined the UN's Sustainable Stock Exchange (SSE) initiative, while fifty-four African countries signed the Cairo Declaration on Managing Africa's Natural Capital for Sustainable Development and Poverty Eradication. The Association for Sustainable and Responsible Investment in Asia (ASrIA) established the Private Equity ESG initiative, and the International Chamber of Commerce issued a revised version of its Business Charter for Sustainable Development. Nationally, the Sustainability Accounting Standards Board (SASB) issued voluntary reporting guidelines for chemical and heavy industry, retailers and consumable products, renewable and alternative energy companies, as well as Fundamentals of Sustainability Accounting (FASB) credentials. Finally, in 2015, a new record of 433 corporate shareholder resolutions on environmental and social issues were filed, and President Obama issued Executive Order 13693, Planning for Federal Sustainability in the Next Decade, along with implementing instructions.

In 2015, ExxonMobil was challenged for its public engagement regarding climate change, facing accusations that it knew carbon dioxide emissions from fossil fuels posed significant risks, but concealed this knowledge from the public. The New York Attorney General initiated an investigation into ExxonMobil's research regarding climate change under state law, targeting alleged consumer and securities fraud based on ExxonMobil's public statements. Peabody Energy Corporation reached its own settlement with the New York Attorney General, agreeing to revise its disclosures to address climate change and climate policy risks.

Regarding ecosystems, international agreements to protect ecosystems were reached between the U.S. and Cuba, the Third Session of the Plenary of the Intergovernmental Platform on Biodiversity and Ecosystem Services (IPBES-3) met in Germany, the Eighth Annual Polar Law Symposium was held in Alaska, and the Third Steering Committee for the United Nations Environmental Program (UNEP) International Ecosystem Management Partnership (IEMP) approved a new work plan. Nationally, President Obama issued a memorandum directing departments and agencies

to incorporate ecosystem services into their decision making, in addition to a memorandum requiring all natural resource management agencies to mitigate impacts on natural resources. The EPA issued its National Ecosystem Services Classification System (NESCS) report, and as reported by other committees, promulgated with the USCOE the Clean Water Rule, which was immediately challenged and stayed.

C. Constitutional Law

The Constitutional Law Committee covers federal and state constitutional issues arising in the practice of environmental law, particularly issues of standing, preemption, takings, the separation of powers, and all constitutional issues related to the prosecution of environmental crimes.

This year, the Committee discusses 2015 constitutional law developments in Article III standing, the commerce clause, federal preemption, takings and due process, the First and Eleventh Amendments, and state constitutional law. Specifically regarding standing, in *Arizona State Legislature v. Arizona Independent Redistricting Commission* concerning the Election Clause, the U.S. Supreme Court upheld the district court cautioning parties not to confuse "weakness on the merits with the absence of Article III standing." In *Alabama Legislative Black Caucus v. Alabama* regarding the Equal Protection Clause and associational standing, the Court reversed the district court, determining that an initial finding of insufficient evidence regarding residence merited a request for further evidence rather than dismissal of the entire claim. The Committee also noted *Organized Village of Kake v. U.S. Department of Agriculture*, reported above with Forest Resources, for resolution of intervenor standing in that Roadless Rule case, allowing Alaska standing to appeal as an intervenor due to the decision's adverse impact. Also, the D.C. Circuit found organizational standing in *Gunpowder Riverkeeper v. FERC*, although claims were outside the zone of interest, while the Ninth Circuit found organizational standing in *WildEarth Guardians v. U.S. Department of Agriculture* to review destructive predator control methods and *Cottonwood Environmental Law Center v. U.S. Forest Service* to review a consultation decision.

Commerce Clause cases included *Energy v. Environmental Legal Institute v. Epel*, in which the Tenth Circuit reviewed a Colorado renewable energy law mandating minimum percentages for consumer electricity, and on those facts, the court found no violation of the *Baldwin* "extraterritoriality" doctrine. Preemption cases included the Second Circuit's decision in *Allco Finance Limited v. Klee*, declining to find that Connecticut's alternative energy power contracts were federally preempted, while the Sixth Circuit held in *Merrick v. Diageo Americas Supply, Inc.* that the CAA does not preempt state common law claims due to the citizen suit savings clause, distinguishing the U.S. Supreme Court's decision in *American Electric Power Co. v. Connecticut*, which reviewed CAA displacement of federal common law. The U.S. District Court for the Northern District of California held in *Lawson v. General Electric Co.*, that state law claims were only preempted to the extent they conflicted with the federal requirements, while in *American Fuel & Petrochemical Manufacturers v. O'Keefe*, the U.S. District Court for the District of Oregon held that EPA's decision to not regulate methane in fuels does not preclude state regulation. However, the U.S. District Court for the District of Hawaii, in *Robert Ito Farm, Inc. v. County of Maui*, found Maui's GMO restrictions precluded by the federal Plant Protection Act.

Regarding takings, among several other cases, the most significant to the Committee was *Horne v. Department Agriculture*, in which the U.S. Supreme Court, in the case of federal mandated raisin reserves applied against raisin farmers, held that the takings clause applies to personal and real property, where the taking of personal property need not be complete, and found a per se taking in the case. Regarding due process,

among other developments, in *Grocery Manufacturers Association v. Sorrell*, the U.S. District Court for the Western District of Virginia reviewed industry's due process challenge and held that the challenged statute restricting GMO food labeling was void for vagueness. In a case also covered by the Oil and Gas report, the U.S. District Court for the District of New Mexico, in *Swepi, LP v. Mora County*, denied industry due process challenge to a county ban on fossil fuel extraction, though finding the ban otherwise invalid based on preemption and the Supremacy Clause.

Regarding First Amendment challenges, the most significant development was the Supreme Court decision in *Reed v. Town of Gilbert, Arizona*, wherein the Court provided a bright-line test for determining whether a law is content based. This test is: if the law defines the subject of its regulation in terms of the message, then it is content based and will automatically be subject to strict scrutiny. Regarding Eleventh Amendment challenges, several decisions clarified the scope of immunity from suit in federal courts, including in the U.S. District Court for the Northern District of Mississippi, regarding a section 183 action; in the Second Circuit, regarding alleged violations of the Fair Labor Standards Act; and in the Eleventh Circuit, regarding the Age Discrimination in Employment Act.

Finally, several states addressed state constitution challenges, including: the New Mexico Court of Appeals, holding that the public trust doctrine does not allow the judicial branch to unilaterally regulate greenhouse gas emissions; the Georgia Supreme Court, reviewing a dormant commerce clause challenge to a local solid waste ordinance; the Mississippi Supreme Court, considering the boundary between private uplands and submerged sovereign lands; and the Kentucky Court of Appeals, reviewing to distinguish between state constitutional venue and jurisdiction.

D. *Government and Private Sector Innovation*

Formerly known as the Innovation, Management Systems, and Trading Committee, the Government and Private Sector Innovations Committee addresses the range of legal issues, U.S. Defense Department collaboration with the private sector and civilian agencies in developing and procuring "sustainable" cleantech support for mission performance, the increasing use of public-private partnerships as a means for federal, state, and local governments to deal with current and pressing severe austerity requirements, and on-going government efforts to reward the private sector for voluntary use of innovative techniques to promote sustainability.

The FAST Act, covered by Native American Resources, is significant for this Committee's focus on public private partnerships (P3) because it repealed restrictions on tax-exempt bonds so they can be used by municipalities, potentially in partnership with the private sector, to fund public water supply projects under the Water Infrastructure Finance and Innovation Act (WIFA). EPA's Water Infrastructure and Resilience Finance Center, launched in 2015, has focused on P3 as a vehicle to address aging infrastructure. Also important for this Committee is the Congressional extension of renewable tax incentives and other funding mechanisms for renewables and energy efficiency projects, likewise covered by the Renewable, Alternative and Distributed Energy Resources report but without P3 focus. In 2015, the Department of Defense completed its largest solar installation, 18 megawatts, partnering with the Government Services Agency. Meanwhile, the Department of Energy's renewable energy loan projects and individual state green banks, such as Rhode Island's Efficient Buildings Fund, New York's Green Fund, and state tax code revisions to provide renewable energy incentives in New Jersey and Virginia were all growing sources of P3 project funding in 2015.

The Committee provides summaries of individual P3 projects in California (residential solar, waste-to-energy plant, and seawater desalinization), New York (net

metering), Maryland (green stormwater infrastructure), and Seattle (self-supporting building), and it concludes with new financing approaches, including solar securitization and crowd funding.

E. International Environmental and Resources Law

The International Environmental and Resources Law Committee was formerly known as the International Environmental Law Committee. This Committee focuses on international developments from the United Nations, the European Union, and other international agencies and governments regarding current environmental issues that are of international concern.

A significant 2015 development for the Committee was COP21, as well as Green Climate Fund and the Montreal Protocol MOP27 in Dubai, which for purposes of this summary has already been covered by the Climate Change, Sustainable Development, and Ecosystems Committee (CCSDE) report above. Also, the World Bank Group's Forest Carbon Partnership Facility (FCPF) made progress in 2015 toward reducing deforestation. Marine biodiversity progress between the United States and Cuba was covered by CCSDE, while H.R. 774 deterring illegal fishing was covered by the Marine Resources report. In addition, this Committee reviews the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) 2015 annual meeting in Australia, which again failed to reach agreement to protect areas around Antarctica. The report also covers the second international Our Ocean Conference, where more than fifty countries focused on marine pollution acidification and overfishing. International fisheries management progressed with the Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean entering into force in 2015, while members of the International Commission for the Conservation of Atlantic Tunas developed amendments to update fisheries management principles. Also, the International Tribunal for the Law of the Sea (ITLOS) addressed illegal fishing, rights, and duties under international law, and agreement was reached on the Trans-Pacific Partnership (TPP) regional trade agreement.

International hazard management focused on transboundary movement of hazardous waste with the twelfth meeting of the Conference of the Parties (COP12) for the Basel Convention on the Transboundary Movement of Hazardous Wastes and Their Disposal, held with the Rotterdam and Stockholm Conventions (a Triple COP). COP12 adopted guidelines for management of persistent organic pollutants, including mercury and e-waste, and focused on implementing the Cartagena declaration on waste prevention, minimization, and recovery for hazardous and household wastes. The International Conference on Chemicals Management, governing the United Nations Environmental Program (UNEP)'s Strategic Approach to International Chemicals Management (SAICM) met in 2015 for its fourth session (ICCM4), to address sound management of chemicals and waste. Moreover, international biotechnology litigation progressed with the Syngenta corn biotech case, also covered by Agricultural Management above.

The global water crisis was felt acutely in 2015, as global drought continued through October. Significantly, Israel and Jordan signed an agreement to exchange water and jointly funnel Red Sea brine to the Dead Sea. Additional agreements progressed between Ethiopia, Egypt, and Sudan, regarding Ethiopia's Grand Renaissance Dam. Additionally, China released a plan to clean up its most heavily polluted waters by 2020.

Biological resources and wildlife were the focus of international support in 2015, in response to significant poaching and illegal trade. The Convention on International Trade in Endangered Species (CITES) and UNEP announced a new collaborative effort supporting CITES implementation, while the UN General Assembly adopted a resolution,

Tackling Illicit Trafficking in Wildlife, calling for member states to recognize wildlife trafficking as a serious crime. However, the TPP regional trade agreement may represent the most significant progress in wildlife and biodiversity conservation. Also in 2015, the UN General Assembly adopted the Sustainable Development Goals, including Goal 15, which encourages nations to promote sustainability to protect ecosystems and halt loss of biodiversity.

In litigation, the World Trade Organization (WTO) ruled against the United States and for Mexico regarding the "dolphin safe" label, finding it violated the General Agreements on Tariffs and Trade (GATT) and the Agreement on Technical Barriers to Trade (TBT). Also, while there was no prosecution of Walter Palmer, the Minnesota dentist who killed Cecil, the black-maned Zimbabwe lion, Lumber Liquidators was convicted under the U.S. Lacey Act for illegally importing hardwood from an endangered Siberian tiger habitat in eastern Russia.

In finance, 2015 developments occurred with the Global Environment Facility (GEF), the World Bank Environmental and Social Safeguard Policy Review, and the Asian Infrastructure Investment Bank.

F. Science and Technology

The Science and Technology Committee covers scientific and technological issues and trends in litigation, federal and state regulatory regimes, and legislative developments in practice areas across the spectrum of environmental, energy, and resources law.

Most important 2015 developments for the Committee were EPA's 2015 release of two technical guides for evaluating vapor intrusion and TSCA developments. The vapor intrusion guides, of which one the Committee discusses in detail, are also referenced with the Environmental Transactions and Brownfields report above, and include one general guide for volatile organic chemicals and a second specifically addressing volatile organics from petroleum releases. These guides are the first issued since the 2002 draft guidance based on the "Johnson Ettinger" model, which at least some practitioners found to be overly conservative and impractical. In contrast, the 2015 guides reflect EPA's experience with years of indoor air sampling, evaluation of potential for volatilization, degradation, and attenuation, all supporting a more helpful and practical approach.

Additionally, the Committee reported TSCA developments in detail, including chemical assessments, problem formulations, and initial assessments and data needs assessments, which were also a focus of the Pesticides, Chemical Regulation and Right-To-Know Committee report.

G. Smart Growth and Green Buildings

The Smart Growth and Green Buildings Committee (SGGB) focuses on national developments in environmental, land development, and energy regulation and policy, especially on the interaction between environmental, urban and sustainability policy and emerging best practices.

In its 2015 report, the Committee discusses green building and smart growth developments, including federal, state, and local executive and legislative actions encouraging energy efficiency, renewable energy, and green infrastructure, such as net-metering and microgrid approaches. Many of these developments are covered by the Climate Change, Sustainable Development, and Ecosystems Committee, while those developments involving government and private partnerships are also covered by the Government and Private Sector Innovation Committee.

Regarding green buildings, among other positive developments removing barriers to energy efficiency implementation, the Housing and Urban Development (HUD) and the Department of Agriculture (USDA) determined that they will be requiring energy efficiency codes in HUD and USDA assisted housing. The Committee also summarizes 2015 activities of the U.S. Green Building Council (USBGC) regarding Leadership in Energy and Environmental Design (LEED), such as switching to the new LEED v4 and other innovations, and developments involving the Green Real Estate Sustainability Benchmark (GRESB) and Green Business Certification Inc. (GBCI), including the release of two new sustainability standards, Sustainable Sites Initiative (SITES) for landscapes and Performance Excellence in Energy Renewal (PEER) for energy supply.

Regarding smart growth, President Obama announced ArtPlace America, awarding funds to community development incorporating arts and cultural strategies in revitalization projects. Additionally, several state and local smart growth initiatives saw reduction in parking restrictions in Minneapolis and Chicago; support for biking and other targeted transit improvements in Chicago, Los Angeles, and New York; incentives for urban farms, gardens, wetlands, or other greenspace in Los Angeles and Santa Clara County, California, as well as Detroit, New York, and Wichita, Kansas (also discussed with the Agricultural Management report), with greener infrastructure including power production from water and wastewater management in Portland and D.C.

G. Ethics and the Profession

The Ethics and Professionalism Committee is a Council Committee advising SEER of developments in ethics and professional responsibility.

The Ethics Committee reports regarding the 2015 SEER Book Project, and its progress on *Ethics and Environmental Practice: The Practitioner's Guide*. Also in 2015, the Standing Committee on Ethics and Professional Responsibility proposed to add "knowing discrimination" to the ABA Model Rules of Professional Conduct Rule 8.4 prohibitions which would extend to harassing or knowing discretion based on race, religion, national origin, ethnicity, disability, sex, age, sexual orientation, gender identity, marital status, or socioeconomic status. The 2015 Governmental Accounting Office ruled that EPA violated anti-propaganda and anti-lobbying prohibitions through its Waters of the United States (WOTUS) CWA rule public outreach efforts via social media, specifically Thunderclap and campaigns for linking to external sites.

Finally, the Committee discusses implications of the DOJ's 2015 policy memorandum, "Individual Accountability for Corporate Wrongdoing," by Deputy Attorney General Sally Quillian Yates (also called "The Yates Memo"), which practitioners anticipate will put a much more individual, and personal, face on EPA's criminal enforcement actions.

The Year in Review 2015

Chapter 1 • AGRICULTURAL MANAGEMENT
2015 Annual Report[1]

I. CONCENTRATED ANIMAL FEEDING OPERATIONS

Both federal and state courts addressed concentrated animal feeding operation (CAFO) issues in 2015. In *Community Association for the Restoration of the Environment v. Cow Palace, LLC*, a federal district court in Washington State issued a preliminary ruling that the large-scale dairy CAFO could be liable under the Resource Conservation and Recovery Act (RCRA) for the contamination of groundwater arising from the dairy's handling and application of manure.[2] Among other findings, the court determined that manure could be considered a RCRA solid waste when it leaks from storage facilities or is over-applied to fields in a manner that allows the manure to leak from the soil. The court found that in these situations, the manure no longer serves a useful or beneficial purpose as fertilizer.

The plaintiffs had sued numerous CAFOs in the Yakima Valley. After the *Cow Palace* ruling, the dairy operators entered into a consent decree, agreeing to stricter requirements for managing dairy manure, such as double-lining manure storage lagoons, limiting the amount of manure applied to fields, monitoring groundwater, and providing clean drinking water to area residents whose water sources were contaminated by manure.[3] The settlement also requires that the concentration of nitrate plus ammonium allowed in manure applications be lowered to 25 ppm by 2018, down from 45 ppm as approved by EPA in 2013.

In another case, the Supreme Court of Minnesota considered whether a farmer must obtain federal and state pollutant discharge permits for animal waste run-off from land used as cropland in the summer and as a livestock feeding site during the winter.[4] The court concluded that a federal National Pollutant Discharge Elimination System permit was not needed because the fields met a federal regulatory requirement that they be vegetated during the normal growing season, even if they were bare when animals were present in the winter. However, the court ruled that under the Minnesota Pollution Control Act, a farmer must obtain a state permit. The court interpreted the state law as requiring a state permit unless there is vegetative cover on the field throughout the year.[5] The court further determined that the cover could be growing vegetation or post-harvest residues maintained until the next growing season.

CAFO air emission regulations were addressed in *Zook v. Environmental Protection Agency*.[6] The plaintiffs were Iowa residents who wanted EPA to list ammonia and hydrogen sulfide as criteria pollutants, issue National Ambient Air Quality Standards for these listed pollutants, and list animal feeding operations as stationary sources of these air pollutants. The U.S. Court of Appeals for the District of Columbia ruled that EPA had no mandatory duty under the Clean Air Act to issue

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[2]80 F. Supp. 3d 1180 (E.D. Wash. 2015).

[3]Consent Decree, Cmty. Ass'n for Restoration of the Env't v. Cow Palace, LLC, No. 13-CV-3016-TOR (E.D. Wash. May 19, 2015).

[4]*In re* Reichmann Land & Cattle, LLP, 867 N.W.2d 502 (Minn. 2015).

[5]*See* MINN. STAT. § 116.07, subdiv. 7d(b) (2014).

[6]611 F. App'x 725 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 421 (2015).

the regulations sought by the plaintiffs. The Supreme Court denied a petition for writ of certiorari.

II. AGRICULTURE AND BIOTECHNOLOGY

This year brought a historical decision that allowed nuisance, negligence, and other claims to proceed against Syngenta based on its decision to market two biotech corn products (Viptera™ and Duracade™) without waiting for food or feed import approvals from China. Although China approved Viptera in 2014, the steady progress of litigation involving farmers and grain traders did not slow. The plaintiffs won a significant victory on September 11, 2015, when the court denied most of Syngenta's motion to dismiss. The court concluded that "the risk of a flood of new litigation is sufficiently great and sufficiently unfair to preclude the recognition of a legal duty here."[7]

The U.S. Department of Agriculture (USDA) reported that more than 90% of all soybeans, upland cotton, and corn grown in the United States used biotech traits.[8] The USDA approved a non-browning apple, with more biotech crops pending that will bring biotech foods, such as sweet corn, to U.S. tables.[9] After many years of waiting, the U.S. Food and Drug Administration (FDA) finally approved a fast-growing salmon from AquaBounty, which will be marketed and sold under the label "Atlantic Salmon."[10] This is the first genetically modified (GM) animal approved for food use.[11] The Center for Food Safety has announced its intention to file a lawsuit challenging the agency's approval of the genetically engineered fish.[12]

Internationally, developing nations are opening pathways to rapid adoption of biotech crops, potentially increasing yields despite drought.[13] The European Union (EU) is allowing member states to ban crops but denied them the right to reject EU-approved food and feed.[14] Canada continues to lead efforts to set a reasonable

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[7] *In re* Syngenta AG MIR 162 Corn Litigation, No. 14-MD-2591-JWL, 2015 WL 5607600 (D. Kan. Sept. 11, 2015).

[8] *Genetically Engineered Varieties of Corn, Upland Cotton, and Soybeans, by State and for the United States, 2000-15*, DEP'T OF AGRIC. ECON. RESEARCH SERV., http://www.ers.usda.gov/data-products/adoption-of-genetically-engineered-crops-in-the-us.aspx (last updated July 9, 2015).

[9] Press Release, U.S. Dep't of Agric., Animal & Plant Health Inspection Serv., USDA Announces Deregulation of Non-Browning Apples (Feb. 13, 2015).

[10] Letter from Bernadette M. Dunham, Dir., Ctr. For Veterinary Med., FDA, to Ronald Stotish, CEO and Pres., AquaBounty Techs., AquAdvantage Salmon Approval Letter and Appendix, NADA 141-454 (Nov. 19, 2015).

[11] Andrew Pollack, *Genetically Engineered Salmon Approved for Consumption*, N.Y. TIMES, (Nov. 19, 2015), http://www.nytimes.com/2015/11/20/business/genetically-engineered-salmon-approved-for-consumption.html?_r=0.

[12] *Help CFS Fight the Approval of GE Salmon in Court*, CTR. FOR FOOD SAFETY, https://salsa3.salsalabs.com/o/1881/p/salsa/donation/common/public/?donate_page_KEY=12505 (last visited Mar. 7, 2016).

[13] *ISAAA Brief 49-2014: Executive Summary*, INT'L SERV. FOR THE ACQUISITION OF AGRI-BIOTECH APPLICATIONS, http://isaaa.org/resources/publications/briefs/49/executivesummary/default.asp (last visited Mar. 7, 2016).

[14] AFP, *EU Countries Won't be Able to Opt Out from Genetically-Modified Food*, THEJOURNAL.IE (Oct. 28, 2015, 5:08 PM), http://www.thejournal.ie/eu-gmo-opt-out-2413905-Oct2015/.

tolerance for the unintended low-level commingling of new biotech crops that lack import approval to avoid trade disruption.[15] Tolerance remains at zero, triggering disruption that can lead to mass tort liability.

Vermont's GM food labeling law will take effect in 2016.[16] The law requires all GM food to be labeled if its GM content exceeds 0.9%. The legislation survived a preliminary injunction challenge;[17] an appeal is pending at the Second Circuit Court of Appeals.[18]

While the battle over mandatory GM labeling wages on in the courts and the legislatures, the White House announced on July 2, 2015, that it is planning to overhaul the existing system for regulating biotechnology products.[19] Promulgated in 1986, the Coordinated Framework for the Regulation of Biotechnology represents a coordinated effort between EPA, USDA, and FDA.[20] In 1992, the Office of Science and Technology Policy updated the Coordinated Framework, implementing a risk-based approach to overseeing practices that introduce biotechnology products into the environment.[21]

Additionally, the USDA is seeking public comment on its approval process. Given the looming influence of the National Environmental Policy Act (NEPA), approvals of some biotech crops are being delayed pending completion of environmental impact statements (EIS).[22] These EISs consider economic impacts of biotech crops, including export-related impacts like those being litigated in the Syngenta case.[23]

III. URBAN AGRICULTURE

[15] *Frequently Asked Questions – Revised Draft Policy on the Management of Low-Level Presence of Genetically Modified Crops in Imported Grain, Food and Feed and its Associated Implementation Framework for Grain*, AGRIC. AND AGRI-FOOD CANADA, http://www.agr.gc.ca/eng/about-us/public-opinion-and-consultations/update-on-domestic-low-level-presence-policy-development/frequently-asked-questions-revised-draft-policy-on-the-management-of-low-level-presence-of-genetically-modified-crops/?id=1347981109268 (last updated Aug. 11, 2015).

[16] H.B. 112, 2013-2014 Gen. Assemb. (Vt. 2014).

[17] Grocery Mfrs. Ass'n. v. Sorrell, 102 F. Supp. 3d 583 (D. Vt. 2015).

[18] Grocery Mfrs. Ass'n. v. Sorrell, 102 F. Supp. 3d 583 (D. Vt. 2015), *appeal docketed*, No. 15-1504 (2d Cir. May 6, 2015).

[19] Memorandum from John Holdren, Dir., Office of Sci. and Tech. Policy, et. al,, to Food and Drug Admin., et. al., Modernizing the Regulatory System for Biotechnology Products (July 2, 2015).

[20] 7 C.F.R. § 340 (1986).

[21] Exercise of Federal Oversight Within Scope of Statutory Authority: Planned Introductions of Biotechnology Products Into the Environment, 57 Fed. Reg. 6753 (Feb. 27, 1992).

[22] *Final EIS for 2,4-D Corn and Soybeans and Draft EIS for Dicamba Resistant Cotton and Soybeans*, ANIMAL AND PLANT HEALTH INSPECTION SERV. (Aug. 2014), *available at* https://www.aphis.usda.gov/publications/biotechnology/2014/faq_brs_eis.pdf.

[23] Peter Whitfield, *White House Announces Plans to Revise the Coordinated Framework for the Regulation of Biotechnology*, ENVTL. L. STRATEGY (July 8, 2015), http://www.environmentallawstrategy.com/2015/07/white-house-announces-plans-to-revise-the-coordinated-framework-for-the-regulation-of-biotechnology/.

Although urban agriculture was often overlooked in agricultural policies and city planning efforts in the past, these practices are increasing in popularity as a tool to mitigate climate change, improve urban resilience, and increase access to growing space for urban residents.[24] In 2015, cities continued to pass bills and ordinances to reduce the regulatory burden on metropolitan farmers and gardeners and to incentivize urban agriculture. For example, in March, Sacramento, California, passed the *Urban Agriculture Ordinance*, which amended its City Code to allow small-scale urban agriculture as either the primary land use or as an accessory use, such as with temporary on-site urban agricultural stands.[25] An ordinance providing tax incentives to promote urban agriculture was also passed.[26] Santa Clara County, California, adopted the *Urban Agriculture Incentive Zones Act*, which provides tax incentives for landowners who use vacant, unimproved, or blighted lands for small-scale agricultural production.[27] Some cities also passed ordinances allowing residents to raise farm animals within city limits. In July, for instance, the Pittsburgh, Pennsylvania City Council amended its *Zoning Code* to institute a more efficient and less costly permitting system for the raising of domestic small farm animals and honey bees by residents.[28] Similarly, in October, the Savannah, Georgia City Council amended its *Animal Control Ordinance* to implement rules for the keeping of urban livestock.[29] Urban agriculture promotes food security and urban resilience, leading local governments to increasingly welcome such practices.

In 2015, rooftop farms, a subcategory of urban agriculture, continued to provide urban residents with more agricultural space while also helping to improve building sustainability through city greening. For instance, the development of farms or gardens on the rooftops of affordable housing buildings has become an effective method for balancing the often competing interests of affordable housing and growing space in urban areas. In January, an affordable housing building opened in Portland, Maine, with a rooftop community garden composed of raised beds and a greenhouse.[30] Over the summer, a 619-unit affordable housing complex called Hunter's Point South Commons opened in Long Island City, New York, with thirteen planting beds, expected to yield 1,000 lbs of produce, and an apiary.[31] Cities all over

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[24]Susanne A. Heckler, *A Right to Farm in the City: Providing a Legal Framework for Legitimizing Urban Farming in American Cities*, 47 VAL. U. L. REV. 217, 223-27 (2012).

[25]SACRAMENTO, CAL., ORDINANCE 2015-0005 (Mar. 24, 2015).

[26]*Id.*

[27]*See* Memorandum from Kirk Girard, Dir., Dep't of Planning and Dev., to Bd. of Supervisors, Urban Agric. Program: AB 551 Implementation (Sept. 29, 2015).

[28]PITTSBURGH, PA., ORDINANCE 2015-1562 (amending and supplementing PITTSBURGH CODE tit. 9, art. V, §§ 911.02, 911.04.A.2 (2015)).

[29]Mary Landers, *Savannah City Council OKs Backyard Chickens, Bees—and Big Pigs*, SAVANNAH MORNING NEWS (Oct. 29, 2015, 9:18 PM), http://savannahnow.com/news/2015-10-29/savannah-city-council-oks-backyard-chickens-bees-and-big-pigs#; SAVANNAH, GA., ORDINANCE 10-29-2015 (Oct. 29, 2015) (amending SAVANNAH, GA., CODE pt. 9, ch. 5 (2003)).

[30]Mary Pols, *Rooftop Gardening, and Cooking Lessons, Come to New Apartment Building in Portland*, PORTLAND PRESS HERALD (Aug. 9, 2015), http://www.pressherald.com/2015/08/09/gardening-on-high-in-portlands-new-affordable-housing-building/.

[31]Katherine Clarke, *Hunter's Point Buzz: Rooftop Urban Farm at New Queens Rental Complex Will Have 13,000 Honey Bees*, N.Y. DAILY NEWS (May 14, 2015, 12:20

the United States are embracing urban agricultural practices like rooftop gardens or farms because of the benefits they provide.[32]

Overall in 2015, important urban agriculture milestones were reached and are likely to inspire further local action in support of sustainable agriculture in the future. As governments are zoning for and encouraging urban agriculture, cities will continue to reap the benefits of improved urban resilience and food security.

IV. DRONES, DATA, AND PRIVACY

There are strong reasons to believe that the Federal Aviation Administration (FAA) will promulgate a final rule for Small Unmanned Aircraft Systems (UAS) during 2016. On February 15, 2015, the FAA announced a proposed rule for small UAS.[33] The rule covers three components: Operator Certification and Responsibilities, Aircraft Requirements, and Operational Limitations, with the last section comprising the bulk of the regulation's text. Along with other provisions, the rule would authorize the use of UAS weighing less than fifty-five pounds for visual line-of-sight use. Public comment on the proposed rule closed on April 24, 2015. Until the rule becomes final, those wishing to use drones for commercial applications can apply for an exemption, which requires the applicant to hold a private pilot certificate and a third-class airman medical certificate. So far, the FAA has granted more than 3,300 exemptions.[34]

Although the agency missed its September 30, 2015 deadline for promulgating a final rule, the FAA has taken an initial step toward regulating both private and commercial drone use.[35] Beginning on December 21, 2015, UAS owners must register their aircraft with the FAA's UAS registry before taking to the skies.[36] Current drone operators had until February 19, 2016, to register their devices. Registrants will receive an identification number valid for three years that they must affix to their remote-controlled aircraft. The protocol imposes civil and criminal penalties on drone operators who fail to register.

Meanwhile, Senators Cory Booker (D-NJ) and John Hoeven (R-ND) introduced the Commercial UAS Modernization Act, which would set interim operating guidelines for commercial unmanned aircraft systems.[37] The bill would allow the operation of a small UAS for commercial purposes without first obtaining

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PM), http://www.nydailynews.com/life-style/real-estate/rooftop-farm-new-queens-rental-13-000-bees-article-1.2221998.

[32]Matthew R. Dawson, Note, *Perennial Cities: Applying Principles of Adaptive Law to Create A Sustainable and Resilient System of Urban Agriculture*, 53 U. LOUISVILLE L. REV. 301, 303 (2015).

[33]Operation and Certification of Small Unmanned Aircraft Systems, 80 Fed. Reg. 9544 (Feb. 23, 2015) (to be codified at 14 C.F.R. pts. 21, 43, 45, 47, 61, 91, 101, 107, and 183).

[34]*Section 333*, FED. AVIATION ADMIN, https://www.faa.gov/uas/legislative_programs/section_333/ (last updated Feb. 11, 2016).

[35]Keith Wagstaff, *FAA Misses Deadline for Creating Drone Regulations*, NBC NEWS (Oct. 1, 2015, 3:29 PM), http://www.nbcnews.com/tech/innovation/faa-misses-deadline-creating-drone-regulations-n437016.

[36]*Unmanned Aircraft Systems (UAS) Registration*, FED. AVIATION ADMIN., https://www.faa.gov/uas/registration/ (last updated Jan. 22, 2016).

[37]S. 1314, 114th Cong. (2015).

an airworthiness certificate. The amendment would end when the FAA's final Small UAS Rule takes effect.

On July 1, 2015, Florida's Freedom from Unwanted Surveillance Act (FUSA) became effective, prohibiting a person, state agency, or political subdivision from using a drone to capture an image of privately owned property or those on the property, including an owner, occupant, or invitee, without prior consent.[38] Some have expressed concern that the law will invite a wave of litigation over drone use as the FAA gradually loosens the restrictions on commercial drone use.[39]

Concerns whether farmers who opt into precision agriculture programs retain ultimate control over their data remained prominent in 2015. These software platforms use remote sensors or satellite imagery to collect information about a farmer's fields and use proprietary algorithms to provide the farmer with more accurate insight on how to best manage the operation at the intra-field level.[40] The last major effort to solidify an approach to privacy rights in the agricultural data arena came in the form of the *Privacy and Security Principles for Farm Data*, an agreement reached by agricultural technology providers and farmers interests groups in fall 2014.[41]

[38] FLA. STAT. § 934.50 (2015).

[39] Carolina Bolado, *New Fla. Drone Privacy Law Could Trigger Litigation Wave*, LAW360 (May 15, 2015, 4:31 PM) http://www.law360.com/articles/653530/new-fla-drone-privacy-law-could-trigger-litigation-wave (subscription).

[40] *See* Lauren Manning, *Setting the Table for Feast or Famine: How Education Will Play a Deciding Role in the Future of Precision Agriculture*, 11 J. FOOD L. & POL'Y 113 (2015).

[41] *Privacy and Security Principles for Farm Data*, AM. FARM BUREAU FED'N (Nov. 13, 2014), *available at* http://www.fb.org/tmp/uploads/PrivacyAndSecurityPrinciplesForFarmData.pdf.

Chapter 2 • AIR QUALITY
2015 Annual Report[1]

I. JUDICIAL DEVELOPMENTS

A. Title I—Federal & State Implementation Plans, Conformity, and Federal Facilities

In *Westar Energy, Inc. v. EPA*, the D.C. Circuit reviewed EPA's final action disapproving Kansas' proposed state implementation plan (SIP) revision for the 2006 fine particular matter national ambient air quality standard (NAAQS).[2] The petition arose out of Kansas' SIP that was made in response to more stringent EPA standards addressing nitrogen oxides (NO_x) and sulfur dioxide (SO_2) contributions to nonattainment of certain air quality standards. In April 2010, Kansas submitted a revised SIP incorporating its NO_x and SO_2 emissions. In July 2011, EPA issued a final action disapproving the revised SIP because the agency believed that Kansas had not provided a significant analysis of interstate transport and the downwind effect of its in-state emissions in the SIP. The court upheld EPA's decision and held that EPA's disapproval was not arbitrary, capricious, or otherwise outside the scope of the law.

In *National Parks Conservation Association v. EPA*, the Ninth Circuit reviewed whether EPA's regional haze federal implementation plan (FIP) for Montana included the ability to prescribe emission limits at certain power plants.[3] The court considered EPA's cost-effectiveness analysis as compared to NO_x and SO_2 emissions control. In finding EPA's determination to be arbitrary and capricious, the court reasoned that the FIP standards were internally inconsistent and did not adequately explain how these measures would cut costs and reduce emissions.

In *Sierra Club v. EPA*, the Sixth Circuit reviewed the Sierra Club's petition of EPA's redesignation of the Ohio and Indiana portions of the Cincinnati area from "nonattainment" to "attainment."[4] Applying an arbitrary and capricious standard, the

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[1]The Air Quality Committee prepared this report. Zachary Fayne and Thomas Santoro, Arnold & Porter LLP, Washington, D.C., edited the report. Contributing authors were: Tyler Bowlin, University of Oregon School of Law; Karen Bridges; Megan Galey, Husch Blackwell LLP, St. Louis, Missouri; Eric Gallon, Porter Wright Morris & Arthur LLP, Columbus, Ohio; Laura Marie Goldfarb and Marissa Grace, Steptoe & Johnson PLLC, Charleston, West Virginia; Shani S. Harmon, Baker Botts L.L.P., Washington, D.C.; Julia Johnson, Ballard Spahr LLP, Atlanta, Georgia; Rod Johnson, Enoch Kever PLLC, Austin, Texas; H. Michael Keller and Megan Nelson, Fabian VanCott, Salt Lake City, Utah; Ashleigh H. Krick, Vermont Law School, South Royalton, Vermont; Todd Palmer, Michael, Best & Friedrich LLP, Milwaukee, Wisconsin; Douglas Williams, St. Louis University School of Law, St. Louis, Missouri; Gretchen Frizzell, United States Environmental Protection Agency, Atlanta, Georgia; and Zachary Pilchen, United States Environmental Protection Agency, Washington, D.C. This work is not a product of the United States Government or the United States Environmental Protection Agency, and Ms. Frizzell and Mr. Pilchen are not doing this work in any governmental capacity. The views expressed by Ms. Frizzell and Mr. Pilchen are their own only and do not necessarily represent those of the United States or EPA. Senior Legal Assistant Leigh Logan, Arnold & Porter LLP, Washington, D.C., also assisted in the preparation of this report.

[2]608 F. App'x 1 (D.C. Cir. 2015).

[3]788 F.3d 1134 (9th Cir. 2015).

[4]793 F.3d 656 (6th Cir. 2015).

court upheld EPA's determination that the sources that reduce their emissions for a given area do not need to be physically located in the immediate locale because of the role of sources in upwind states affecting air quality in the Cincinnati area. The court further determined that a SIP need not address every statutory provision, but instead need only satisfy the applicable requirements necessary to achieve NAAQS compliance.

In *Indiana v. EPA*, the Seventh Circuit reviewed EPA's approval of Illinois' revised SIP for ozone, which proposed relaxed standards for the state's motor vehicle inspection and maintenance program.[5] The court held that Indiana had standing to challenge Illinois' revised SIP on the theory that it would increase Indiana's regulatory burden in helping the Chicago area achieve attainment. Nevertheless, the court held that EPA did not act arbitrarily or capriciously in approving the SIP, finding that EPA reasonably concluded under section 110(*l*) of the Clean Air Act (CAA), 42 U.S.C. § 7410(*l*), that increased emissions from the motor vehicle inspection and maintenance program would be outweighed by other emissions reductions, even though the SIP's relaxed standards for the program had arguably led to the classification of the Chicago area as nonattainment in the past.[6]

In *Berks County v. EPA*, the Third Circuit denied a Pennsylvania county's challenge to EPA's approval of Pennsylvania's SIP with respect to the monitoring of airborne lead particles in a certain nonattainment zone.[7] In December 2009, Pennsylvania's Department of Environmental Protection (DEP) installed a new lead monitor near a lead smelting facility in a nonattainment zone, which EPA subsequently approved. Deferring to EPA's fact-based analysis, the court held that EPA did not abuse its discretion by approving DEP's placement of the monitor, even though the facility's own monitors registered higher levels of lead, and DEP failed to account for fugitive emissions during its dispersion modeling process. In addition, the court held that data from the facility's own monitors did not provide a basis for vacating EPA's approval of the SIP, since the facility's monitor did not comply with EPA's technical requirements.[8]

In *National Parks Conservation Association v. EPA*, the Third Circuit partly granted and partly denied conservation groups' petition to review EPA's approval of Pennsylvania's Regional Haze SIP.[9] The SIP applied a best available retrofit technology (BART) analysis for most of the state's BART-eligible sources, but relied on a "better-than-BART" approach for eight fossil fuel-fired electric generating stations with a capacity of 750 megawatts or more, based on Pennsylvania's participation in the cap-and-trade-program for SO_2 and NO_x emissions under the Clean Air Interstate Rule.[10] The EPA ultimately approved Pennsylvania's plan with respect to the BART analysis but replaced the state's better-than-BART approach with a FIP that relied on EPA's nationally promulgated Cross-State Air Pollution Rule (Transport Rule).[11] The court held that although the D.C. Circuit had sole jurisdiction to review the national Transport Rule, EPA's approval of Pennsylvania's SIP was arbitrary based on multiple flaws in the

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[5]796 F.3d 803 (7th Cir. 2015).
[6]*Id.* at 810–15.
[7]619 F. App'x 179 (3d Cir. 2015).
[8]*Id.*
[9]803 F.3d 151 (3d Cir. 2015).
[10]Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions ot the NO_x SIP Call, 70 Fed. Reg. 25,162 (May 12, 2005) (to be codified at 40C.F.R. pts. 51, 72, 73, 74, 77, 78, and 96).
[11]Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208 (Aug. 8, 2011) (to be codified at 40 C.F.R. 51, 52, 72, 78, and 97).

state's BART analysis and EPA's insufficient explanation for overlooking the flaws. However, the court also held that the state was not required to consider limits imposed by best available control technology, lowest achievable emission rate, or maximum achievable control technology in conducting its BART analysis, and that the state was not required to set a cost-effectiveness threshold of pollution controls available for each BART-eligible source.[12]

In *El Comite Para el Bienestar de Earlimart v. EPA*, the Ninth Circuit denied a petition for review challenging EPA's approval of revisions to the California SIP requiring the reduction of volatile organic compounds (VOCs) emitted from agricultural and commercial pesticides.[13] The court held that the pesticide element of the SIP referred to both a 12% and a 20% reduction in VOC emissions, thus making the SIP ambiguous. As such, the court deferred to EPA's finding that the 12% requirement was an enforcement commitment, whereas the 20% figure was merely an aspirational goal. The court also rejected claims that EPA failed to consider whether the pesticide use allowed by the SIP might result in disparate health impacts on Latino school children in violation of Title VI of the Civil Rights Act.

In *Committee for a Better Arvin v. EPA*, the Ninth Circuit partially granted a petition for review challenging EPA's approval of California SIP provisions addressing $PM_{2.5}$ and ozone pollution in the San Joaquin Valley.[14] The court held that EPA violated the CAA by failing to include within the SIP several state enacted mobile source emission standards that were part of the California's NAAQS compliance strategy. However, the court upheld EPA's approval of the SIP provisions that were state commitments to propose and adopt future emission control measures sufficient to achieve aggregate emission reductions that would result in compliance with the NAAQS. The court held that these SIP commitments for future action were enforceable because the requirements and relevant deadlines for action are binding on the state and can only be altered through a SIP revision approved by EPA in notice-and-comment rulemaking.

In *Natural Resources Defense Council v. EPA*, the Ninth Circuit upheld an EPA order approving a revision to California's SIP to incorporate the South Coast Air Quality Management District's rule on nonattainment fees, Rule 317.[15] The court held EPA reasonably interpreted CAA section 172(e)'s nonattainment "anti-backsliding" provision to apply not only when EPA relaxes a NAAQS, but also when it strengthens one. The court further held that EPA reasonably interpreted section 172(e) to allow EPA to approve an alternative to the CAA section 185 fee requirement for severe and extreme ozone nonattainment areas, so long as the alternative fee program is "not less stringent than" the program required by section 185.

In *St. Marys Cement Inc. v. EPA*, the Sixth Circuit denied a petition to vacate an EPA FIP that imposed NO_x emission limits on the petitioner's cement plant.[16] The petitioner challenged EPA's conclusions that its plant was subject to the Regional Haze Rule's BART requirements and that installing Selective Non-Catalytic Reduction (SNCR) technology would reduce the plant's NO_x emissions by 50%. The court held the petitioner waived its argument that its plant was not "BART-eligible" by raising it after the public comment period. The court further held EPA's conclusions regarding the efficacy of SNCR at the plant were not arbitrary or capricious.

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[12] *Nat'l Parks Conservation Ass'n*, 803 F.3d at 151, 153, 156–57, 159, 163, 167.
[13] 786 F.3d 688 (9th Cir. 2015).
[14] 786 F.3d 1169 (9th Cir. 2015).
[15] 779 F.3d 1119 (9th Cir. 2015).
[16] 782 F.3d 280 (6th Cir. 2015).

In *Sierra Club v. McCarthy*, the district court granted summary judgment to the plaintiff in a deadline citizen suit.[17] The court held that EPA had violated the CAA by failing to timely issue a finding that twenty-five states had failed to submit "Good Neighbor" SIPs to mitigate interstate pollution transport under the 2008 ozone NAAQS. EPA conceded that the Good Neighbor SIP requirements were non-discretionary, which left the court to decide the deadline for EPA's compliance with this mandatory duty. The court ordered EPA to submit the required findings within sixty days of the court's order (June 30, 2015).

B. Preemption of State Law Claims and Displacement of Federal Law Claims

In *Merrick v. Diageo Americas Supply, Inc.*, the Sixth Circuit held that the CAA does not preempt state common law claims related to air emissions.[18] The court relied chiefly on the text of section 116 of the CAA, explaining that the provision's broad phrase, "any requirement," encompasses common law standards and that state courts "adopt or enforce" those requirements. In addition to noting supportive legislative history, the court analogized to Supreme Court precedent interpreting a "materially indistinguishable" provision of the Clean Water Act to reach a similar conclusion.

In *Little v. Louisville Gas & Electric Company*, the Sixth Circuit affirmed on interlocutory appeal a district court's order refusing to dismiss state law nuisance, trespass, and negligence claims as preempted by the CAA.[19] The Sixth Circuit explained that the state law claims at issue were materially indistinguishable from those brought in *Merrick*,[20] a companion case holding that the CAA does not preempt state common law claims related to air emissions.

In *American Fuel & Petrochemical Manufacturers v. O'Keeffe*, the district court upheld Oregon's clean fuels program by rejecting the trade associations' assertions that the program discriminates against out-of-state commerce, regulates extraterritorial activity, or is preempted by federal law.[21] The court found that the program did not discriminate because it distinguished among fuels based on greenhouse gas emissions, not origin. Next, the court found that the program does not regulate extraterritorial activity because the program does not control conduct wholly outside the state. Further, the court dismissed plaintiffs' preemption claims finding that neither the CAA nor EPA's reformulated gasoline rules expressly preempted the Oregon program. Finally, although the court found that plaintiffs did not have prudential standing to assert a conflict preemption challenge, the court noted in dicta that neither the Energy Independence and Security Act, CAA's renewable fuel standard, nor the Energy Policy Act of 2005 conflicted with the program.

C. New Source Review (NSR), Prevention of Significant Deterioration (PSD), New Source Performance Standards (NSPS), and Title V Permitting

In *Association of Irritated Residents v. EPA*, the Ninth Circuit denied a petition for review of an EPA action correcting the agency's prior approval of New Source Review (NSR) rules into the California SIP.[22] EPA determined that it had erred in

[17]No. 14-CV-05091 YGR, 2015 WL 3666419 (N.D. Cal. May 7, 2015).
[18]805 F.3d 685 (6th Cir. 2015).
[19]805 F.3d 695 (6th Cir. 2015).
[20]*Merrick*, 805 F.3d at 691.
[21]No. 3:15-cv-00467-AA, 2015 WL 5665232, at *1 (D. Or. Sept. 23, 2015), *appeal docketed*, No. 15-35834 (9th Cir. Oct. 27, 2015).
[22]790 F.3d 934, 951 (9th Cir. 2015).

approving the rules after it learned that California law did not authorize the San Joaquin Air Control District to require new source permits or emissions offsets for minor agricultural sources and thus the rules should not have been approved. The court held that EPA's error determination was not arbitrary, capricious, or an abuse of discretion. The Agency revised its decision under CAA section 110(k)(6), an error-correcting provision which the petitioner argued limits EPA's authority to correct its errors to certain methods only—namely, those enumerated in 110(k). The court disagreed and held that the Agency's interpretation of section 110(k)(6) was reasonable.

In *United States v. Oklahoma Gas & Electric Company*, the district court granted OG&E's motion to dismiss EPA and Sierra Club's complaints due to lack of subject matter jurisdiction.[23] Plaintiffs alleged that OG&E failed to properly project whether modifications made to two coal-fired electric generating units, which were grandfathered-in prior to the enactment of the Prevention of Significant Deterioration (PSD) program, would result in a significant increase in emissions. Plaintiffs requested both a declaratory judgment that OG&E's project notifications were insufficient as projections and injunctive relief to order OG&E to now make and submit the projections to EPA. However, plaintiffs did not allege that the modifications were major or that the emissions constituted a significant emissions increase. Instead, plaintiffs requested a declaratory judgment that OG&E's project notifications were insufficient in anticipation of bringing a subsequent enforcement action for a PSD permit violation. The court held that Article III's case and controversy requirement barred such use of the Declaratory Judgment Act for anticipatory purposes.

In *Citizens for Pennsylvania's Future v. Ultra Resources, Inc.*, the district court held that the defendant's eight separately permitted compressor stations were not "adjacent" under Pennsylvania law, and thus need not have been treated as a single source for permitting purposes.[24] The court relied heavily on the Sixth Circuit's majority opinion in *Summit Petroleum Corp. v. EPA*[25] and on a state guidance document to conclude that physical and geographic proximity are typically the driving considerations in determining adjacency. However, the court departed from *Summit Petroleum* by keeping the door open for functional interrelatedness to be considered in a source aggregation, noting that solely applying "a wooden and inflexible definition of adjacency" could lead to manipulative structuring of oil and gas wells and compressors.

In *United States v. Luminant Generation Company, LLC*, the district court dismissed seven of nine NSR claims against the owners/operators of two power plants in Texas.[26] The court found that five claims of PSD violations were barred by the five-year statute of limitations, disagreeing with EPA's argument that the violations were ongoing (following the Third, Seventh, Eighth, and Eleventh Circuits). The court also dismissed EPA's two claims that the facilities' Title V operating permits were deficient by virtue of the permit-holders' failure to modify their operating permits to include PSD requirements, calling the two Title V claims an unauthorized "collateral attack" on the "facially valid'" operating permits. Two of EPA's claims remain: one involving a more recent alleged PSD violation and one relating to defendants' response to EPA's request for information under CAA section 114.

D. Title II—Mobile Sources and Fuels

[23]No. CIV-13-690-D, 2015 WL 224911, at *1 (W.D. Okla. Jan. 15, 2015).
[24]No. 4:11-CV-1360, 2015 WL 769757 (M.D. Pa. Feb. 23, 2015).
[25]690 F.3d 733 (6th Cir. 2012).
[26]No. 3:13-CV-3236-K, 2015 U.S. Dist. LEXIS 111322, at *18–19 (N.D. Tex. Aug. 21, 2015).

In *Hermes Consolidated, LLC v. EPA*, the D.C. Circuit held that because the CAA does not define "disproportionate economic hardship," EPA has broad discretion to choose which economic factors the agency considers in reviewing small refineries' petitions for exemption from the Renewable Fuels program based on economic hardship.[27] The court also concluded that EPA's reliance on the Department of Energy's scoring index to assess compliance costs is reasonable. However, mathematical errors in EPA's review of the petitioners' application significantly altered important figures in the agency's analysis and therefore warranted remand of EPA's decision.

In *Lion Oil Company v. EPA*, the Eighth Circuit upheld EPA's methodology for evaluating small refineries' petitions for exemption from the Renewable Fuels program based on economic hardship.[28] The court found that EPA's decision to use the Department of Energy's scoring of compliance costs as a criterion for evaluating petitions is within EPA's discretion and reasonable.

In *Energy Future Coalition v. EPA*, the D.C. Circuit upheld EPA's policy requiring that automobile manufacturers use test fuels that are commercially available.[29] The court reasoned that using only commercially available fuels for testing is consistent with the CAA's direction that test fuels "reflect the actual current driving conditions under which motor vehicles are used, including conditions relating to fuel."[30] Accordingly, the court concluded that EPA's rejection of E30 as a test fuel was not arbitrary and capricious since E30 is not commercially available.

E. Hazardous Air Pollutants

In *Michigan v. EPA*, the U.S. Supreme Court remanded EPA's mercury rule, finding that EPA acted unreasonably by not considering costs when EPA decided it was "appropriate and necessary" to regulate power plants under section 112 of the CAA.[31] EPA argued that it need only consider cost when deciding how much to regulate power plants. However, the Supreme Court disagreed, holding that EPA must consider cost of compliance before deciding if regulation is "appropriate and necessary."

In *Delaware Department of Natural Resources and Environmental Control v. EPA*, the D.C. Circuit held that EPA acted arbitrarily and capriciously when it modified an emission rule to allow backup generators to run without emission controls for up to 100 hours a year for an emergency demand response program.[32] The court further held that EPA acted arbitrarily and capriciously by not addressing plaintiffs' concerns during the notice-and-comment period, by relying on faulty evidence, and by not consulting the Federal Energy Regulatory Commission when issuing a rule founded on grid reliability reasoning.

In *Mexichem Specialty Resins, Inc. v. EPA*, the D.C. Circuit upheld EPA's regulation of toxic chemical emissions from polyvinyl chloride production plants.[33] The court held that many of the petitioner's arguments were barred because they did not raise them during the notice-and-comment period.

In *National Association for Surface Finishing v. EPA*, the D.C. Circuit rejected challenges by both environmental and industry groups to EPA's revised national

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[27] 787 F.3d 568 (D.C. Cir. 2015).
[28] 792 F.3d 978 (8th Cir. 2015).
[29] 793 F.3d 141 (D.C. Cir. 2015).
[30] *Id.* at 146 (quoting 42 U.S.C. § 7525(h)).
[31] 135 S. Ct. 2699 (2015).
[32] 785 F.3d 1 (D.C. Cir. 2015).
[33] 787 F.3d 544 (D.C. Cir. 2015).

emission standards for hazardous air pollutants (NESHAPs) for hexavalent chromium.[34] The revised rule created more stringent emissions standards and mandated the phasing out of a toxic fume suppressant. Ruling against the environmental groups, the court held that when revising the NESHAPs, EPA is not required to recalculate the maximum achievable control technology floor, thus allowing cost to be taken into account in the revisions. As for the industry groups' claims, the court held EPA does not need to identify a nexus between each distinct development and the revised standard; it simply must take the developments into account. Further, the court ruled against the industry groups' claim that the mandatory phasing out of PFOS-based fume suppressant, a toxic compound, was arbitrary and capricious by indicating that the record was adequate to support the decision.

F. Civil and Criminal Enforcement

In *United States v. Hyundai Motor Co.*, the district court issued an order approving a consent decree on an unopposed motion by the United States. The decree, which included the largest monetary penalty in the history of the CAA, resolved claims by the United States and the California Air Resources Board against the defendant motor vehicle manufacturers for allegedly falsifying fuel economy and greenhouse emissions claims for more than a million Hyundai and Kia automobiles.[35]

G. Citizen Suits

In *Zook v. EPA*, the D.C. Circuit affirmed a district court judgment dismissing the plaintiff's citizen suit under the CAA, which claimed that EPA had unreasonably delayed regulating air pollutants from animal feeding operations under the CAA. The court held that, in the absence of an endangerment finding for those pollutants by EPA—a finding EPA had not made—the agency's duty to regulate is discretionary and thus not subject to challenge by way of an action under the CAA's citizen suit provisions.[36]

In *Nucor Steel-Arkansas v. Big River Steel, LLC*, the district court granted the defendant steel company's motion to dismiss for lack of jurisdiction a twenty-seven-count complaint filed by Nucor Steel-Arkansas (Nucor) under the CAA's citizen suit provisions. The plaintiff's claims raised substantive objections to a final construction and operating permit issued by the Arkansas Department of Environmental Quality. The court held that Nucor's complaint was a collateral attack on a facially valid permit issued by the state agency and that such an attack is not authorized by the CAA's citizen suit provisions.[37]

H. Procedural Issues

In *Dalton Trucking, Inc. v. EPA*, the D.C. Circuit held that EPA's final decision authorizing California regulations regarding emissions from in-use nonroad diesel engines did not have national applicability, so that the D.C. Circuit was not the proper venue for plaintiffs to challenge the decision under the judicial review provision of the CAA. The court did not give effect to EPA's finding that its decision was a "final action of national applicability" because there was no requirement that other states adopt the

[34] 795 F.3d 1 (D.C. Cir. 2015).
[35] 77 F. Supp. 3d 197, 200, 201 (D.D.C. 2015).
[36] 611 F. App'x 725 (D.C. Cir. 2015).
[37] 93 F. Supp. 3d 983, 992 (E.D. Ark. 2015).

California regulations and because the regulations only applied to nonroad engines and vehicles owned and operated in California.[38]

In *Delta Construction Company, Inc. v. EPA*, the D.C. Circuit held that a group of California industry plaintiffs lacked standing to challenge EPA's greenhouse gas regulations for light-duty vehicles and trucks.[39] The court held that the California petitioners' procedural challenge to EPA's rules (petitioners argued that EPA failed to submit the emissions standards to EPA's Science Advisory Board for review) did not identify a redressable injury. The court reasoned that, even if it were to invalidate EPA's rules, the National Highway Traffic Safety Administration's (NHTSA's) substantially similar fuel economy rules issued in coordination with EPA would still stand. Thus, petitioners would continue to suffer the same injury, namely higher vehicle prices. In the same opinion, the court dismissed a challenge brought by a California biodiesel company against EPA's and NHTSA's coordinated rules for trucks (heavy duty vehicles). The court held that it did not have original jurisdiction over the plaintiff's petition for review of the NHTSA's actions (no statutory exception to the general requirement that petitioner first go to district court), but that it did have original jurisdiction over petitioner's claims against EPA. However, the court still dismissed plaintiff's action because it found the plaintiff lacked standing to sue. The biodiesel company did not fall within the "zone of interests" protected by the CAA's motor vehicle provisions because the company's challenge "[m]erely [sought] to boost sales" of its own "green" product.[40]

In *California Dump Truck Owners Association v. Nichols*, the Ninth Circuit affirmed the district court's decision to dismiss plaintiff's federal preemption claim against a 2012 California rule regulating emissions from heavy-duty diesel trucks.[41] Because EPA approved the rule as part of California's SIP and because plaintiff did not comment on or challenge EPA's decision, the Ninth Circuit agreed that the lower court lacked subject matter jurisdiction over plaintiff's suit. The appellate court found that even though plaintiff did not directly challenge EPA or the SIP, plaintiff "effectively" challenged EPA's final decision on the SIP because plaintiff's objective "[was] to nullify the SIP and challenge the EPA's legal determination regarding its validity."[42] Therefore, the court found that jurisdiction was exclusive in the court of appeals, pursuant to section 307(b)(1) of the CAA. The court also found that plaintiff had ample opportunity to pursue a timely challenge to EPA's SIP decision under section 307(b)(1), and thus plaintiff had an adequate remedy but chose not to use it.[43]

In *Murray Energy Corporation v. EPA*, the district court denied EPA's motion to dismiss coal industry plaintiffs' claims against EPA for lack of standing.[44] Plaintiffs alleged EPA consistently failed to perform statutorily required evaluations of the impact of CAA regulations on employment. The court found that plaintiffs demonstrated sufficient injury-in-fact, even though the alleged injury (reduced economic viability of the coal industry) was indirect and dependent on the actions of third parties (power generators). The court also found that the alleged injuries were redressable (EPA or Congress could change the rules in response to the evaluations) and that plaintiffs fell within the zone of interests protected by the relevant statute. The court stated that one "purpose of 18 U.S.C. § 7621 is to protect industries, employers and employees from the

[38] 808 F.3d 875, 881(D.C. Cir. 2015).
[39] 783 F.3d 1291, 1297 (D.C. Cir. 2015).
[40] *Id.* at 1301.
[41] 784 F.3d 500 (9th Cir. 2015).
[42] *Id.* at 510.
[43] *Id.* at 512–13.
[44] No. 5:14-CV-39, 2015 WL 1438036 (N.D. W. Va. Mar. 27, 2015).

untoward effects of prior EPA actions."[45] Finally, the court found that plaintiffs asserted sufficient procedural and informational injury because (1) the denied "benefit" of the evaluations was enough to support standing, despite the fact that the evaluations were not a required prerequisite to EPA action, and (2) plaintiffs were entitled to the statutorily required information on employment impacts that EPA had failed to gather.[46]

In *Environmental Integrity Project v. EPA*, the district court held that EPA can be sued for failing to act on a petition to make an endangerment finding in a reasonable amount of time even though endangerment findings are made at EPA's discretion.[47] The court nevertheless dismissed Environmental Integrity Project's (EIP) citizen suit seeking EPA action on a 2011 petition to make an endangerment finding for ammonia gas because EIP did not provide EPA 180-day notice prior to bringing the suit. EIP argued that it could still bring the suit relying on the APA, but the court found that the APA did not provide the cause of action and waiver of sovereign immunity necessary for jurisdiction because the CAA provided an adequate remedy.

I. Greenhouse Gas Emissions

In *In re Murray Energy Corporation*, the D.C. Circuit dismissed a petition for review filed by coal companies, industry groups, and approximately a dozen states, seeking to enjoin EPA from issuing an anticipated rule restricting carbon dioxide emissions from existing power plants under section 111(d) of the CAA.[48] The court found that EPA's proposed rule was not final agency action subject to judicial review. The court further held that petitioners had no injury-in-fact and lacked standing to challenge a 2011 settlement agreement that EPA reached with other parties in order to obtain a "backdoor ruling" that EPA lacked authority to regulate carbon dioxide emissions from existing power plants.

J. Criteria Air Pollutants

In *EME Homer City Generation, L.P. v. EPA*, on remand from the U.S. Supreme Court, the D.C. Circuit invalidated EPA's 2014 emissions budgets under the Transport Rule as applied to thirteen states.[49] The court found EPA's argument that uniform pollution reductions were important for preventing states that had done relatively little to control pollution in the past from "free riding" on neighboring states' reduction efforts flatly contradicted the U.S. Supreme Court's prior holding. The court further concluded that the low levels in downwind locations were the result of over-control in upwind locations. The court, therefore, held that the specific limits at issue were unnecessarily strict.

In *Treasure State Resource Industry Association v. EPA*, the D.C. Circuit upheld EPA's designation of Wayne County, Michigan, and Yellowstone County, Montana, as nonattainment areas under the SO_2 NAAQS.[50] One petitioner argued that EPA relied on outdated and unreliable data collection methods. The other argued that EPA's line-drawing was arbitrary. The court held that EPA's determination that the data was "robust enough to be reliable" for the 2010 NAAQS was reasonable. The court further held that EPA's line-drawing for the designation of non-attainment areas was not arbitrary, noting

[45] *Id.* at *6.
[46] *Id.* at *7-9.
[47] No. 15-0139 (ABJ), 2015 WL 7737307 (D.D.C. Dec. 1, 2015).
[48] 788 F.3d 330 (D.C. Cir. 2015).
[49] 795 F.3d 118 (D.C. Cir. 2015).
[50] 805 F.3d 300 (D.C. Cir. 2015).

that nothing in the CAA prevented EPA from presumptively following county boundaries or required EPA to make simultaneous decisions on neighboring counties. The court, therefore, denied both petitions.

In *Sierra Club v. McCarthy*, the district court approved a proposed consent decree in connection with claims asserted by plaintiffs Sierra Club and the Natural Resources Defense Council that EPA had failed to promulgate designations for the 2010 revised primary SO_2 NAAQS.[51] The proposed consent decree set forth mandatory deadlines for EPA to issue designations for all areas of the country that remain undesignated. The court found that the proposed consent decree was procedurally and substantively fair and reasonable, finding that in a "deadline" suit such as this one, the appropriate remedy is to set a binding schedule for EPA to make all remaining designations, while preserving EPA's discretion to determine whether an area is "attainment" or "nonattainment" with the revised SO_2 air quality standard or whether the area is "unclassifiable."

In *Mississippi Commission on Environmental Quality v. EPA*, the D.C. Circuit considered petitions for review filed by various states, counties, environmental organizations, and industrial entities regarding EPA's determinations that certain geographic areas were, or were not, in attainment of EPA's ground-level ozone NAAQS.[52] The D.C. Circuit held that: (1) EPA's interpretation of a CAA provision that permitted the Agency to designate areas "nearby" a nonattainment area to presumptively include counties in the same metropolitan area was reasonable; (2) EPA's interpretation of the CAA to only require the Agency to use ozone pollution data from regulatory monitors was reasonable; (3) EPA's refusal to use uncertified air quality data was reasonable; (4) EPA's use of older data was not arbitrary and capricious; (5) EPA's application of its five-factor test to determinate whether a county contributed to nonattainment was not arbitrary or capricious; (6) EPA's designation of two counties in Indiana as nonattainment based on their contribution to violations in Illinois was not arbitrary or capricious; and (7) EPA's use of air particle movement modeling to determine the impact of pollutant emissions from a county in Texas was not arbitrary or capricious.

II. REGULATORY DEVELOPMENTS

A. Title I—Federal & State Implementation Plans, Conformity, and Federal Facilities

On January 6, 2015, EPA proposed to redraw the Southern California air quality planning areas to allow the Pechanga Band of Luiseno Mission Indians of the Pechanga Reservation to have a separate air quality planning area for the 1997 8-hour ozone NAAQS. Furthermore, EPA proposed to allow the Pechanga Reservation ozone area to be re-designated from nonattainment to attainment because it meets the statutory requirements.[53]

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[51]No. 13-cv-03953-SI, 2015 WL 889142 (N.D. Cal. Mar. 2, 2015), *appeal docketed*, Sierra Club v. McCarthy, No. 15-15894 (9th Cir. May 1, 2015).

[52]790 F.3d 138 (D.C. Cir. 2015).

[53]Approval of Tribal Implementation Plan and Designation of Air Quality Planning Area; Pechanga Band of Luiseno Mission Indians, 80 Fed. Reg. 436 (proposed Jan. 6, 2015) (to be codified at 40 C.F.R. pts. 49 and 81).

On February 5, 2015, EPA proposed to amend the definition of volatile organic compounds (VOCs) to exclude, for all purposes, t-butyl acetate, which already had been excluded for purposes of VOC emission limitations and VOC content requirements.[54]

On February 23, 2015, EPA issued a final order denying petitions for "the EPA to object to permits issued by the Texas Commission on Environmental Quality (TCEQ) to Luminant Generating Company, LLC . . . relating to three coal fired steam electric generating stations."[55]

On March 6, 2015, EPA issued a final rule for implementing the 2008 ozone NAAQS. The "final rule addresse[d] a range of nonattainment area state implementation plan (SIP) requirements for the 2008 ozone NAAQS, including requirements pertaining to attainment demonstrations, reasonable further progress (RFP), reasonably available control technology (RACT), reasonably available control measures (RACM), major new source review (NSR), emission inventories, and the timing of SIP submissions and of compliance with emission control measures in the SIP."[56]

On May 1, 2015, EPA "finaliz[ed] general permits for use in Indian country pursuant to the Federal Minor New Source Review (NSR) Program in Indian Country for new or modified minor sources in the following two source categories: Hot mix asphalt (HMA) plants; and stone quarrying, crushing, and screening (SQCS) facilities. The EPA . . . also finaliz[ed] permits by rule for use in Indian country for new or modified minor sources in three source categories: Auto body repair and miscellaneous surface coating operations; gasoline dispensing facilities (GDFs), except in California; and petroleum dry cleaning facilities."[57]

On September 18, 2015, EPA issued a proposed rule establishing a FIP for new minor sources and "minor modifications at existing true minor sources in the production segment of the oil and natural gas sector that are locating or expanding in Indian reservations or in other areas of Indian country[.]" The proposed FIP would require, among other things, emission limitations for compression ignition and spark ignition engines, compressors (reciprocating and centrifugal), fuel storage tanks, fugitive emissions from well sites and compressor stations, glycol dehydrators, hydraulically fractured oil and gas well completions, pneumatic controllers in production, pneumatic pumps, process heaters and storage vessels. The proposed rule also sought to amend the Federal Indian Country Minor NSR rule.[58]

B. New Source Review (NSR), Prevention of Significant Deterioration (PSD), New Source Performance Standards (NSPS), and Title V Permitting

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[54]Air Quality: Revision to the Regulatory Definition of Volatile Organic Compounds—Requirements for t-Butyl Acetate, 80 Fed. Reg. 6481 (proposed Feb. 5, 2015) (to be codified at 40 C.F.R. pt. 51).

[55]Clean Air Act Operating Permit Program; Petitions for Objection to State Operating Permits for Luminant Generating Company, LLC Steam Electric Generating Stations Martin Lake, Monticello, and Big Brown in Texas, 80 Fed. Reg. 9456 (Feb. 23, 2015).

[56]Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements, 80 Fed. Reg. 12,264 (Mar. 6, 2015) (to be codified at 40 C.F.R. pts. 50, 51, 52, 70, and 71).

[57]General Permits and Permits by Rule for the Federal Minor New Source Review Program in Indian Country for Five Source Categories, 80 Fed. Reg. 25,068 (May 1, 2015) (to be codified at 40 C.F.R. pt. 49).

[58]Review of New Sources and Modifications in Indian Country: Federal Implementation Plan for Managing Air Emissions from True Minor Sources Engaged in Oil and Natural Gas Production in Indian Country, 80 Fed. Reg. 56,554 (proposed Sept. 18, 2015) (to be codified at 40 C.F.R. pt. 49).

On January 21, 2015, EPA granted reconsideration on four provisions of the February 2013 NSPS and Emission Guidelines for Commercial and Industrial Solid Waste incineration Units. EPA also proposed amendments to the 2013 final rule to increase clarity and help with implementation of the rule.[59]

On March 16, 2015, EPA issued a final rule revising the NSPS for New Residential Wood Heaters, adding a new subpart: Standards of Performance for New Residential Hydronic Heaters and Forced-Air Furnaces.[60]

On March 20, 2015, EPA proposed "to revise the part 60 General Provisions and various [NSPS] subparts in [the] regulations to require affected facilities to submit specified air emissions data reports to the EPA electronically and to allow affected facilities to maintain electronic records of these reports."[61]

On May 7, 2015, EPA published a direct final rule[62] amending the PSD program regulations to allow for rescission of certain PSD permits issued by EPA and delegated reviewing authorities under Step 2 of the PSD and Title V Greenhouse Gas (GHG) Tailoring Rule (Tailoring Rule), in light of the U.S. Supreme Court's decision in *Utility Air Regulatory Group (UARG) v. EPA*,[63] and the amended appeals court judgment in *Coalition for Responsible Regulation (Coalition) v. EPA*,[64] which vacated the Tailoring Rule.

On May 7, 2015, EPA published a proposed rule "proposing to amend the federal [PSD] program regulations to allow for rescission of certain PSD permits issued by the EPA and delegated reviewing authorities under Step 2" of the Tailoring Rule in light of the Supreme Court's decision in *UARG v. EPA* and the amended appeals court judgment in *Coalition v. EPA*, which vacated the Tailoring Rule.[65]

On July 7, 2015, EPA finalized "performance specifications and test procedures for hydrogen chloride (HCl) continuous emission monitoring systems (CEMS) to provide

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[59]Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units, 80 Fed. Reg. 3018 (proposed Jan. 21, 2015) (to be codified at 40 C.F.R. pt. 60).

[60]Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces, 80 Fed. Reg. 13,672 (Mar. 16, 2015) (to be codified at 40 C.F.R. pt. 60).

[61]Electronic Reporting and Recordkeeping Requirements for New Source Performance Standards, 80 Fed. Reg. 15,100 (proposed Mar. 20, 2015) (to be codified at 40 C.F.R. pt. 60).

[62]Prevention of Significant Deterioration Permitting for Greenhouse Gases: Providing Option for Rescission of EPA-Issued Tailoring Rule Step 2 Prevention of Significant Deterioration Permits, 80 Fed. Reg. 26,183 (May 7, 2015) (to be codified at 40 C.F.R. pt. 52) (direct final rule).

[63]134 S. Ct. 2427 (2014); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, and 71).

[64]606 Fed. App'x 6 (D.C. Cir. 2015).

[65]Prevention of Significant Deterioration Permitting for Greenhouse Gases: Providing Option for Rescission of EPA-Issued Tailoring Rule Step 2 Prevention of Significant Deterioration Permits, 80 Fed. Reg. 26,210 (May 7, 2015) (to be codified at 40 CFR pt. 52); *see also UARG*, 134 S. Ct. 2427; *Coalition*, 606 Fed. App'x 6.

sources and regulatory agencies with criteria and test procedures for evaluating the acceptability of HCl CEMS."[66]

On August 12, 2015, EPA issued a final rule defining "low pressure gas well" and "storage vessel" for purposes of the oil and natural gas sector NSPS.[67]

On August 19, 2015, EPA finalized its residual risk and technology review for phosphoric acid manufacturing and phosphate fertilizer production for five source categories.[68]

On August 19, 2015, EPA issued a final rule "amending its [PSD] and title V regulations to remove from the Code of Federal Regulations portions of those regulations that were initially promulgated in 2010 and that the [D.C. Circuit] specifically identified as vacated in" *Coalition for Responsible Regulation v. EPA*.[69]

On August 27, 2015, EPA issued a proposed rule for emission guidelines and compliance times for municipal solid waste landfills.[70]

On August 27, 2015, the EPA issued a supplemental proposal NSPS for municipal solid waste landfills that set an emission rate threshold for non-methane organic compounds.[71]

On September 18, 2015, EPA issued a proposed rule to clarify the definition of "adjacent" as used in the definitions of "building, structure, facility, or installation" as applied to stationary sources in the oil and natural gas sector. EPA proposed to define "adjacent" either in terms of proximity or in terms of proximity and/or functional interrelatedness.[72]

On September 18, 2015, EPA issued a proposed rule to amend the NSPS for the oil and gas sector to set standards for emissions of methane and VOCs from equipment, processes, and activities in the oil and natural gas source category.[73]

On October 23, 2015, EPA issued proposed model training rules and federal plan requirements for greenhouse gas emissions from electric utility generating units (EGUs) constructed on or before January 8, 2014.[74]

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[66]Performance Specification 18—Performance Specifications and Test Procedures for Hydrogen Chloride Continuous Emission Monitoring Systems at Stationary Sources, 80 Fed. Reg. 38,628 (July 7, 2015) (to be codified at 40 C.F.R. pt. 60).

[67]Oil and Natural Gas Sector: Definitions of Low Pressure Gas Well and Storage Vessel, 80 Fed. Reg. 48,262 (Aug. 12, 2015) (to be codified at 40 C.F.R. pt. 60).

[68]Phosphoric Acid Manufacturing and Phosphate Fertilizer Production RTR and Standards of Performance for Phosphate Processing, 80 Fed. Reg. 50,386 (Aug. 19, 2015) (to be codified at 40 C.F.R. pts. 60 and 63).

[69]Prevention of Significant Deterioration and Title V Permitting for Greenhouse Gases: Removal of Certain Vacated Elements, 80 Fed. Reg. 50,199 (Aug. 19, 2015) (to be codified at 40 C.F.R. pts. 51, 52, 70, and 71); *Coalition*, 606 F. App'x 6.

[70]Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, 80 Fed. Reg. 52,100 (proposed Aug. 27, 2015) (to be codified at 40 C.F.R. pt. 60).

[71]Standards of Performance for Municipal Solid Waste Landfills, 80 Fed Reg. 52,162 (Aug. 27, 2015) (to be codified at 40 C.F.R. pt. 60) (supplemental proposal).

[72]Source Determination for Certain Emission Units in the Oil and Natural Gas Sector, 80 Fed. Reg. 56,579 (proposed Sept. 18, 2015) (to be codified at 40 C.F.R. pts. 49, 51, 52, et al.).

[73]Oil and Natural Gas Sector: Emission Standards for New and Modified Sources, 80 Fed. Reg. 56,593 (proposed Sept. 18, 2015) (to be codified at 40 C.F.R. pt. 60).

[74]Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations, 80 Fed. Reg. 64,966 (proposed Mar. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 62, and 78).

On October 23, 2015, EPA issued a final rule establishing an NSPS for carbon dioxide from newly constructed, modified, and reconstructed fossil fuel-fired EGUs and fossil fuel-fired stationary combustion turbines.[75]

On November 6, 2015, EPA proposed amendments to the NSPS for stationary compression ignition internal combustion engines to allow the engines to be manufactured in a way that allows operators to override the emission control system in case of emergency.[76]

On November 25, 2015, EPA published a notice stating that between April 16, 2014 and October 1, 2015, the New Jersey Department of Environmental Protection (NJDEP) and EPA Region 2 issued three final agency actions pursuant to the PSD program: NJDEP issued a PSD permit to West Deptford Energy, LLC for a natural gas combined-cycle unit; NJDEP extended the PSD permit for RC Cape May Holdings, LLC's BL Energy Repowering Project; and EPA Region 2 extended Energy Answer's PSD permit for the Arecibo Puerto Rico Renewable Energy Project.[77]

On December 7, 2015, EPA published final amendments to the National Emissions Standards for Hazardous Air Pollutants (NESHAP) for aerospace manufacturing and rework facilities, pursuant to its residual risk and technology review.[78]

C. Title II—Mobile Sources and Fuels

1. Fuels

On April 3, 2015, EPA proposed amendments that would clarify regulations related to the data sources used to establish the price for cellulosic waiver credits (CWC). The proposal would also amend the procedures for establishing the CWC price by removing the price from the regulations and replacing it with an Internet based publication in order to establish prices in a more expeditious manner.[79] A corresponding direct final rule was published on the same day.[80]

On February 6, 2015, EPA approved Maine's request to extend a federal prohibition on selling or dispensing conventional gasoline to the southern Maine counties of York, Cumberland, Sagadahoc, Androscoggin, Kennebec, Knox, and Lincoln beginning June 1, 2015. On and after that date, only reformulated gasoline (RFG) may be

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[75]Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 70, 71, and 98).

[76]Standards of Performance for Stationary Compression Ignition Internal Combustion Engines, 80 Fed. Reg. 68,808 (proposed Nov. 6, 2015) (to be codified at 40 C.F.R. pt. 60).

[77]Prevention of Significant Deterioration of Air Quality (PSD) Final Determinations in New Jersey, Puerto Rico, and the Virgin Islands, 80 Fed. Reg. 73,755 (Nov. 25, 2015).

[78]National Emission Standards for Aerospace Manufacturing and Rework Facilities Risk and Technology Review, 80 Fed. Reg. 76,152 (Dec. 7, 2015) (to be codified at 40 C.F.R. pt. 63).

[79]Regulation of Fuels and Fuel Additives: Cellulosic Waiver Credit Price and Minor Amendments to Renewable Fuel Standard Regulations, 80 Fed. Reg. 18,179 (proposed Apr. 3, 2015) (to be codified at 40 C.F.R. pt. 80).

[80]Regulation of Fuels and Fuel Additives: Cellulosic Waiver Credit Price and Minor Amendments to Renewable Fuel Standard Regulations, 80 Fed. Reg. 18,136 (Apr. 3, 2015) (to be codified at 40 C.F.R. pt. 80) (direct final rule).

sold or dispensed in the covered counties. EPA also prohibited opting out of the federal RFG program for four years after the RFG commencement date.[81]

On June 10, 2015, EPA proposed "annual percentage standards for cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuel that apply to all motor vehicle gasoline and diesel produced or imported in the years 2014, 2015, and 2016" and proposed a biomass-based diesel volume standard for 2017. EPA also proposed to rescind the cellulosic biofuel standard for 2011 and proposed compliance and attest reporting deadlines for 2013, 2014, and 2015. Finally, EPA proposed regulatory amendments to clarify the scope of the existing algal biofuel pathway.[82]

On December 14, 2015, EPA issued a final rule establishing renewable fuel percentages for motor vehicle gasoline and diesel produced or imported in 2014, 2015, and 2016, including annual percentage standards for cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuel.[83]

2. Vehicle and Engine Standards

On February 19, 2015, EPA proposed amendments to correct and clarify Tier 3 motor vehicle emission and fuel standards; revise test procedures and compliance provisions for nonroad spark-ignition engines at or below 19 kW; address ambiguity in design standards for portable fuel containers; align standards for diesel engine powered marine vessels with MARPOL Annex VI requirements; and correct errors in the Voluntary Quality Assurance Program rulemaking.[84] A corresponding direct final rule was published on the same day. [85]

On May 6, 2015, under section 209(e)(2) of the CAA, EPA granted the California Air Resources Board's (CARB's) request to amend California's marine spark-ignition engine regulations concerning hydrocarbon emission standards, enhanced evaporative emission controls for high performance stern drive/inboard (SD/I) engines, modifications of exhaust standards for high performance SD/I engines, not to exceed limits, revised jet boat engine standard, new carbon monoxide emissions standards, and revised on-board diagnostic marine requirements. EPA also confirmed that the following additional amendments were within the scope of a previous EPA authorization: aftermarket exemption procedures clarification; optional fifth tier added to environmental label program; optional loaded test cycle for high performance engines; optional portable measurement systems for high performance engines; optional assigned deterioration

[81]Regulation of Fuels and Fuel Additives: Extension of the Reformulated Gasoline Program to Maine's Southern Counties, 80 Fed. Reg. 6658 (Feb. 6, 2015) (to be codified at 40 C.F.R. pt. 80).

[82]Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017, 80 Fed. Reg. 33,100 (proposed June 10, 2015) (to be codified at 40 C.F.R. pt. 80).

[83]Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017, 80 Fed. Reg. 77,420 (Dec. 14, 2015) (to be codified at 40 C.F.R. pt. 80).

[84]Amendments Related to: Tier 3 Motor Vehicle Emission and Fuel Standards, Nonroad Engine and Equipment Programs, and MARPOL Annex VI Implementation, 80 Fed. Reg. 8826 (proposed Feb. 19, 2015) (to be codified at 40 C.F.R. pts. 59, 80, 85, 86, 600, 1037, 1043, 1051, 1054, 1060, 1065, and 1066).

[85]Amendments Related to: Tier 3 Motor Vehicle Emission and Fuel Standards, Nonroad Engine and Equipment Programs, and MARPOL Annex VI Implementation, 80 Fed. Reg. 9078 (Feb. 19, 2015) (to be codified at 40 C.F.R. pts. 59, 80, 85, 86, 600, 1037, 1043, 1051, 1054, 1060, 1065, and 1066) (direct final rule).

factors for high performance engines; optional engine discontinuation allowance for SD/I engines; compliance assistance for all spark-ignition marine engines; and replacement engine provisions.[86]

On May 6, 2015, EPA "confirm[ed] that the [CARB's] 2008 amendments to its Small Off-Road Engines (SORE) regulation (2008 Amendments) are within the scope of previous EPA authorizations. The 2008 Amendments modif[ied] provisions through which manufacturers may generate and use emission credits to comply with SORE emission standards, and establish[ed] an ethanol blend certification fuel option. CARB's SORE regulations apply to all small off-road engines rated at or below 19 kilowatts (kW)."[87]

On July 13, 2015, EPA issued a proposed rule for a second phase of greenhouse gas emissions and fuel efficiency standards for medium- and heavy-duty engines and vehicles.[88]

On December 9, 2015, EPA granted CARB's "request for authorization of California's 2008 amendments to its new large spark-ignition nonroad engines regulation (2008 LSI Amendments). EPA . . . also confirm[ed] that CARB's 2010 amendments to its in-use fleet average emission requirements (2010 LSI Fleet Amendments) are within the scope of EPA's prior authorization."[89]

On December 10, 2015, EPA "grant[ed] [CARB's] request for authorization of amendments to [California's] Portable Diesel-Fueled Engines Air Toxics Control Measure."[90]

D. Hazardous Air Pollutants

On January 21, 2015, EPA announced reconsideration of and requested public comment on amendments to the NESHAP for industrial, commercial, and institutional boilers. EPA also proposed a "number of technical corrections and amendments . . . [and] propos[ed] to delete rule provisions for an affirmative defense for malfunction."[91]

On February 4, 2015, EPA proposed to amend the NESHAP for polyvinyl chloride and copolymers production area sources. In addition to the proposed rule, EPA published a direct final rule withdrawing "the total non-vinyl chloride organic hazardous

[86]California State Nonroad Engine Pollution Control Standards; Amendments to Spark Ignition Marine Engine and Boat Regulations; Notice of Decision, 80 Fed. Reg. 26,032 (May 6, 2015).

[87]California State Nonroad Engine Pollution Control Standards; Small Off-Road Engines Regulations; Notice of Decision, 80 Fed. Reg. 26,041 (May 6, 2015).

[88]Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2, 80 Fed. Reg. 40,138 (proposed July 13, 2015) (to be codified at 40 C.F.R. pts. 9, 22, 85, 86, 600, 1033, 1036, 1037, 1039, 1042, 1043, 1065, 1066, and 1068).

[89]California State Nonroad Engine Pollution Control Standards; Large Spark-Ignition (LSI) Engines; New Emission Standards and In-Use Fleet Requirements; Notice of Decision, 80 Fed. Reg. 76,468 (Dec. 9, 2015).

[90]California State Nonroad Engine Pollution Control Standards; Portable Diesel-Fueled Engines Air Toxics Control Measure; Notice of Decision, 80 Fed. Reg. 76,685 (Dec. 10, 2015).

[91]National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers, 80 Fed. Reg. 2871 (proposed Jan. 21, 2015) (to be codified at 40 C.F.R. pt. 63).

air pollutant (TOHAP) area source process wastewater emission standards for new and existing polyvinyl chloride and copolymers (PVC) area sources."[92]

On February 17, 2015, EPA proposed to correct and clarify several provisions in the NESHAP for coal- and oil-fired electric utility steam generating units (the MATS rule) and the NSPS for fossil-fuel-fired electric utility, industrial-commercial-institutional, and small industrial-commercial-institutional steam generating units. EPA also proposed to remove a NESHAP provision that provided an affirmative defense for violations caused by malfunctions.[93]

On March 18, 2015, EPA issued a final rule amending several provisions of the NESHAP for Off-Site Waste and Recovery Operations (OSWRO). Among other changes, the final rule eliminates the OSWRO NESHAP's start-up, shutdown, and malfunction (SSM) exemption and requires owners/operators to submit the results of some performance tests through EPA's Electronic Reporting Tool (ERT).[94]

On March 24, 2015, EPA issued a final rule requiring owners and operators of sources subject to the MATS rule to begin submitting required emissions and compliance information in PDF format through EPA's Emissions Collection and Monitoring Plan System (ECMPS) Client Tool, rather than EPA's Compliance and Emissions Data Reporting Interface (CEDRI), until at least April 16, 2017.[95]

On April 30, 2015, EPA published a notice of its final action denying twenty-three "petitions for reconsideration of the final rules titled [2012 NESHAP] from Coal- and Oil-Fired Electric Utility Steam Generating Units and [NSPS] for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units," codified at 40 C.F.R. parts 60 and 63.[96]

On June 3, 2015, EPA finalized its "determination that the EPA completed its statutory obligation under the [CAA] to promulgate emissions standards for source categories accounting for not less than 90[%] of the aggregated emissions of each of seven specific hazardous air pollutants (HAP) enumerated in the CAA."[97]

On June 30, 2015, EPA published a final rule amending the NESHAP for the Ferroalloys Production source category based on EPA's determinations pursuant to the

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[92]National Emission Standards for Hazardous Air Pollutants for Polyvinyl Chloride and Copolymers Production Area Sources Wastewater Limit Withdrawal, 80 Fed. Reg. 6035 (proposed Feb. 4, 2015) (to be codified at 40 C.F.R. pt. 63); National Emission Standards for Hazardous Air Pollutants for Polyvinyl Chloride and Copolymers Production Area Sources Wastewater Limit Withdrawal, 80 Fed. Reg. 5938 (Feb. 4, 2015) (direct final rule).

[93]National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units; Revisions, 80 Fed. Reg. 8442 (proposed Feb. 17, 2015) (to be codified at 40 C.F.R. pts. 60 and 63).

[94]National Emission Standards for Hazardous Air Pollutants: Off-Site Waste and Recovery Operations, 80 Fed. Reg. 14,248 (Mar. 18, 2015) (to be codified at 40 C.F.R. pt. 63).

[95]National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Steam Generating Units, 80 Fed. Reg. 15,510 (Mar. 24, 2015) (to be codified at 40 C.F.R. pt. 63).

[96]Reconsideration on the Mercury and Air Toxics Standards (MATS) and the Utility New Source Performance Standards; Final Action, 80 Fed. Reg. 24,218 (Apr. 30, 2015) (notice of final action denying petitions for reconsideration).

[97]Completion of Requirement To Promulgate Emissions Standards, 80 Fed. Reg. 31,470 (June 3, 2015) (to be codified at 40 C.F.R. pt. 63).

residual risk and technology review (RTR) provisions of CAA section 112. The amendments "include revisions to particulate matter (PM) standards for electric arc furnaces, metal oxygen refining processes, and crushing and screening operations;" revised requirements "to control process fugitive emissions from furnace operations, tapping, casting, and other processes;" opacity limits; and "emissions standards for four previously unregulated hazardous air pollutants (HAP): Formaldehyde, hydrogen chloride (HCl), mercury (Hg)[,] and polycyclic aromatic hydrocarbons (PAH);" and "other requirements related to testing, monitoring, notification, recordkeeping, and reporting."[98]

On July 27, 2015, EPA issued a final rule correcting and clarifying certain requirements in the NESHAP for the Portland cement manufacturing industry and the NSPS for Portland cement plants. EPA also removed a NESHAP provision that had provided an affirmative defense for violations caused by malfunctions.[99]

On July 29, 2015, EPA issued a final rule amending several provisions in the NESHAPs for mineral wool production and wool fiberglass manufacturing. Among other changes, the final rule eliminates the NESHAP's SSM exemptions.[100]

On September 11, 2015, EPA issued a final rule correcting and clarifying certain performance testing and monitoring requirements in the NESHAP for the Portland cement manufacturing industry.[101]

On September 18, 2015, EPA issued a final rule amending the NESHAP for the secondary aluminum production source category. The final rule includes requirements related to electronic reporting, accounting for unmeasured emissions during compliance testing, alternative compliance options, compliance provisions for hydrogen fluoride, and provisions regarding emissions during periods of startup, shutdown, and malfunction.[102]

On October 15, 2015, EPA issued a final rule setting new and revised emission standards for various hazardous air pollutants emitted by primary aluminum reduction plants, including "technology-based standards and work practice standards reflecting performance of maximum achievable control technology (MACT), and related monitoring, reporting, and testing requirements."[103]

On November 20, 2015, EPA issued a final rule setting forth the Agency's final decision on issues that it granted reconsideration in connection with certain aspects of the

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[98]National Emissions Standards for Hazardous Air Pollutants: Ferroalloys Production, 80 Fed. Reg. 37,366 (June 30, 2015) (to be codified at 40 C.F.R. pt. 63).

[99]National Emission Standards for Hazardous Air Pollutants for the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants, 80 Fed. Reg. 44,772 (July 27, 2015) (to be codified at 40 C.F.R. pts. 60 and 63).

[100]National Emissions Standards for Hazardous Air Pollutants for Mineral Wool Production and Wool Fiberglass Manufacturing, 80 Fed. Reg. 45,280 (July 29, 2015) (to be codified at 40 C.F.R. pt. 63).

[101]National Emission Standards for Hazardous Air Pollutants for the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants; Correction, 80 Fed. Reg. 54,728 (Sept. 11, 2015) (to be codified at 40 C.F.R. pt. 63).

[102]National Emission Standards for Hazardous Air Pollutants for Secondary Aluminum Production, 80 Fed. Reg. 56,700 (Sept. 18, 2015) (to be codified at 40 C.F.R. pt. 63).

[103]National Emission Standards for Hazardous Air Pollutants for Primary Aluminum Reduction Plants, 80 Fed. Reg. 62,390 (Oct. 15, 2015) (to be codified at 40 C.F.R. pt. 63).

January 2013 amendments to the NESHAP for industrial, commercial, and institutional boilers and process heaters.[104]

On December 1, 2015, EPA finalized its "residual risk and technology review conducted for the Petroleum Refinery source categories regulated under [NESHAP] Refinery MACT 1 and Refinery MACT 2." The final rule "also includes revisions to the Refinery MACT 1 and MACT 2 rules in accordance with provisions regarding establishment of MACT standards."[105]

On December 7, 2015, EPA finalized several amendments to the NESHAP for aerospace manufacturing and rework facilities to "add limitations to reduce organic and inorganic emissions of hazardous air pollutants (HAP) from specialty coating application operations; remove exemptions for periods of [SSM] . . . ; and revise provisions to address recordkeeping and reporting requirements applicable to periods of SSM."[106]

E. Title VI – Stratospheric Ozone

On January 26, 2015, EPA issued a final "rule extend[ing] the laboratory and analytical use exemption for the production and import of class I ozone-depleting substances through December 31, 2021."[107]

On April 10, 2015, EPA issued a final rule listing five flammable refrigerants as acceptable substitutes for ozone-depleting substances, subject to use conditions, in several end-uses related to refrigeration and air conditioning. The rule also exempts four hydrocarbon refrigerant substitutes as acceptable, subject to use conditions, in specific end-uses.[108]

On July 20, 2015, EPA issued a final rule changing the status of a number of substitutes for ozone-depleting substances that were previously listed as acceptable, including certain hydrofluorocarbons (HFCs) and HFC-containing blends in various end-uses in the aerosols, refrigeration, air conditioning, and foam blowing sectors.[109]

On October 15, 2015, EPA issued a final rule authorizing uses of methyl bromide that qualify for the critical use exemption and addressing "the amount of methyl bromide that may be produced or imported for those uses for the 2016 control period."[110]

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[104]National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters, 80 Fed. Reg. 72,790 (Nov. 20, 2015) (to be codified at 40 C.F.R. pt. 63).

[105]Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards, 80 Fed. Reg. 75,178 (Dec. 1, 2015) (to be codified at 40 C.F.R. pts. 60 and 63).

[106]National Emission Standards for Aerospace Manufacturing and Rework Facilities Risk and Technology Review, 80 Fed. Reg. 76,152 (Dec. 7, 2015) (to be codified at 40 C.F.R. pt. 63).

[107]Protection of Stratospheric Ozone: Extension of the Laboratory and Analytical Use Exemption for Essential Class I Ozone-Depleting Substances, 80 Fed. Reg. 3885 (Jan. 26, 2015) (to be codified at 40 C.F.R. pt. 82).

[108]Protection of Stratospheric Ozone: Listing of Substitutes for Refrigeration and Air Conditioning and Revision of the Venting Prohibition for Certain Refrigerant Substitutes, 80 Fed. Reg. 19,454 (Apr. 10, 2015) (to be codified at 40 C.F.R. pt. 82).

[109]Protection of Stratospheric Ozone: Change of Listing Status for Certain Substitutes Under the Significant New Alternatives Policy Program, 80 Fed. Reg. 42,870 (July 20, 2015) (to be codified at 40 C.F.R. pt. 82).

[110]Protection of Stratospheric Ozone: The 2016 Critical Use Exemption From the Phaseout of Methyl Bromide, 80 Fed. Reg. 61,985 (Oct. 15, 2015) (to be codified at 40 C.F.R. pt. 82).

On November 9, 2015, EPA proposed to update requirements for certain service practices that must be observed by persons servicing or disposing of air-conditioning and refrigeration equipment to reduce emissions of ozone-depleting refrigerant.[111]

F. Greenhouse Gas Emissions

On July 1, 2015, EPA published proposed endangerment and cause or contribute findings under section 231(a)(2)(A) of the CAA that GHG emissions from aircraft engines used in certain types of aircraft (referred to as "covered aircraft," including smaller jet aircraft to the largest commercial jet aircraft and larger turboprop aircraft) contribute to air pollution that endangers public health and welfare. EPA also published an Advance Notice of Proposed Rulemaking to solicit public comments on issues related to setting an international CO_2 standard for aircraft at the International Civil Aviation Organization (ICAO).[112]

On October 22, 2015, EPA issued a final rule for the 2015 revisions and confidentiality determinations for petroleum and natural gas systems to address greenhouse gas emissions.[113]

On October 23, 2015, EPA published a final rule "establishing final emission guidelines for states to follow in developing plans to reduce [GHG] emissions from existing fossil fuel-fired [EGUs]. . . . [Including] [CO_2] emission performance rates representing the best system of emission reduction (BSER) for two subcategories of existing fossil fuel-fired EGUs—fossil fuel-fired electric utility steam generating units and stationary combustion turbines; state-specific CO_2 goals reflecting the CO_2 emission performance rates; and guidelines for the development, submittal and implementation of state plans that establish emission standards or other measures to implement the CO_2 emission performance rates."[114]

G. Criteria Air Pollutants

On January 5, 2015, EPA issued a proposed rule for national ambient air quality standards for lead.[115]

On January 15, 2015, EPA published a final rule promulgating initial area designations of nonattainment for the 2012 Primary Annual Fine Particle ($PM_{2.5}$) NAAQS for the majority of the United States, including areas of Indian country.[116]

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[111]Protection of Stratospheric Ozone: Update to the Refrigerant Management Requirements Under the Clean Air Act, 80 Fed. Reg. 69,458 (proposed Nov. 9, 2015) (to be codified at 40 C.F.R. pt. 82).

[112]Proposed Finding That Greenhouse Gas Emissions From Aircraft Cause or Contribute to Air Pollution That May Reasonably Be Anticipated To Endanger Public Health and Welfare and Advance Notice of Proposed Rulemaking, 80 Fed. Reg. 37,758 (proposed July 1, 2015) (to be codified at 40 C.F.R. pts. 87 and 1068).

[113]Greenhouse Gas Reporting Rule: 2015 Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems, 80 Fed. Reg. 64,262 (Oct. 22, 2015) (to be codified at 40 C.F.R. pt. 98).

[114]Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

[115]National Ambient Air Quality Standards for Lead, 80 Fed. Reg. 278 (proposed Jan. 5, 2015) (to be codified at 40 C.F.R. pt. 50).

On February 19, 2015, EPA issued a final rule modifying the emissions inventory reporting requirements for lead.[117]

On March 23, 2015, EPA proposed SIP requirements to meet the fine particulate matter NAAQS.[118]

On April 7, 2015, EPA published a final rule promulgating: (1) initial area designations of unclassifiable/attainment for the 2012 Primary $PM_{2.5}$ NAAQS for five areas in Georgia and two neighboring counties in Alabama and South Carolina, which were deferred in the January 15, 2015 rulemaking designating the majority of the United States; (2) changing the "designation of one area in Ohio, two areas in Pennsylvania, one area shared between Indiana and Kentucky, and one area shared between Kentucky and Ohio"; and (3) making a minor technical amendment to correct an error in the designation for Allegheny County, Pennsylvania.[119]

On April 15, 2015, EPA published a final rule determining that the Southeast Desert nonattainment area in California, encompassing the Victor Valley/Barstow region in San Bernardino County, the Coachella Valley region in Riverside County, and the Antelope Valley portion of Los Angeles County, attained the 1-hour ozone NAAQS.[120]

On June 5, 2015, EPA issued a notice that it had designated "one new reference method and one new equivalent for measuring concentrations of $PM_{2.5}$, one new equivalent method for measuring $PM_{10-2.5}$, and two new equivalent methods for measuring ozone (O_3) in the ambient air."[121]

On July 13, 2015, EPA published a final rule "finding that [twenty-four] states have failed to submit infrastructure [SIPs] to satisfy certain interstate transport requirements of the [CAA] with respect to the 2008 [eight]-hour ozone [NAAQS]" and establishing "a [two]-year deadline for the EPA to promulgate a [FIP] to address the interstate transport SIP requirements" in these states, unless the state submits and EPA approves a SIP meeting the requirements.[122]

On August 21, 2015, EPA published a final rule directing state and tribal air agencies to provide EPA data regarding air quality "in areas with large sources of [SO_2]

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[116]Air Quality Designations for the 2012 Primary Annual Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS), 80 Fed. Reg. 2206 (Jan. 15, 2015) (to be codified at 40 C.F.R. pt. 81).

[117]Revisions to the Air Emissions Reporting Requirements: Revisions to Lead (Pb) Reporting Threshold and Clarifications to Technical Reporting Details, 80 Fed. Reg. 8787 (Feb. 19, 2015) (to be codified at 40 C.F.R. pt. 51).

[118]Fine Particulate Matter National Ambient Air Quality Standards: State Implementation Plan Requirements, 80 Fed. Reg. 15,340 (proposed Mar. 23, 2015) (to be codified at 40 C.F.R. pts. 50, 51, and 93).

[119]Additional Air Quality Designations and Technical Amendment To Correct Inadvertent Error in Air Quality Designations for the 2012 Primary Annual Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS), 80 Fed. Reg. 18,535 (Apr. 7, 2015) (to be codified at 40 C.F.R. pt. 81).

[120]Determination of Attainment of the 1-Hour Ozone National Ambient Air Quality Standard in the Southeast Desert Nonattainment Area in California, 80 Fed. Reg. 20,166 (Apr. 15, 2015) (to be codified at 40 C.F.R. pt. 52).

[121]Office of Research and Development; Ambient Air Monitoring Reference and Equivalent Methods: Designation of One New Reference Method and Four New Equivalent Methods, 80 Fed. Reg. 32,114 (June 5, 2015).

[122]Findings of Failure To Submit a Section 110 State Implementation Plan for Interstate Transport for the 2008 National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 39,961 (July 13, 2015) (to be codified at 40 C.F.R. pt. 52).

emissions to identify maximum [one]-hour SO_2 concentrations in ambient air" and allow EPA to evaluate air quality in these areas in the future under the 2010 one-hour SO_2 NAAQS.[123]

On August 27, 2015, EPA proposed three separate determinations regarding thirty-six areas currently classified as "Marginal" for the 2008 ozone NAAQS: (1) determining seventeen"areas attained the 2008 ozone NAAQS by the applicable attainment date of July 20, 2015[;]" (2) granting a one-year attainment date extensions for eight areas; and (3) determining that eleven areas that failed to attain the 2008 ozone NAAQS by the applicable attainment date of July 20, 2015, were not eligible for an extension and be reclassified as "Moderate."[124]

On October 26, 2015, EPA issued a final NAAQS for ozone.[125]

On December 3, 2015, EPA issued a proposed rule "to address interstate air quality impacts with respect to the 2008 ozone NAAQS." The proposed rule found "that ozone season emissions of NO_x in 23 eastern states affect the ability of downwind states to attain and maintain the 2008 ozone NAAQS. . . . EPA propose[d] to issue [FIPs] that generally update the existing [Cross-State Air Pollution Rule (CSAPR)] NO_x ozone-season emissions budgets for [EGUs] and implement these budgets via the CSAPR NOx ozone-season allowance trading program."[126]

[123]Data Requirements Rule for the 2010 1-Hour Sulfur Dioxide (SO_2) Primary National Ambient Air Quality Standard (NAAQS), 80 Fed. Reg. 51,052 (Aug. 21, 2015) (to be codified at 40 C.F.R. pt. 51).

[124]Determinations of Attainment by the Attainment Date, Extensions of the Attainment Date, and Reclassification of Several Areas Classified as Marginal for the 2008 Ozone National Ambient Air Quality Standards, 80 Fed. Reg. 51,992 (proposed Aug. 27, 2015) (to be codified at 40 C.F.R. pt. 52).

[125]National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65,292 (Oct. 26, 2015).

[126]Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 80 Fed. Reg. 75,706 (proposed Dec. 3, 2015) (to be codified at 40 C.F.R. pts. 52, 78, and 97).

Chapter 3 • ENDANGERED SPECIES
2015 Annual Report[1]

The following is a summary of major legislative, administrative, and judicial developments under the Endangered Species Act (ESA) and the implementing regulations promulgated by the United States Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (also known as National Oceanic and Atmospheric Administration-Fisheries Division, or NOAA-Fisheries) for the calendar year 2015.[2]

I. LEGISLATIVE DEVELOPMENTS

No developments of significance.

II. ADMINISTRATIVE DEVELOPMENTS[3]

FWS and NMFS continued their busy administrative reform agenda (see the 2014 report) in 2015 with several final and proposed rules and policies. The agencies adopted a final rule amending the incidental take statement (ITS) provisions of the implementing regulations for section 7 consultations.[4] The new rule outlines the criteria for using habitat and other surrogates to express the amount or extent of take allowed under the ITS—an effort the agencies undertook to bring their approach in line with judicial decision on the subject rendered over the past decade—and also clarifies the standards for development of programmatic ITSs.

FWS and NMFS also proposed a rule which would revise the regulations governing review and processing of petitions to list, delist, or reclassify species and to revise a critical habitat designation.[5] The main thrust of the proposed rule is to define additional information requirements for petitions and to adopt a "credible scientific or commercial information" standard for making ninety-day findings on petitions.

Although species-specific, FWS "not warranted" finding on the greater sage grouse is significant for its extensive reliance on federal agency and state conservation plans as the basis for the finding.[6] The BLM and Forest Service conservation actions

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[1]Compiled by J. B. Ruhl, David Daniels Allen Distinguished Chair in Law, Vanderbilt University Law School. The principal focus of this report is the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544. Please direct questions or comments to jb.ruhl@vanderbilt.edu.

[2]Developments involving criminal prosecutions and the Convention on International Trade in Endangered Species are not covered in this report unless they have general application to ESA law and practice.

[3]Specific listings of species, designations of critical habitat, development of recovery plans, inter-agency consultations, and issuance of incidental take authorizations are not covered in the portion of this report on administrative developments unless they have general application to ESA law and practice.

[4]Interagency Cooperation—Endangered Species Act of 1973, as Amended; Incidental Take Statements, 80 Fed. Reg. 26,832 (May 11, 2015) (to be codified at 50 C.F.R. pt. 402).

[5]Endangered and Threatened Wildlife and Plants; Revisions to the Regulations for Petitions, 80 Fed. Reg. 29,286 (May 21, 2015) (to be codified at 50 C.F.R. pt. 424).

[6]Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition To List Greater Sage-Grouse (Centrocercus urophasianus) as an Endangered or Threatened Species, 80 Fed. Reg. 59,858 (October 2, 2015) (to be codified at 50 C.F.R. pt. 17).

relied on in the decision, however, are the subject of litigation challenges by various states and resource users.[7]

While not limited by the ESA mitigation, a November Presidential Memorandum on natural resources mitigation specifically requires FWS to develop a revised mitigation policy applicable to its responsibilities under the ESA and to finalize a policy on credits for pre-listing conservation actions.[8]

III. JUDICIAL DEVELOPMENTS[9]

A. Section 4: Listings, Critical Habitat Designation, and Recovery Plans

1. Listings

On a number of occasions courts have found that FWS had improperly relied on speculative, voluntary, or untested federal, state, local, and private conservation actions as reason not to list a species—in essence finding that FWS had overestimated the benefits of the actions—which led the agency to develop its Policy for Evaluation of Conservation Efforts When Making Listing Decisions (PECE). In a first of its kind decision, a district court found that FWS had violated its PECE by *underestimating* the conservation benefits of conservation actions when deciding to list the lesser prairie chicken (LPC) as a threatened species.[10] Specifically, the court found that FWS's assumption, made at the beginning of its PECE evaluation, that not listing LPC would remove incentives for industry to participate in the plan was conclusory and not supported by any substantive basis. Further, the court found that FWS considered outdated information on landowner enrollment in the plan, that FWS did not attempt to look forward and project future funding, that FWS's conclusions regarding future industry enrollment in the plan were contradictory, that FWS arbitrarily dictated its own timeframe for implementation of the plan, and that FWS failed to account for fact that the main function of plan was to create habitat for the species.[11]

Plaintiffs argued that the FWS decision not to designate a distinct population segment (DPS) of the marbled murrelet violated agency "precedents" of methodology and policy when compared to other DPS decisions. The D.C. Circuit ruled that "the Service is bound by methodologies and policies established in prior determinations [only]

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[7] *See* Complaint for Declaratory and Injunctive Relief, Otter v. Jewell, No. 1:15-cv-01566 (D.C. Cir. filed Sept 25, 2015); Complaint for Declaratory and Injunctive Relief, W. Exploration LLC v. Dep't of the Interior, No. 3:15-cv-00491 (D. Nev. filed Sept. 23, 2015).

[8] Presidential Memorandum of Nov. 3, 2015, 80 Fed. Reg. 68,743 (Nov. 6, 2015); *see also* Press Release, The White House, Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment (Nov. 3, 2015).

[9] The case discussions presented in this report include significant ESA cases selected by the author and organized according to an outline of major ESA sections as the statute existed in 2015. All slip opinions are on file with the author. Some decisions from late in the calendar year 2014 are included if they were not included in the Committee's 2014 Year in Review Report.

[10] Permian Basin Petroleum Ass'n v. Dep't of the Interior, No. MO–14–CV–50, 2015 WL 5192526, at *5 (W.D. Tex. Sept. 1, 2015).

[11] *Id.* at *4, *7-10, *19.

to the extent that such [conditions] are not factually distinguishable on a case-by-case basis," which was not the case with the DPS decision in question.[12]

In a suit challenging the so-called "Listing Settlements," under which FWS agreed to a schedule for processing warranted-but-precluded species to final listing decisions, the D.C. Circuit held that there is no procedural right to provide public comment at the warranted-but-precluded stage prior to FWS determining whether to list candidate species, withdraw warranted-but-precluded classification, or accelerate final listing determinations.[13]

In a somewhat roundabout discussion, a district court ruled that the 2014 Final Policy on Interpretation of the Phrase "Significant Portion of its Range"[14] is entitled to *Chevron*/*Brand X* deference and, thus, is to be reviewed only for its reasonableness.[15] Under the facts of the case, however, the court found that the meaning of "significant portion of its range" ultimately did not matter in FWS's decision not to list the Gunnison's prairie dog, and thus, the court did not consider whether the 2014 policy is reasonable.[16]

2. Critical Habitat Designations

After proposing to designate more than 375,000 acres as critical habitat for a population of the woodland caribou, FWS reevaluated the science based on several peer reviews and public comments and designated just over 30,000 acres. The district court found this a procedural violation of the Administrative Procedure Act (APA) because FWS made a fundamental and dramatic change in reasoning based on materials not previously discussed or cited in the Proposed Rule, meaning the final designation was not a "logical outgrowth" of the proposed rule and thus required republication with opportunity for public notice and comment.[17]

The Ninth Circuit held that a provision in a habitat conservation plan (HCP) permit assuring that FWS will not designate land within the scope of the HCP as critical habitat "to the maximum extent allowable after public review and comment" does not and could not legally constitute a contractual assurance that the agency would not designate as critical habitat lands covered by the HCP; so long as FWS adequately took the impacts on the HCP into account, which the court ruled the agency did, the designation was proper.[18]

After providing a thorough history of FWS's methodology for conducting economic impact analyses for critical habitat designations, a district court held that FWS/NMFS 2012 joint rule adopting the "baseline approach" is entitled to *Chevron*/*Brand X* deference.[19]

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[12]Am. Forest Res. Council v. Ashe, 601 Fed. App'x 1, 3, 4-5 (D.C. Cir. 2015).

[13]Nat'l Ass'n of Home Builders v. U.S. Fish and Wildlife Serv., 786 F.3d 1050, 1052 (D.C. Cir. 2015).

[14]Final Policy on Interpretation of the Phrase "Significant Portion of Its Range" in the Endagered Species Act's Definitions of "Endangered Species" and "Threatened Species", 79 Fed. Reg. 37,578 (July 1, 2014) (to be codified at 50 C.F.R. ch. I and ch. II).

[15]WildEarth Guardians v. Jewell, No. 2:14–cv–00833 JWS, 2015 WL 5770537, at *6 (D. Ariz. Sept. 8, 2015).

[16]*Id.* at *8.

[17]Ctr. for Biological Diversity v. Kelley, 93 F. Supp. 3d 1193, 1204 (D. Idaho 2015).

[18]Bear Valley Mut. Water Co. v. Jewell, 790 F.3d 977, 991 (9th Cir. 2015).

[19]Otay Mesa Prop., L.P. v. Dep't of the Interior, No. 13–cv–0240 (KBJ), 2015 WL 7176104, at *13 (D.D.C. Nov. 13, 2015).

3. Recovery Plans

No developments of importance.

4. Five-Year Reviews

No developments of importance.

B. Section 5: Habitat Acquisition

No developments of importance.

C. Section 6: State Cooperative Programs

No developments of importance.

D. Section 7: Federal Agency Conservation Duty, Jeopardy Standard Consultations, and Incidental Take Statements

1. Section 7(a)(1) Conservation Duty

No developments of importance.

2. Section 7(a)(2) Consultation Standards and Procedures

Over a blistering dissent, in an application of the *Home Builders* "discretionary control" principle, the Ninth Circuit held that the Bureau of Safety and Environmental Enforcement (BSEE) was not required to consult when approving petroleum companies' oil spill response plans, even though a spill could affect listed species, because BSEE has a nondiscretionary duty to approve plans that meet statutory criteria defined and implemented through BSEE's regulations.[20] The Ninth Circuit later denied en banc review, again over a scathing dissent.[21]

In another Ninth Circuit "discretionary control" case coming out the other way, the court held that the U.S. Forest Service was required to reinitiate consultation at a programmatic level after FWS revised its critical habitat designation for the Canada lynx to include national forest land, even though the Forest Service made its final forest plan final decisions before the revision. The court concluded that FWS's initial designation did not include any national forest land and the Forest Service's ongoing regulatory authority provided it continued discretionary control to inure to Canada lynx's benefit.[22]

By contrast, a district court held that the fact that EPA, in general, administers Clean Air Act PSD permitting authority, discretion is not a basis for requiring EPA to reinitiate consultation regarding a power plant PSD permit it issued in 2001, when that permit expired and has since been replaced by a state-issued PSD permit.[23]

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[20]Alaska Wilderness League v. Jewell, 788 F.3d 1212, 1224-25 (9th Cir. 2015).
[21]Alaska Wilderness League v. Jewell, No. 13-35866, 2015 WL 9466852 (9th Cir. Dec. 29, 2015).
[22]Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv., 789 F.3d 1075, 1087-88 (9th Cir. 2015).
[23]Wild Equity Inst. v. Envtl. Prot. Agency, No. 15-cv-2461-PJH, 2015 WL 7351400, at *11 (N.D. Cal. Nov. 20, 2015).

The Ninth Circuit held that BLM was not required to consult on the direct or indirect effects of a wind farm on private land when issuing a right of way across BLM land to reach the wind farm because: (1) BLM did not fund, authorize, or construct the wind farm, and thus had no discretion over the wind farm to exercise for the benefit of species; and (2) the wind farm could have gained roadway access through alternative routes not requiring BLM approval and thus was not part of an interrelated or interdependent action.[24]

The Ninth Circuit rejected the argument that when deciding whether to exclude areas from critical habitat, NMFS must not only "tak[e] into consideration" the economic impact of designation, but also it must balance the economic impact against the environmental benefits of designation, ruling that "after the agency considers economic impact, the entire exclusionary process is discretionary and there is no particular methodology that the agency must follow."[25]

The D.C. Circuit held that FWS's issuance of an incidental take statement to the U.S. Army Corps covering the use by a pipeline of the Corps' nationwide permit for stream crossings was not a federal action subject to NEPA because "[a]n agency's advice to another agency on how that agency should proceed with its permitting actions does not amount to federal action under NEPA."[26] The court concluded FWS had stayed within this "consultative role," by merely offering its opinions and suggestions to the Corps, which, as the action agency, ultimately decides whether to adopt or approve them.[27] Notably, because the Corps engaged in a verification process for the stream crossings, including seeking FWS ITS, the court held the Corps' adoption of the ITS and imposition of the conditions on the pipeline was a "regulatory approval" triggering NEPA, though the scope of the NEPA assessment was limited to the stream crossings, not the entire pipeline.[28]

The Ninth Circuit emphasized its case law requires that courts

> [G]ive wide latitude to an agency to determine what constitutes the best scientific and commercial data available, as "[t]he determination of what constitutes the *best* scientific data available belongs to the agency's special expertise, and thus when examining such a determination, a reviewing court must generally be at its most deferential . . . ."[29]

In an example of the increasing importance of climate change in consultations, a district court held NMFS did not adequately explain how the short-term effects of climate change, which NMFS acknowledged in the biological opinion assessing the impacts of fishing on sea turtles, factored into the no jeopardy finding.[30] In particular, the court found the biological opinion did not explain how its conclusion is a reasonable one in view of the potential short-term impacts caused by sea-level rise, which NMFS stated is expected to result in increased erosion rates along nesting beaches.[31]

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[24]Sierra Club v. Bureau of Land Mgmt., 786 F.3d 1219, 1224-25 (9th Cir. 2015).
[25]Building Indus. Ass'n of the Bay Area v. Dept. of Commerce, 792 F.3d 1027, 1032-33 (9th Cir. 2015).
[26]Sierra Club v. U.S. Army Corps of Eng'rs, 803 F.3d 31, 45 (D.C. Cir. 2015).
[27]*Id.*
[28]*Id.* at 46, 49-52.
[29]Cascadia Wildlands v. Thrailkill, 806 F.3d 1234, 1241 (9th Cir. 2015).
[30]Oceana, Inc. v. Pritzker, No. 12-0041 (PLF), 2015 WL 5138389, at *14 (D.D.C. Aug. 31, 2015).
[31]*Id.* at *14.

A district court ruled that FWS's finding in a biological opinion that BLM's continued approval of grazing in an area will adversely affect unfenced stock tanks, which are part of a species' critical habitat, does not render FWS's no adverse modification determination arbitrary and capricious.[32] The court explained that "an adverse modification requires more than an adverse effect; rather, '[a]dverse modification occurs only when there is a direct or indirect alteration that *appreciably diminishes* the value of critical habitat."[33] Nevertheless, the agency's finding was defective because it did not adequately take into account effects on the species' dispersal habitat within the critical habitat area.[34]

The Ex-Im bank financed two natural gas projects in Australia. The upstream portion includes the development of coal seam gas fields and the construction of gas transmission pipelines, whereas the downstream portion includes the construction of LNG facilities and related infrastructure, which will be used to process natural gas, condense it to liquid, and store it for transport. The district court refused to dismiss a claim that the Ex-Im Bank should have consulted on the projects

> Because it is reasonable to infer that exporting LNG to destinations abroad is one of the primary objectives/components of the [p]rojects . . . [and therefore,] [p]laintiffs pled facts plausibly showing that the scope of Ex–Im Bank's actions entail not only construction-related activities occurring in Australia and its territorial seas but also post-construction shipping activities occurring upon the high seas . . . .[35]

The district court held it did not have subject matter jurisdiction to hear plaintiff's ESA citizen suit claim that EPA failed to consult with FWS and NMFS regarding its registration of a chemical compound as an active pesticide ingredient under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) because FIFRA's jurisdictional grant requires plaintiffs to bring "all challenges to an [EPA registration] [o]rder's validity before the Courts of Appeals, even when a separate statutory scheme grants jurisdiction to the District Courts."[36]

3. Section 7(d) Prohibition Against Irreversible Commitment of Resources

No developments of importance.

4. Incidental Take Statements

Because plaintiffs did not identify evidence in the administrative record that take of Atlantic salmon may occur in connection with construction of transmission lines for a wind farm and only alleged that take was "inevitable," the district court ruled plaintiffs failed to demonstrate that FWS should have issued an incidental take statement in its consultation with the Corps.[37]

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[32]Ctr. for Biological Diversity v. Branton, No. CV 10-330 TUC AWT, 2015 WL 3922107, at *11 (D. Ariz. June 26, 2015).
[33]*Id.* (internal quotations and citations omitted).
[34]*Id.* at *12-13.
[35]Ctr. for Biological Diversity v. Export-Import Bank of the United States, No: C 12-6325 SBA, 2015 WL 738641, at *6 (N.D. Cal. Feb. 20, 2015).
[36]Ctr. for Biological Diversity v. EPA, 106 F. Supp. 3d 95, 101 (D.D.C. 2015).
[37]Protect Our Lakes v. U.S. Army Corps of Eng'rs, No. 1:13-cv-402-JDL, 2015 WL 732655, at *4 (D. Me. Feb. 20, 2015).

NMFS concluded the Navy's proposed training and testing activities in a more than 2.7 square nautical mile area of Pacific Ocean would not jeopardize affected turtle species, but it issued an incidental take statement without a numerical cap on the taking of turtles by vessel strikes, instead limiting take based on "activity levels as proposed." The district court held NMFS did not adequately explain its position that it was impracticable to express a numerical measure of take, and the agency failed to provide any trigger for an unacceptable level of incidental take that would require reinitiating consultation.[38]

E. Section 9: Take Prohibition

Although it granted the federal and state defendants' motions to dismiss on standing grounds, the district court went on to address the substantive claim that the government defendants were liable for vicarious take of protected sea turtles by "allowing and authorizing" known takings by the recreational hook and line fishery. The court ruled the plaintiffs had "not plausibly alleged that the federal defendants ha[d] caused sea-turtle takings to be committed" because they failed to allege "that the federal defendants play any role in 'authorizing or allowing' recreational hook and line fishing in North Carolina waters."[39] Additionally,

> [T]o the extent plaintiffs' claim against the federal defendants is based on the federal defendants' failure to enact a specific regulatory scheme against the recreational hook and line fishery or on the federal defendants' decision not to seek penalties against the recreational hook and line fishery for sea-turtle takings, those decisions are [wholly] discretionary and are judicially unreviewable.[40]

Unlike with the federal defendants, however, the court ruled the plaintiffs had "plausibly alleged that the state defendants are actively involved in licensing, permitting, and regulating the recreational hook and line fishery."[41]

F. Section 10: Permits and Experimental Populations

1. Habitat Conservation Plans (HCP) Permits

The district court found it improper for FWS, in issuing fifty-year HCP permits for timber harvesting projects, to factor a third-party non-applicant's conservation efforts on neighboring lands—in this case the Forest Service on national forest lands—into its analysis of the permit applicant's mitigation efforts.[42] The court later vacated the permits.[43]

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[38]Conservation Council for Haw. v. Nat'l Marine Fisheries Serv., 97 F. Supp. 3d 1210, 1234-35 (D. Haw. 2015).
[39]N.C. Fisheries Ass'n, Inc. v. Pritzker No. 4:14–CV–138–D, 2015 WL 4488509, *8 (E.D.N.C. July 22, 2015).
[40]*Id.* at *9.
[41]*Id.*
[42]Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic and Atmospheric Admin., 99 F. Supp. 3d 1033, 1066 (N.D. Cal. 2015).
[43]Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic and Atmospheric Admin., 109 F. Supp. 3d 1238 (N.D. Cal. 2015).

Plaintiffs argued FWS improperly issued an HCP permit to a wind farm because the project should have been required to minimize take to the maximum extent practicable before mitigating for any remaining take. The district court held that once the project demonstrated it had a plan to mitigate and minimize impacts of takings to the "maximum extent possible," the project was not required to further reduce takings until further reduction was impracticable, and FWS was not required to independently assess whether plaintiff's project's proposed alternative of reducing turbine "cut in" speeds was impracticable.[44] As the court explained,

> [I]t would be unnecessary, and indeed wasteful of agency resources, for this Court to require that the Service reject proposed alternatives as impracticable *even after* the Service has first found that proposed minimization and mitigation measures have "fully offset" the impact to a species and that a project will not have a statistically significant impact on the species.[45]

2. Experimental and Reintroduced Populations

No developments of importance.

G. Section 11: Enforcement, Citizen Suits, Standing, and Jurisdiction Issues

The D.C. Circuit held that associations representing entities and individuals involved in building and developing land lacked standing to challenge consent decrees requiring FWS to determine, in accordance with a settlement-defined schedule for action, whether species classified as warranted-but-precluded should be listed—even though the candidate species were located on association members' lands and association members had expended resources on conservation efforts to reduce risks to the candidate species—because the settlements simply required FWS to render final listing decision using specific timeline without dictating agency's substantive judgment, and no species had been formally listed.[46]

In holding a citizen suit notice letter adequate to satisfy the notice requirement, the Ninth Circuit emphasized that a would-be plaintiff "must at a minimum provide sufficient information so that the notified parties [can] identify and attempt to abate the violation," but a citizen is "not required to list every specific aspect or detail of every alleged violation."[47] In weighing the adequacy of the notice, "[a] reviewing court may examine both the notice itself and the behavior of its recipients to determine whether they understood or reasonably should have understood the alleged violations[,]" which the court explained requires the recipients to combine the information provided in the notice letter with the information to which they have ready access.[48] Under these principles, plaintiffs challenging Forest Service approvals of mining operations did not have to first extract more detained information from the agency through Freedom of Information Act (FOIA) requests and include it in the notice letters; rather, because such information is

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[44]Union Neighbors United, Inc. v. Jewell, 83 F. Supp. 3d 280 (D.D.C 2015).
[45]*Id.* at 288.
[46]Nat'l Ass'n of Home Builders v. U.S. Fish and Wildlife Serv., 786 F.3d 1050 (D.C. Cir. 2015).
[47]Klamath-Siskiyou Wildlands Ctr. v. MacWhorter, 797 F.3d 645, 651 (9th Cir. 2015) (internal quotations and citations omitted).
[48]*Id.* at 651-53.

readily available to the plaintiffs through FOIA, it is equally readily available to the agency, and the notice letters were sufficient to lead the agency to the details.[49]

A district court held that a trade association did not have standing to challenge FWS's designation of critical habitat for the northern spotted owl because it did not show that any of its economic losses are traceable to the designation of critical habitat instead of to an independent source, such as the recession or that their predictions of future injury, such as that the critical habitat designation "will lead to a substantial probability of imminent future harm from catastrophic wildfire, disease and insect infestation starting with the designated critical habitat and spreading uncontrollably onto county forestland, reducing or destroying the economic value of those lands."[50]

H. Miscellaneous ESA Topics and Related Federal and State Laws

1. Purposes of the Statute

The Ninth Circuit rejected a claim by municipalities and water districts that FWS did not cooperate with the state in resolving water resource issues that arose from designation of critical habitat for threatened Santa Ana sucker, and the ESA's declaration in section 2(c)(2) of a federal policy to "cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species" was a non-operative statement of policy that did not create an enforceable mandate or an additional procedural step.[51]

2. Migratory Bird Treaty Act

The split in the Circuits regarding whether the Migratory Bird Treaty Act (MBTA) prohibits unpermitted incidental take of covered species widened as the Fifth Circuit joined the courts interpreting the statute's taking prohibition to be "limited to deliberate acts done directly and intentionally to migratory birds," meaning that "commercial activity that unintentionally and indirectly causes migratory bird deaths"—in this case deaths of birds landing in open-air oil tanks—is not prohibited.[52] The court reasoned that when Congress enacted the MBTA in 1918, the common law conception of "take" in the context of wildlife did not extend beyond reducing animals, by killing or capturing, to human control, and that in later statutes, such as the ESA, Congress clearly indicated its intent to go beyond the common law definition by including terms like "harm" and "harass" in the statutory definition of take.[53] The court also pointed to what it considered the absurd result that "[i]f the MBTA prohibits all acts or omissions that 'directly' kill birds, where bird deaths are 'foreseeable,' then all owners of big windows, communication towers, wind turbines, solar energy farms, cars, cats, and even church steeples may be found guilty of violating the MBTA."[54]

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[49] *Id.* at 653-54.
[50] Carpenters Indus. Council v. Jewell, No. 13–361 (RJL), 2015 WL 5693079, at *3-4 (D.D.C. Sept. 28, 2015).
[51] Bear Valley Mut. Water Co. v. Jewell, 790 F.3d 977, 987 (9th Cir. 2015).
[52] United States v. CITGO Petroleum Corp., 801 F.3d 477, 488-89 (5th Cir. 2015).
[53] *Id.* at 489-90.
[54] *Id.* at 494.

Chapter 4 • ENVIRONMENTAL DISCLOSURE
2015 Annual Report[1]

The year 2015 was an active one for environmental disclosure and reporting issues in terms of renewed interest in enforcement of regulatory disclosure requirements, shareholder lawsuits, shareholder proposals and voluntary reporting initiatives.

I. SEC, STATE & FEDERAL ENFORCEMENT ACTIVITY, AND DISCLOSURE LEGISLATION

In 2015, climate change disclosure again became a focus of the Obama administration,[2] legislators, presidential candidates, and the New York State Attorney General. In the wake of news reports that ExxonMobil knew of climate change risks from fossil fuel use from its own research since the 1970s yet funded groups that sought to undermine climate change science, four members of Congress sent a letter to the Securities and Exchange Commission (SEC), asking the agency to investigate ExxonMobil's climate change disclosure; another forty-five House Democrats sent a letter to the CEOs of ExxonMobil, Chevron Corp., ConocoPhillips Co., BP, Royal Dutch Shell PLC, and Peabody Energy Corp., asking for responses to allegations that the industry covered up its knowledge about the impacts of fossil fuels on climate change; and two members of Congress and public interest groups sent letters to the U.S. Department of Justice, asking it to investigate whether ExxonMobil deliberately covered up its climate change knowledge.[3] In addition, the New York State Attorney General began an investigation pursuant to the New York State's expansive securities statute (the Martin Act) of ExxonMobil's public statements and internal research regarding climate change.[4] The New York State Attorney General also entered into an Assurance of Discontinuance agreement with Peabody Energy Corp., requiring the company to increase its climate change disclosure to resolve an investigation under the Martin Act.[5] Among other corrective disclosures, Peabody agreed that it would not state that it cannot

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[1]This summary was prepared by Donna Mussio, Associate, Fried, Frank, Harris, Shriver & Jacobson LLP; Mary Beth Phipps, Associate, Fried, Frank, Harris, Shriver & Jacobson LLP; James G. Votaw, Partner, Manatt, Phelps & Phillips, LLP; Adam Riedel, Associate, Manatt, Phelps & Phillips, LLP; and Misty A. Sims, Sims & Sims Law, PLLC.

[2]In March 2015, President Obama issued an executive order designed to reduce the federal government's greenhouse gas emissions. The order required the White House Council on Environmental Quality to prepare an inventory of major federal suppliers, including information about whether the suppliers account for and disclosed their greenhouse gas emissions for the previous year and have set emissions reduction targets. Exec. Order No. 13,693, 80 Fed. Reg. 15,869 (Mar. 19, 2015).

[3]Letter from Ted W. Lieu, Member of Cong., et al. to Mary Jo White, Chair, Sec. and Exch. Comm'n (Oct. 30, 2015); Letter from Ted W. Lieu, Member of Cong., et al. to John S. Watson, CEO & Chairman, Chevron, et al. (Dec. 7, 2015); Letter from Margie Alt, Exec. Director of Environment America, et al. to Loretta E. Lynch, Att'y Gen., Dep't of Justice (Oct. 23, 2015); Letter from Ted W. Lieu & Mark DeSaulnier, Members of Cong., to Loretta E. Lynch, Att'y Gen., Dep't of Justice (Oct. 14, 2015).

[4]Justin Gillis & Clifford Krauss, *Exxon Mobil Investigated for Possible Climate Change Lies by New York Attorney General*, N.Y. TIMES (Nov. 5, 2015), http://www.nytimes.com/2015/11/06/science/exxon-mobil-under-investigation-in-new-york-over-climate-statements.html.

[5]Press Release, N.Y. State Office Of The Att'y Gen., A.G. Schneiderman Secures Unprecedented Agreement with Peabody Energy to End Misleading Statements and Disclose Risks Arising From Climate Change (Nov. 9, 2015).

reasonably predict the range of impacts that any future laws related to climate change may have on its business and would not omit less favorable projections by the International Energy Agency of future coal demand. In November 2015, a group of thirty-five Democratic members of Congress wrote a letter to the SEC demanding stronger action to improve disclosure of material risks from climate change, including an update to the SEC's plans to implement its 2010 climate change guidance.[6]

Members of Congress have also sent letters to the SEC in July[7] and August[8] 2015, asking the SEC to review the risk disclosures of companies engaged in drilling on the Outer Continental Shelf and Arctic Ocean and identifying the disclosure of Royal Dutch Shell as providing investors with only "boilerplate generalities" regarding the potential for accidents without disclosing equipment problems, the likely costs of a spill, and related litigation.

The criminal trial of ex-Massey Energy Co. CEO Don Blankenship resulted in the acquittal of charges that Blankenship made false statements to the SEC after a mine explosion in 2010 that killed twenty-nine employees. The trial judge allowed the indictments relating to the alleged false statements to proceed, rejecting Blankenship's arguments that the statements to the SEC that the company does not condone mining safety violations and strives to be in compliance were subjective and incapable of being proven false.[9]

In August 2015, Navistar received Wells notices (i.e., notices indicating a preliminary determination to recommend that the SEC file an enforcement action against Navistar and its former CEO) as a result of the SEC's ongoing investigation into possible fraudulent statements in connection with Navistar's attempt to receive EPA emissions certification of its heavy duty diesel engines.[10]

A number of commentators have suggested that there may be implications beyond conflict minerals disclosure in connection with the D.C. Circuit Court of Appeals' 2014 decision—which was affirmed on rehearing in 2015—holding that SEC's conflict mineral rule's requirement to describe products as having not been found to be Democratic Republic of the Congo conflict free is "compelled speech" that violates the First Amendment.[11] These commentators have suggested that the D.C. Circuit's refusal to apply a more relaxed standard of review creates doubt regarding the constitutionality of other mandatory disclosures relating to public health and environmental hazards.[12] For

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[6]Letter from Sen. Jack Reed, et al. to Mary Jo White, Chair, Sec. and Exch. Comm'n (Oct. 29, 2015); *see also* Press Release, Sen. Jack Reed, Reed, Schatz, & Cartwright Lead Bicameral Letter Urging SEC to Enforce Climate Change Guidance (Oct. 29, 2015).

[7]Letter from Raul Grijalva, Member of Cong., et al. to Mary Jo White, Chair, Sec. and Exch. Comm'n (July 24, 2015).

[8]Letter from Benjamin L. Cardin, Member of Cong., et al. to Mary Jo White, Chair, Sec. and Exch. Comm'n (Aug. 18, 2015).

[9]Cara Salvatore, *Ex-Massey CEO Found Guilty of Conspiracy in Mine Blast Trial*, LAW360 (Dec. 3, 2015, 12:22 PM), http://www.law360.com/articles/727858/ex-massey-ceo-found-guilty-of-conspiracy-in-mine-blast-trial (subscription); Jeremy Peterson, Joel Gross and James W. Cooper, *Blankenship Case Shows Perils of Post-Crisis Assurances*, LAW360 (Dec. 17, 2014, 11:00 AM), http://www.law360.com/articles/605265/blankenship-case-shows-perils-of-post-crisis-assurances (subscription).

[10]NAVISTAR INT'L CORP., Quarterly Report (Form 10-Q) (Sept. 2, 2015).

[11]Nat'l Ass'n of Mfrs., Inc. v. Sec. and Exch. Comm'n, 800 F.3d 518 (D.C. Cir. 2015).

[12]Cydney Poser, *Is a Lot More at Stake in the Conflict Minerals Case Than the Conflict Minerals Disclosure Rules?*, PUBCO @ COOLEY BLOG (Oct. 16, 2015, 4:28 PM),

example, food related industry groups have brought legal challenges against the State of Vermont's 2014 enactment of Act 120, which subjects manufacturers of food "produced with genetic engineering" to additional labeling requirements, arguing that the label requirements amount to "compelled speech." The district court denied the industry groups' preliminary injunction to enjoin the enforcement of Act 120 (set to go into effect in July 2016) but also denied the state's motion to dismiss in part allowing the case to proceed. The decision is currently on appeal.[13]

Congress and the SEC have also taken steps to make disclosures generally less duplicative and more specific. On December 4, 2015, President Obama signed into law the Disclosure Modernization and Simplification Act of 2015, which requires the SEC to revise regulation S-K to eliminate duplicative, overlapping, outdated, or unnecessary provisions.[14] In 2015, the SEC issued comment letters to more than thirty-five companies that generally requested more specific or additional details surrounding environmental risks. The SEC issued comment letters to several funds that stated they considered the sustainability and social impact of the companies that the funds invest in, asking the funds to provide the specific criteria that they use to evaluate such impacts.[15] The SEC asked another company to define its use of the term "green bonds."[16] A company was also asked to explain the basis for its statement that it could not estimate the financial effect of ongoing settlement negotiations with EPA when offers and counteroffers were being exchanged.[17] SEC comment letters were issued to more than eighteen companies, asking them to quantify the impacts of low oil and gas prices on their proved reserves and results of operations. The SEC also issued a number of comment letters requesting companies to provide more detail on their accounting for environmental risks and liabilities, including the risks associated with oil and gas operations, asbestos claims, the useful life of solar panels, disposal facility retirement obligations, and renewable energy credits.[18]

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http://cooleypubco.com/2015/10/16/is-a-lot-more-at-stake-in-the-conflict-minerals-case-than-the-conflict-minerals-disclosure-rules/.

[13]Grocery Mfrs. Ass'n. v. Sorrell, 102 F. Supp. 3d 583 (D. Vt. 2015), *appeal docketed*, No. 15-1504 (2d Cir. May 6, 2015).

[14]H.R. 1525, 114th Cong. (1st Sess. 2015) (enacted).

[15]*See, e.g.*, Letter from Ryan C. Larrenaga, Sec'y, Columbia Funds Series Trust I, to Deborah O'Neal-Johnson, Sec. and Exch. Comm'n (Mar. 20, 2015); Letter from Jay S. Fitton, Sec'y, Huntington Asset Servs., Inc., to Laura Hatch, Sec. and Exch. Comm'n (Aug. 26, 2015).

[16]Letter from Horst Seissinger, First Vice President, & Jurgen Kostner, Vice President, KfW Bankengruppe, to Sandra B. Hunter, Staff Att'y, Sec. and Exch. Comm'n (Oct. 16, 2015).

[17]Letter from Charles Herlinger, Chief Fin. Officer, Orion Engineered Carbons S.A., to Terence O'Brien, Accounting Branch Chief, Sec. and Exch. Comm'n (Aug. 31, 2015).

[18]*See, e.g.*, Letter from James Muchmore, Gen. Counsel, Emerald Oil, Inc., to H. Roger Schwall, Assistant Dir., Sec. and Exch. Comm'n (May 6, 2015); Letter from Colleen M. Darragh, Vice President and Controller, U.S. Steel Corp., to Terence O'Brien, Accounting Branch Chief, Sec. and Exch. Comm'n (Aug. 13, 2015); Letter from Sunrun Inc. to Pamela Long, et. al., Sec. and Exch. Comm'n (July 22, 2015); Letter from Eric L. Gerratt, Exec. Vice President, US Ecology, Inc., to Melissa N. Rocha, Senior Assistant Chief Accountant, Sec. and Exch. Comm'n (Oct. 5, 2015); Letter from James R. Hatfield, Exec. Vice President and Chief Fin. Officer, Pinnacle West Capital Corp., to William H. Thompson, Accounting Branch Chief, Sec. and Exch. Comm'n (Aug. 21, 2015).

In 2015, environmental and safety issues were an area of increasing focus for the plaintiff securities bar. Securities class actions were filed against a number of companies for allegedly making false statements regarding compliance with environmental and safety requirements, including: Plains All American Pipeline LP[19] for alleged false statements regarding pipeline integrity maintenance, compliance with oil spill standards, and the damage caused by a May 2015 rupture of one of its pipelines near Santa Barbara, California; Vale SA and certain of its executives regarding alleged false statements about the company's environmental, health and safety standards, and risk management and the toxicity of mining waste from a burst dam in Brazil;[20] executives at Duke Energy Corp.[21] for allegedly withholding information in a proxy statement about their complicity in a 2014 coal ash spill in North Carolina until after their re-election at an annual meeting; Lumber Liquidators Holdings, Inc.[22] and certain of its executives for alleged false statements regarding levels of formaldehyde in flooring products, as well as illegally harvested wood from Russia;[23] and Rayonier Advanced Materials Inc.[24] for allegedly failing to record material liabilities for environmental remediation obligations.

The news in September 2015 that Volkswagen employed software-based "defeat devices" in certain of its diesel engines to circumvent emissions standards quickly led to the filing of a few investor lawsuits on behalf of investors who purchased VW's American Depositary Receipts in the U.S.[25] In addition, claims have been filed under

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[19]Complaint and Demand for Jury Trial, Jacksonville Police and Fire Pension Fund v. Plains All Am. Pipeline, L.P., No. 2:15-cv-06210, 2015 WL 4965986 (C.D. Cal. Aug. 14, 2015).

[20]Michael Daniels, *Investor Filed Lawsuit Against Vale SA (ADR)(NYSE:VALE) Over Alleged Misleading Statements*, WALLSTREET SCOPE (Dec. 21, 2015, 10:34 AM), http://www.wallstreetscope.com/investor-filed-lawsuit-against-vale-sa-adr-nysevale-over-alleged-misleading-statements/25543786/.

[21]Complaint and Demand for Jury Trial, Greenberg v. Browning, et al., No. 4:15-cv-82 (E.D.N.C. May 26, 2015).

[22]Third Amended Complaint and Demand for Jury Trial, Kiken v. Lumber Liquidators Holdings, Inc., No. 4:13-cv-00157-AWA-DEM (E.D. Va. Nov. 26, 2014).

[23]A Lumber Liquidators investor also filed a derivative lawsuit against the company's founder and president, alleging insider trading for selling $19 million worth of stock shortly before possible criminal charges against the company were revealed. The company pled guilty to five offenses, including a felony for making false statements regarding the sourcing of its wood. The company is also facing more than 100 consumer lawsuits accusing it of falsely stating that its flooring inventory complies with emission standards for formaldehyde. Representative Class Action Complaint, In re Lumber Liquidators Chinese-Mfg. Flooring Prod. Mktg., Sales Pracs. & Prod. Liab. Litig., No. 15-md-02627-AJT-TRJ (E.D. Va. Sept. 11, 2015).

[24]Complaint and Demand for Jury Trial, Okla. Firefighters Pension & Ret. Sys. v. Rayonier Advanced Materials, Inc., 2015 WL 1952700, No. 3:15-cv-546-J-32PDB (M.D. Fla. April 30, 2015).

[25]Volkswagen's emissions cheating scandal has also led to the filing of more than 500 consumer lawsuits, which the Judicial Panel on Multidistrict Litigation has consolidated in the U.S. District Court for the Northern District of California. Y. Peter Kang, *Volkswagen Emissions Fraud MDL Consolidated in California*, LAW360 (Dec. 8, 2015,

Dutch law on behalf of Volkswagen shareholders who purchased shares through a Dutch bank or broker[26] and under German securities laws for failing to publish market-sensitive information in a timely way.[27] According to Volkswagen counsel, the company is also in talks with the SEC.[28]

A number of securities class action lawsuits involving environmental liabilities and compliance resulted in federal court opinions in 2015. In *Construction Workers Pension Fund – Lake County and Vicinity v. Navistar International Corp.*,[29] a federal district court in Illinois dismissed with prejudice the majority of a securities class action against truck engine manufacturer, Navistar International Corp., and its former executives regarding the company's statements about its progress in developing a diesel engine that complied with Environmental Protection Agency (EPA) nitrogen oxide emission standards. The case was subsequently settled for an undisclosed sum.[30] In *In Re Barrick Gold Securities Litigation*,[31] a federal district court in New York dismissed a portion of a class action alleging that Barrick Gold Corp. and certain of its officers misrepresented the projected cost and construction schedule of a South American mining project on the basis that these statements were protected by the safe harbor, but concluded that the plaintiffs sufficiently alleged that the company knew it was violating its environmental commitments during construction of the mine and that the company knew or recklessly disregarded the risk that its investment in the mine might not be recoverable due to material weakness in internal controls. In *Firefighters Pension & Relief Fund of the City of New Orleans v. T. Paul Bulmahn*, a Louisiana federal judge dismissed proposed class actions by noteholders and shareholders claiming that bankrupt ATP Oil & Gas Corp.'s executives misled shareholders regarding the company's liquidity after drilling moratoriums enacted after the Deepwater Horizon oil spill.[32]

Several federal courts also certified classes in connection with securities actions alleging environmental misstatements. In *Ludlow v. BP, P.L.C.*, the Fifth Circuit affirmed the district court's refusal to certify a class of pre-spill investors on the basis that there

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10:30 PM), http://www.law360.com/articles/735773/volkswagen-emissions-fraud-mdl-consolidated-in-california (subscription).

[26]Kevin M. LaCroix, *Volkswagen Vehicle Emissions Scandal Triggers U.S. Securities Suit, Dutch Collective Action*, THE D&O DIARY (Sept. 27, 2015), http://www.dandodiary.com/2015/09/articles/securities-litigation/volkswagen-vehicle-emissions-scandal-triggers-u-s-securities-suit-dutch-collective-action-initiative/.

[27]Olaf Fasshauer, *The VW Case and the German Act on Model Case Proceedings in Disputes under the Capital Market Law*, LEXOLOGY (Dec. 23, 2015), http://www.lexology.com/library/detail.aspx?g=e09418e8-12a7-4910-b826-89316fb032e3.

[28]Beth Winegarner, *Volkswagen Diesel MDL Judge Pushes for Quick Resolution*, LAW360 (Dec. 22, 2015, 5:13 PM), http://www.law360.com/articles/741083/volkswagen-diesel-mdl-judge-pushes-for-quick-resolution (subscription).

[29]Constr. Workers Pension Fund v. Navistar Int'l Corp., No. 13-C-2111, 2015 WL 4185928 (N.D. Ill. July 10, 2015).

[30]Adam Sege, *Settlement Reached in Slashed Navistar Investors Suit*, LAW360 (Dec. 1, 2015) http://www.law360.com/articles/732879/settlement-reached-in-slashed-navistar-investors-suit (subscription).

[31]*In re* Barrick Gold Sec. Litig., No. 13 Civ. 3851(SAS), 2015 WL 1514597, (S.D.N.Y. Apr. 1, 2015).

[32]Firefighter Pension & Relief Fund v. Bulmahn, Nos. 13-6083, 13-6084, 13-6233, 2015 WL 4879217 (E.D. La. Aug. 14, 2015); Nos. 13-3935, c/w 13-60083, 13-6084, 13-6233, 2015 WL 7454598 (E.D. La. Nov. 23, 2015).

was no sound method for calculating damages across the class, but affirmed the certification of another class of investors who bought BP stock after the spill, who were all allegedly harmed by the alleged misrepresentations regarding spill rate.[33] A California federal court in *Loritz v. Exide Technologies* agreed to certify a liability-only class of investors accusing the bankrupt battery manufacturer of false statements regarding the company's compliance with environmental regulations, but expressed concern regarding the plaintiffs' ability to present a damages model, given that the allegedly false information was disclosed at different times in multiple disclosures throughout the class period. The court initially refused to certify a proposed class of noteholders because plaintiffs had failed to show that common issues predominate, but subsequently amended the class certification order to certify a class of noteholders, based on the common question of controlling person liability for secondary claims under section 15 of the Securities Act and section 20 of the Exchange Act.[34] In a thirteen-year old shareholder suit that made two trips to the U.S. Supreme Court, *Erica P. John Fund, Inc. v. Halliburton Co.*, a federal judge in Texas certified a class of investors regarding alleged misstatements about its financial liability for asbestos claims, finding that Halliburton failed to meet its burden of showing that its announcement of a $30 million asbestos verdict against its subsidiary did not affect stock price.[35]

In addition to securities class actions, there has been an increase in consumer class actions resulting from alleged misstatements regarding environmental matters, as evidenced by the hundreds of consumer lawsuits against Lumber Liquidators and Volkswagen. Consumer complaints were also filed against Chiquita Brands International[36] and Sea World Entertainment Inc.[37] regarding purported false environmental statements in various contexts, including securities filings and corporate sustainability reports. A federal judge in San Diego dismissed three consolidated class action lawsuits against Sea World, finding that the named plaintiffs lacked standing because they failed to establish that they relied on the alleged misrepresentations and failed to plead with particularity the details of the misrepresentations and omissions on which they allegedly relied.[38]

III. SHAREHOLDER RESOLUTIONS

The year 2015 had record-breaking numbers of shareholder resolutions relating to environmental and social topics. Climate change related risks and impacts continue to represent the majority of the environmental resolutions filed in 2015, with seventy-six resolutions filed on the topic. New proposals include resolutions requesting an analysis of the risks posed by transporting oil and gas via train and asking companies to consider

[33]Ludlow v. Dinapoli, 800 F.3d 674 (5th Cir. 2015).
[34]Loritz v. Exide Techs., No. 2:13-cv-02607, 2015 WL 6790247 (C.D. Cal. July 21, 2015).
[35]Erica P. John Fund, Inc. v. Halliburton Co., 309 F.R.D. 251 (N.D. Tex. 2015).
[36]Complaint, Campbell v. Chiquita Brands Int'l, No. 15-cv-02860 (C.D. Cal. Apr. 17, 2015).
[37]Complaint, Anderson v. SeaWorld Parks and Entm't, Inc., No. CGC-15-545292, 2015 WL 1872083 (N.D. Ca. May 15, 2015); Complaint, Hall v. SeaWorld Entm't Inc., No. 3:15-cv-660-CAB-RBB, 2015 WL 8101910 (S.D. Cal. Mar. 25, 2015).
[38] Hall v. SeaWorld Entm't, Inc., No. 3:15-CV-660-CAB-RBB, 2015 WL 9659911 (Dec. 23, 2015) (order granting motion to dismiss).

deforestation's ecological and human rights impacts.[39] A shareholder campaign that was noteworthy for its size, was the New York City Comptroller asking, on behalf of the city's $160 billion pension funds, for proxy access at seventy-five companies with risks associated with climate change, board diversity, and excessive CEO pay.[40]

Shareholders are particularly focused on risks associated with future demand for carbon assets. These resolutions request information regarding how companies are preparing for the likelihood that demand for oil and gas may be significantly reduced due to regulation or other climate-associated drivers, increasing risk for stranding of certain fossil fuel reserves. In a historic moment for shareholder engagement on climate change, and with support of the relevant company boards, resolutions by shareholders of Royal Dutch Shell PLC, BP PLC, and Statoil, calling for annual disclosure of climate change and carbon asset risk reporting, received 98.9%, 98.3%, and 99.95% of the vote, respectively.[41] As a result of past investor requests, more than twenty companies have provided detailed information in this area, including internal pricing of carbon emissions and considerations involved in screening new extraction projects, and some companies have increased investments in renewable energy sources.[42]

Resolutions targeted at sustainability included thirty asking for sustainability reports and eleven requesting that executive pay be linked to sustainability metrics, including one submitted to ConocoPhillips asking it to adopt a policy that it will *not* use any metric based on reserves to determine any amount of executive incentive compensation without first adjusting reserves to account for those that would not be economically producible in a reduced fossil fuel demand scenario.[43] These had varying levels of support, with the resolutions regarding sustainability reports typically receiving 30% to 40% of the shareholder vote, and the resolutions regarding linkage of executive pay all receiving less than 10% of the vote.[44]

Hydraulic fracturing was the subject of seven shareholder resolutions. Six companies were asked to report on efforts to minimize the adverse water resource and community impacts from such company's hydraulic fracturing operations. The resolutions by shareholders of Chevron Corp., ExxonMobil Corp., WPX Energy, Inc., and QEP Resources received 26.9%, 24.9%, 32.8%, and 32% of the vote, respectively, while National Fuel Gas and SM Energy Company agreed to address the motions.[45] Shareholders of Chesapeake Energy Corp. withdrew a request that at least one environmentally qualified candidate be recommended to Chesapeake's board of directors,

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[39]HEIDI WELSH & MICHAEL PASSOFF, PROXY PREVIEW 2015 5, 6 (Feb. 2015). A total of 165 environmental related resolutions were filed in 2015. *See Shareholder Resolutions*, CERES, http://www.ceres.org/investor-network/resolutions (last visited Apr. 6, 2016).

[40]Press Release, N.Y.C. Comptroller Scott M. Stringer, NYC Pension Funds Launch National Campaign to Give Shareowners a True Voice in how Corporate Boards are Elected (Nov. 6, 2014).

[41]*Shell Climate and Carbon Asset Risk Reporting*, CERES (last visited Apr. 6, 2016); *BP Report Annually on Carbon Asset Risk Mitigation*, CERES (last visited Apr. 6, 2016); CERES, CARBON ASSET RISK: A REVIEW OF PROGRESS AND OPPORTUNITIES 14 (June 30, 2015) [hereinafter CARBON ASSET RISK].

[42]CARBON ASSET RISK, *supra* note 41, at 1.

[43]*Id.* at 56. *ConocoPhillips Delink Executive Compensation from Reserves 2015*, CERES (last visited Apr. 6, 2016); WELSH & PASSOFF, *supra* note 39, at 1; CARBON ASSET RISK, *supra* note 41, at 56-57.

[44]*Shareholder Resolutions*, CERES (last visited Jan. 18, 2016).

[45]*Investors Seek Better Disclosures of Fracking Companies' Impacts on Cmtys. and the Env't*, GREEN CENTURY FUNDS (Feb. 20, 2015); *Shareholder Resolutions*, INVESTOR ENVTL. HEALTH NETWORK, (last visited Jan. 18, 2016).

and for such person to have responsibility for environmental matters relating to risks associated with hydraulic fracturing, when Chesapeake named an environmental professional to its board.[46]

In response to past shareholder resolutions, Lowe's agreed to the phasing out of all products containing neonicotinoids.[47] Shareholders have also asked PepsiCola for a report "that discusses the Company's options for policies, above and beyond legal compliance, to minimize impacts of neonics in its supply chain."[48]

IV. PRIVATE GOVERNANCE, VOLUNTARY STANDARDS, AND MISCELLANEOUS

The Global Reporting Initiative (GRI) launched its Sustainability and Reporting 2025 project, designed to produce a roadmap for the future development of sustainability reporting and disclosure over the next decade.[49] The roadmap will be based on interviews with thought leaders on evolving reporting trends and the purpose of sustainability reporting. Initial trends identified by the project include integrated reporting, transparency in the supply chain, shorter and more focused reports, and digital, real-time reporting.[50] GRI has also established a separate Global Sustainability Standards Board (GSSB). GSSB has approved plans to transition the GRI G4 Guidelines to GRI Sustainability Reporting Standards to be issued in 2016, which will follow a new modular structure and be updated on an ongoing basis.[51] In order to avoid duplication of disclosure efforts, GRI published guidances explaining how GRI G4 Guidelines and CDP water questions and climate questions are aligned.[52] GRI also published a linkage document showing how companies can use GRI G4 Guidelines to comply with the European Directive on disclosure of non-financial and diversity information.[53]

The U.N. Sustainable Development Goal "Target 12.6 calls upon U.N. Member States to encourage companies, especially large and transnational companies, to adopt sustainable practices and to integrate sustainability information into their reporting cycle."[54] The U.N. subsequently published a report examining ways to improve the

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[46] *Chesapeake Add a Board Member With Environmental Expertise*, CERES (last visited Jan. 10, 2016).

[47] LOWE'S, 2014 SOCIAL RESPONSIBILITY REPORT 27 (2014).

[48] WELSH & PASSOFF, *supra* note 39, at 28.

[49] *Sustainability and Reporting 2025*, GLOBAL REPORTING INITIATIVE (last visited Mar. 9, 2016). The first analysis paper, SUSTAINABILITY AND REPORTING TRENDS IN 2025, was published in May 2015. GLOBAL REPORTING INITIATIVE, SUSTAINABILITY AND REPORTING TRENDS IN 2025: PREPARING FOR THE FUTURE (May 2015).

[50] GLOBAL REPORTING INITIATIVE, SUSTAINABILITY AND REPORTING TRENDS IN 2025: PREPARING FOR THE FUTURE (Oct. 2015).

[51] Press Release, Global Reporting Initiative, GSSB to Issue GRI Sustainability Reporting Standards in 2016 (Nov. 4, 2015).

[52] GLOBAL REPORTING INITIATIVE, LINKING GRI AND CDP: HOW ARE GRI'S G4 GUIDELINES AND CDP'S 2015 WATER QUESTIONS ALIGNED? (2015); GLOBAL REPORTING INITIATIVE, LINKING GRI AND CDP: HOW ARE GRI'S G4 GUIDELINES AND CDP'S 2015 CLIMATE CHANGE QUESTIONS ALIGNED? (2015).

[53] GLOBAL REPORTING INITIATIVE, MAKING HEADWAY IN EUROPE: LINKING GRI'S G4 GUIDELINES AND THE EUROPEAN DIRECTIVE ON NON-FINANCIAL AND DIVERSITY DISCLOSURE (2015).

[54] Press Release, Global Reporting Initiative, GRI Sustainability Disclosure Database Upgraded to Track New UN Development Goal (Sept. 25, 2015) (internal quotations omitted).

quality of environmental sustainability reporting.[55] The U.N. also launched the U.N. Guiding Principles Reporting Framework in February 2015, which provides a comprehensive guidance for companies to report on their human rights issues in accordance with the U.N. Guiding Principles on Business and Human Rights.[56] Although the reporting framework does not specifically reference sustainability issues, one of the first adopters of the framework, Unilever, identified health and safety as a salient human rights issue.[57] An Assurance Framework, providing guidance for assurance providers and internal auditors on how to assess and assure the information reported by companies under the reporting framework, is scheduled to be issued in early 2016.

The Climate Disclosure Standards Board (CDSB) Technical Working Group updated its 2010 reporting Framework, which is designed to help businesses present environmental information in mainstream reports, such as annual reports, 10-K filings and integrated reports. The updated Framework goes beyond current climate change and greenhouse gas reporting and now also covers environmental information and natural capital.[58] At the launch of the updated Framework, the CDSB and the International Integrated Reporting Council issued a joint statement of collaboration, renewing their commitment to work together to promote coherent and consistent corporate reporting frameworks.[59] Together with the World Business Council for Sustainable Development, the CDSB also began a project to collect and consolidate corporate Environmental, Social, and Governance (ESG) disclosure standards from around the world into a single, publicly accessible database, which is expected to be available in 2018.[60]

The World Federation of Exchanges (WFE) published a report on the current actions of fifty-six stock exchanges from around the world in promoting sustainability reporting by their member companies. WFE seeks to develop an industry consensus on the role exchanges should play in promoting sustainability reporting among companies, and will be developing guidance on reporting issues in the ESG reporting context (e.g., materiality and minimum metrics).[61] In November 2015, the WFE unveiled a set of ESG metrics for stock exchanges, allowing for each member exchange to decide whether such disclosures would be voluntary or mandatory.[62] Similarly, the Sustainable Stock Exchanges (SSE) Initiative released a *Model Guidance on ESG Reporting Information to Investors* for use by global stock exchanges in developing voluntary reporting

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[55]UNITED NATIONS ENV'T PROGRAMME, RAISING THE BAR – ADVANCING ENVTL. DISCLOSURE IN SUSTAINABILITY REPORTING (2015); *see also* Press Release, United Nations Env't Programme, Raising the Bar on Corporate Sustainability Reporting to Meet Ecological Challenges Globally (Nov. 12, 2015).

[56]*First Comprehensive Guidance for Companies on Human Rights Reporting Launches in London*, UN GUIDING PRINCIPLES REPORTING FRAMEWORK (Feb. 24, 2015), http://www.ungpreporting.org/first-comprehensive-guidance-for-companies-on-human-rights-reporting-launches-in-london/.

[57]UNILEVER, ENHANCING LIVELIHOODS, ADVANCING HUMAN RIGHTS 26, 39 (2015).

[58]CLIMATE DISCLOSURE STANDARDS BD., CDSB FRAMEWORK FOR REPORTING ENVTL. INFO. & NATURAL CAPITAL, (June 2015).

[59]Press Release, Climate Disclosure Standards Bd., Joint Statement of Collaboration by CDSB and the IIRC (June 4, 2015).

[60]Press Release, Climate Disclosure Standards Bd., Sustainability Reporting-Developing a Landscape Mapping Tool for Business (Apr. 1, 2015).

[61]Press Release, World Federation of Exchanges, WFE Survey – Exchanges See Rising Investor Interest in Sustainability (July 22, 2015); WORLD FEDERATION OF EXCHANGES, EXCHANGES AND ESG INITIATIVES – SWG REPORT AND SURVEY 5 (July 23, 2015).

[62]Press Release, World Federation of Exchanges, World Exchanges Agree Enhanced Sustainability Guidance (Nov. 4, 2015).

expectations for listed companies on key sustainability issues.[63] In April 2015, the SSE began publishing Communications to Stakeholders explaining each exchange's approach to promoting sustainability among investors and companies.[64]

The Sustainability Accounting Standards Board (SASB) issued industry-specific sustainability disclosure standards for thirteen broad industry sectors to help companies disclose material sustainability information in connection with SEC disclosure requirements.[65] SASB also issued an Implementation Guide for Companies to provide guidance on how to integrate SASB standards into their SEC filings.[66]

Noting that there are currently about 400 ways companies can disclose environmental risks, the Financial Stability Board (an association of banking regulators) called for a unified set of rules for disclosing climate change risk to stakeholders and established an industry-led disclosure task force to "develop voluntary, consistent climate-related financial risk disclosures for use by companies in providing information to lenders, insurers, investors and other stakeholders."[67] The proposal is a response to a request by G20 Finance Ministers and Central Bank Governors for the FSB to review how the financial sector can account for climate issues.

The International Capital Markets Association updated its Green Bond Principles in 2015. The Green Bond Principles are voluntary guidelines that promote transparency, disclosure, and integrity in the fast growing green bond market.[68] The Climate Bonds Initiative also revised its Climate Bonds Standard, in part to account for the revisions to the Green Bond Principles.[69]

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[63] SUSTAINABLE STOCK EXCHANGES INITIATIVE, MODEL GUIDANCE ON REPORTING ESG INFORMATION TO INVESTORS (Sept. 2015).

[64] Press Release, Sustainable Stock Exchanges Initiative, Stock Exchanges Engage Stakeholders on Sustainability (Apr. 15, 2015).

[65] *Key Dates & Status*, SUSTAINABILITY ACCOUNTING STANDARDS BD., http://www.sasb.org/standards/status-standards/ (last visited Mar. 9, 2016).

[66] SUSTAINABILITY ACCOUNTING STANDARDS BD., IMPLEMENTATION GUIDE FOR COMPANIES (Nov. 2015).

[67] Press Release, Financial Stability Bd., FSB to Establish Task Force on Climate-Related Financial Disclosures (Dec. 4, 2015).

[68] INT'L CAPITAL MARKET ASS'N, GREEN BONDS PRINCIPALS: GREEN PROCESS GUIDELINES FOR ISSUING GREEN BONDS (2015).

[69] CLIMATE BONDS INITIATIVE, CLIMATE BONDS STANDARD (2015).

Chapter 5 • ENVIRONMENTAL ENFORCEMENT AND CRIMES
2015 Annual Report[1]

I. ENVIRONMENTAL ENFORCEMENT RESULTS FOR 2015

At the close of every fiscal year, the U.S. Environmental Protection Agency (EPA) publishes its annual enforcement and compliance results. Consistent with its 2014-2018 Strategic Plan,[2] the EPA's 2015 results reflect a focus on "large cases that reduce pollution, level the playing field for responsible companies, and protect public health in communities across the country."[3] Accordingly, while the EPA initiated fewer enforcement actions and investigations in 2015 than it has in prior years, it also reached several "record-setting" resolutions.[4]

Specifically, the EPA initiated approximately 2,380 civil enforcement actions in 2015,[5] which marked a 4.48% increase from the 2,278 initiated in 2014,[6] but a 30.73% decrease from the 3,436 filed in 2010.[7] Similarly, the EPA opened 213 environmental crimes cases in 2015,[8] which marked a 21.4% decrease from the 271 opened last year[9] and a 38.44% decrease from the 346 opened in 2010.[10] The EPA also conducted 15,400 inspections and evaluations in 2015,[11] a 1.28% decrease from the 15,600 conducted last year[12] and a 26.67% decrease from the 21,000 in 2010.[13] The EPA attributes the declines largely to its recently adopted "risk-based" enforcement strategy, but it also acknowledges that budget cuts played a role in the reduction.[14]

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[1]Prepared by David B. Weinstein and Christopher Torres, shareholders with Greenberg Traurig's Tampa, Florida office, and Laura Bassini and Ryan Hopper, GT Tampa associates.

[2]ENVTL. PROT. AGENCY, FY 2014-2018 EPA STRATEGIC PLAN (2014).

[3]Press Release, Envtl. Prot. Agency, EPA Announces 2015 Annual Environmental Enforcement Results (Dec. 16, 2015).

[4]*Id.*

[5]OFFICE OF ENFORCEMENT & COMPLIANCE ASSURANCE, ENVTL. PROT. AGENCY, FISCAL YEAR 2015 EPA ENFORCEMENT AND COMPLIANCE ANNUAL RESULTS 11 (Dec. 16, 2015) [hereinafter EPA FY 2015 RESULTS].

[6]*Enforcement Annual Results for Fiscal Year (FY) 2014*, ENVTL. PROT. AGENCY, *available at* http://archive.epa.gov/enforcement/annual-results/web/pdf/EnforcementAnnualResultsforFiscalYear2014EnforcementUSEPA.pdf (last visited Mar. 9, 2016) (accessed by searching for Enforcement Annual Results for FY 2014 in the EPA Archive).

[7]*Enforcement Annual Results for Fiscal Year (FY) 2011*, ENVTL. PROT. AGENCY, *available at* http://archive.epa.gov/enforcement/annual-results/web/pdf/eoy2011.pdf (last visited Mar. 9, 2016) (addressing the 2010 results) (accessed by searching for Enforcement Annual Results for FY 2011 in the EPA Archive).

[8]*Enforcement Annual Results Numbers at a Glance for Fiscal Year (FY) 2015*, ENVTL. PROT. AGENCY, http://www.epa.gov/enforcement/enforcement-annual-results-numbers-glance-fiscal-year-fy-2015 (last updated Dec. 28, 2015).

[9]*Enforcement Annual Results for Fiscal Year (FY) 2014*, *supra* note 6.

[10]*Enforcement Annual Results for Fiscal Year (FY) 2011*, *supra* note 7.

[11]*Enforcement Annual Results Numbers at a Glance for Fiscal Year (FY) 2015*, *supra* note 8.

[12]*Enforcement Annual Results for Fiscal Year (FY) 2014*, *supra* note 6.

[13]*Enforcement Annual Results for Fiscal Year (FY) 2011*, *supra* note 7.

[14]EPA FY 2015 RESULTS, *supra* note 5, at 11-12.

In terms of results, the EPA's 2015 civil enforcement actions yielded penalties totaling approximately $205 million and injunctive relief requiring companies to invest approximately $7.3 billion into equipment and programs for pollution control and contamination clean up.[15] The EPA's 2015 criminal cases also produced significant results, yielding approximately $200 million in fines and restitution, $4 billion in court-ordered environmental projects, and 129 combined years of incarceration for sentenced defendants.[16] Additionally, the EPA secured nearly $2.6 billion in CERCLA recovery funds from liable parties.[17] As for direct environmental impacts, enforcement actions concluded in 2015 led to approximately 533 million pounds of reduced, treated, or eliminated pollution, and another 535 million pounds of minimized, treated, or properly disposed hazardous waste.[18]

Significant settlements in 2015 include Anadarko Petroleum Corporation's agreement to pay more than $4.4 billion for the environmental restoration of certain "tribal and overburdened communities" as part of the "largest bankruptcy-related cleanup in American history."[19] Additionally, Mosaic Fertilizer, LLC has committed to ensuring the proper disposal of an estimated sixty billion pounds of wastewater, the largest amount of waste "ever covered by a federal or state [Resource Conservation and Recovery Act] settlement."[20]

Overall, the EPA considers its 2015 enforcement efforts a success.[21] Looking forward, the EPA notes that it has already made significant progress on cases for 2016, both "by pursuing a final settlement that puts billions of dollars to work restoring the Gulf and helping communities affected by the BP oil spill, and by launching an investigation against Volkswagen for illegally emitting air pollution from diesel vehicles."[22]

II. ENVIRONMENTAL ENFORCEMENT INITIATIVES FOR 2016

With input from the public, as well as state, local, and tribal agency partners, the EPA sets national enforcement initiatives every three years to focus resources and expertise for compliance and enforcement on serious pollution concerns.[23] For the 2014-

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[15] *Enforcement Annual Results Numbers at a Glance for Fiscal Year (FY) 2015*, *supra* note 8.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Enforcement Annual Results for Fiscal Year (FY) 2015*, ENVTL. PROT. AGENCY, http://www.epa.gov/enforcement/enforcement-annual-results-fiscal-year-fy-2015 (last updated Dec. 16, 2015); *see also Case Summary: Settlement Agreement in Anadarko Fraud Case Results in Billions for Environmental Cleanups Across the Country*, ENVTL. PROT. AGENCY, http://www.epa.gov/enforcement/case-summary-settlement-agreement-anadarko-fraud-case-results-billions-environmental (last updated Jan. 21, 2016).

[20] *Enforcement Annual Results for Fiscal Year (FY) 2015*, *supra* note 19; *see also Mosaic Fertilizer, LLC Settlement*, ENVTL. PROT. AGENCY, http://www.epa.gov/enforcement/mosaic-fertilizer-llc-settlement (last updated Oct. 1, 2015).

[21] EPA Announces 2015 Annual Environmental Enforcement Results, *supra* note 3.

[22] *Id.*

[23] *National Enforcement Initiatives*, ENVTL. PROT. AGENCY, http://www.epa.gov/enforcement/national-enforcement-initiatives (last updated Feb. 19, 2016).

2016 term, the EPA selected six priorities.[24] These priorities, listed below, are a continuation of those selected for the 2011-2013 term.[25]

A. Reducing Air Pollution from the Largest Sources

Under this initiative, the EPA intends to eliminate or minimize emissions from coal-fired power, acid, glass plants, and cement plants, which it has concluded are the largest source of air pollution emissions.[26] To do so, it will focus on ensuring no under-controlled coal-fired electric generating units, cement, acid, or glass plants are in use.[27]

B. Cutting Hazardous Air Pollutants

The EPA concluded that facilities typically emit more hazardous air pollutants than are reported and that two large sources of these emissions are leaking equipment and improperly operated flares.[28] As a result, it will target emissions from these sources.[29]

C. Ensuring Energy Extraction Activities Comply with Environmental Laws

Natural gas extraction has been identified as a cleaner burning "bridge fuel" by the EPA, which will focus on certain extraction techniques that pose a significant risk to public health and the environment.[30] The EPA intends to use Next Generation, or NexGen, technologies and techniques to address incidences of noncompliance in extraction and production activities.[31]

D. Reducing Pollution from Mineral Processing Operations

The EPA intends to take action under this initiative to minimize or eliminate risks related to mining and mineral processing facilities.[32]

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[24] *Id.*

[25] *How Are the National Enforcement Initiatives Selected?*, ENVTL. PROT. AGENCY, https://compliancegov.zendesk.com/hc/en-us/articles/212101727-How-are-the-National-Enforcement-Initiatives-selected-#_ga=1.243247744.348416307.1451315295 (last updated Dec. 22, 2015).

[26] *National Enforcement Initiative: Reducing Air Pollution from the Largest Sources*, ENVTL. PROT. AGENCY, http://www.epa.gov/enforcement/national-enforcement-initiative-reducing-air-pollution-largest-sources (last updated Mar. 7, 2016).

[27] *Id.*

[28] *National Enforcement Initiative: Cutting Hazardous Air Pollutants*, ENVTL. PROT. AGENCY, http://www.epa.gov/enforcement/national-enforcement-initiative-cutting-hazardous-air-pollutants (last updated Feb. 29, 2016).

[29] *Id.*

[30] *National Enforcement Initiative: Ensuring Energy Extraction Activities Comply with Environmental Laws*, ENVTL. PROT. AGENCY, http://www.epa.gov/enforcement/national-enforcement-initiative-ensuring-energy-extraction-activities-comply (last updated Feb. 29, 2016).

[31] *Id.*

[32] *National Enforcement Initiative: Reducing Pollution from Mineral Processing Operations*, ENVTL. PROT. AGENCY, http://www.epa.gov/enforcement/national-enforcement-initiative-reducing-pollution-mineral-processing-operations (last updated Feb. 29, 2016).

E. Keeping Raw Sewage and Contaminated Stormwater Out of Our Nation's Waters

This initiative concerns Clean Water Act (CWA) violations by municipal sewer systems.[33] The EPA will focus on raw sewage overflows and inadequately controlled stormwater discharges.[34]

F. Preventing Animal Waste from Contaminating Surface and Ground Water

This initiative will focus on concentrated animal feeding operations where feed is brought to animals for forty-five days or more during a twelve-month period.[35] These facilities generate significant amounts of animal waste, and the EPA will take action to reduce potential pollution.[36]

III. SUMMARY OF SIGNIFICANT CASES

A. Criminal Cases

1. *United States v. Duke Energy Business Services LLC*[37]

Three subsidiaries of Duke Energy Corporation, the largest utility company in the United States, pled guilty to nine criminal violations of the CWA arising out of operations at their North Carolina facilities.[38] According to a joint factual statement filed in conjunction with their plea agreement, the subsidiaries admit that a February 2, 2014, pipe failure at a coal-fired power plant released approximately twenty-seven million gallons of wastewater and between 30,000 and 39,000 tons of coal ash into North Carolina's Dan River.[39] The following criminal investigation revealed a history of improper maintenance and negligent pollutant discharges at several other North Carolina facilities owned and operated by the subsidiaries.[40] As a result of their pleas, the subsidiaries must collectively pay a $68 million fine, spend $34 million on environmental service projects, and develop nationwide environmental compliance programs.[41] Further, the plea agreement required that the subsidiaries reserve, and that Duke Energy

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[33] *National Enforcement Initiative: Keeping Raw Sewage and Contaminated Stormwater Out of Our Nation's Waters*, ENVTL. PROT. AGENCY, http://www.epa.gov/enforcement/national-enforcement-initiative-keeping-raw-sewage-and-contaminated-stormwater-out-our (last updated Mar. 7, 2016).

[34] *Id.*

[35] *National Enforcement Initiative: Preventing Animal Waste from Contaminating Surface and Ground Water*, ENVTL. PROT. AGENCY, http://www.epa.gov/enforcement/national-enforcement-initiative-preventing-animal-waste-contaminating-surface-and-ground (last updated Feb. 29, 2016).

[36] *Id.*

[37] Nos. 5:15-cr-62, 5:15-cr-67, 5:15-cr-68 (E.D.N.C. May 14, 2015); *see also* Press Release, Dep't of Justice, Duke Energy Subsidiaries Plead Guilty and Sentenced to Pay $102 Million for Clean Water Act Crimes (May 14, 2015).

[38] Joint Factual Statement at 2-3, United States v. Duke Energy Bus. Servs. LLC, Nos. 5:15-cr-62, 5:15-cr-67, 5:15-cr-68 (E.D.N.C. May 14, 2015).

[39] *Id.* at 2-3.

[40] *Id.* at 4, 12-58.

[41] Judgment, United States v. Duke Energy Bus. Servs. LLC, Nos. 5:15-cr-62, 5:15-cr-67, 5:15-cr-68 (E.D.N.C. May 14, 2015).

Corporation guarantee, an estimated $3.4 billion in assets to be used for the retirement of the companies' coal ash impoundments in North Carolina.[42]

2. *United States v. Pate*[43]

On March 4, 2015, Robert Pate, a former manager of the now-defunct mining company XS Platinum, Inc., pled guilty to three felony violations of the CWA relating to the discharge of "turbid water" from the Platinum Creek Mine in Platinum, Alaska.[44] In his plea agreement, Pate admitted to knowingly allowing the unpermitted discharge of wastewater into creeks surrounding the mine, as well as knowingly violating the National Pollutant Discharge Elimination System (NPDES) permit governing the mining operation by, among other things, inadequately monitoring the turbidity of the surrounding creeks.[45] Pate also admitted that after learning wastewater had reached the surrounding creeks, he falsely stated there had been "no discharge" in a water-quality report submitted to the Alaska Department of Environmental Conservation pursuant to the NPDES permit.[46] Pate awaits sentencing, where the government will recommend "a sentence that includes both imprisonment and home confinement."[47] Along with Pate, four other XS Platinum officers were indicted: one pled guilty to a CWA violation, one was convicted after a jury trial, and two are Australian citizens who have refused to return to the United States to stand trial.[48]

3. *United States v. Newell Smith, Armida Di Santi, Eric Gruenberg, Mark Sawyer, and Milto Di Santi*[49]

On January 22, 2015, a federal district judge in Tennessee sentenced five former metal-salvage company owners and managers to varying terms of imprisonment for felony violations of the Clean Air Act (CAA).[50] The defendants admitted to knowingly directing employees to salvage materials that were "covered" in asbestos-containing materials without proper training or equipment,[51] in contravention of the CAA's "work practice" standards.[52] The defendants' sentences included terms of imprisonment ranging from six months to the statutory maximum of five years, and they also included requirements for restitution payments exceeding $10 million.[53]

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[42] *Id.* at 5.
[43] No. 3:14-cr-103 (D. Alaska Mar. 2, 2015).
[44] Plea Agreement at 6-7, 9, United States v. Pate, No. 3:14-cr-103 (D. Alaska Mar. 2, 2015).
[45] *Id.* at 3-4, 7-15.
[46] *Id.* at 15.
[47] *Id.* at 2; *see also* Press Release, Dep't of Justice, Mining Official Pleads Guilty in Alaska to Making Illegal Discharges from the Platinum Creek Mine and for Making False Statements to Federal Officials (Mar. 4, 2015).
[48] Press Release, Dep't of Justice, Mine Operator Convicted of Clean Water Act Crimes (Oct. 8, 2015).
[49] No. 2:11-cr-82 (E.D. Tenn. Jan 21, 2015).
[50] DEP'T OF JUSTICE, ENVTL. CRIMES SECTION MONTHLY BULLETIN 18 (Feb. 2015) [hereinafter FEB. 2015 ENVTL. CRIMES SECTION BULLETIN].
[51] *Id.*
[52] Press Release, Dep't of Justice' Owners & Managers of Former Salvage Operations at Former Textile Plant in Tennessee Sentenced to Prison for Conspiracy Associated with Illegal Asbestos Removal (Jan. 22, 2015).
[53] *Id.*

4. *United States v. Kieser*[54]

On February 19, 2015, a federal judge in Illinois sentenced Carl Kieser, the creator of an aquatic weed-control product called "Pond Clear Plus," to more than eight years of imprisonment for violating the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and for committing related acts of mail fraud.[55] A jury had previously convicted Kieser of the offenses after the government argued at trial that he violated FIFRA's prohibition against using a registered pesticide in a manner "inconsistent with its labeling."[56] According to the government, Kieser claimed in advertisements that Pond Clear Plus contained "No Chemicals" and should be applied directly to lakes and ponds. Kieser, however, made the product using Diuron 80DF, a registered pesticide with an EPA-approved label warning that direct application to water would be toxic to aquatic wildlife.[57] Several customers purportedly applied Pond Clear Plus to their lakes or ponds and experienced fish kills.[58] The EPA official in charge of the Pond Clear Plus investigation lauded Kieser's eight-year sentence as a reminder that "[m]ail fraud is a crime that can have wide-ranging impacts, sometimes leading to serious public health threats."[59]

5. *United States v. Nancy Stein*[60]

In 2011, creditors forced Nancy Stein's company, American Screw and Rivet Corporation (ASR), into bankruptcy. Shortly thereafter, a U.S. Secret Service investigation into the corporation's assets revealed that Stein and ASR had falsified loan applications to a number of financial institutions, and a South Carolina Department of Health and Environmental Control (DHEC) search of ASR's property revealed that Stein and ASR had unlawfully stockpiled more than 24,000 gallons of toxic waste on site. Both Stein and ASR pled guilty to bank fraud charges as well as a Resource Conservation and Recovery Act (RCRA) violation.[61] Stein received a seventy-three month term of imprisonment and was ordered to pay more than $17 million in restitution.[62]

6. *United States v. Matson Terminals, Inc.*[63]

On January 29, 2015, a federal court ordered a Hawaiian shipping corporation, Matson Terminals, Inc., to pay a $400,000 fine and a $600,000 restitution payment for criminally violating the CWA by permitting a pipe used to load molasses into storage

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[54]No. 2:12-cr-20072 (C.D. Ill. terminated Feb. 23, 2015).
[55]Judgment, No. 2:12-cr-20072 (C.D. Ill. Feb. 23, 2015) (memorializing the Feb. 19, 2015 sentencing); *see also* DEP'T OF JUSTICE, ENVTL. CRIMES SECTION MONTHLY BULLETIN 13 (Mar. 2015) [hereinafter MAR. 2015 ENVTL. CRIMES SECTION BULLETIN].
[56]Press Release, Dep't of Justice, Gibson City Man Sentenced to Eight Years in Federal Prison for Mail Fraud, Tax Evasion (Feb. 20, 2015).
[57]*Id.*
[58]*Id.*
[59]*Id.*
[60]No. 8:13-cr-00724 (D.S.C. terminated Feb. 2, 2015).
[61]Press Release, Dep't of Justice, Anderson Woman Gets Prison for Extensive Bank Fraud Scam and Environmental Crime (Jan. 21, 2015); *see also* MAR. 2015 ENVTL. CRIMES SECTION BULLETIN, *supra* note 55, at 17.
[62]*Id.*
[63]No. 1:4-cr-00911 (D. Haw. terminated Feb. 3, 2015).

tanks on ships to leak for over a year. Approximately 233,000 gallons of molasses leaked into Honolulu Harbor, killing or contributing to the death of approximately 25,000 fish.[64]

7. *United States v. James Jariv, Alexander Jariv, and Nathan Stoliar*[65]

Over the course of 2015, James Jariv, Alexander Jariv, and Nathan Stoliar pled guilty to participating in an international conspiracy to generate and sell fraudulent biodiesel credits. The credits, known as "Renewable Identification Numbers" ("RINs"), demonstrate compliance with the Energy Independence and Security Act of 2007, which requires U.S. fuel producers and importers to gradually replace petroleum-based fuel with renewable fuel.[66] Producing or importing renewable fuels like biodiesel generates RINs, which can be sold like a commodity, either with the associated biofuel or on a secondary market.[67] James Jariv, Alexander Jariv, and Nathan Stoliar owned fuel companies in Vancouver and Las Vegas that they used to document false biodiesel imports, which, in turn, they used to fraudulently generate and sell RINs.[68] For their roles in the conspiracy, James Jariv was sentenced to a ten-year term of imprisonment, Alexander Jariv was sentenced to a two-and-a-half-year term, and Nathan Stoliar was sentenced to a two-year term.[69]

B. Civil Cases

1. *United States and State of Colorado v. Noble Energy, Inc.*[70]

In April, the EPA and the State of Colorado filed a complaint against Noble Energy related to emissions of volatile organic compounds in violation of the Colorado Air Pollution Prevention and Control Act, which is enforceable under the CAA.[71] Noble Energy entered into a consent decree in which it did not admit liability, but agreed to pay $4.95 million in civil penalties and install Next Generation pressure monitors that provide continuous data reporting.[72] Noble Energy also agreed to implement environmental mitigation projects of at least $4.5 million and conduct two supplemental environmental projects as well as a state-only supplemental environmental project.

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[64] Press Release, Dep't of Justice, Matson to Pay $1 Million for Molasses Spills (Jan. 29, 2015); *see also* FEB. 2015 ENVTL. CRIMES SECTION BULLETIN, *supra* note 50, at 17.
[65] No. 2:14-cr-00006 (D. Nev. terminated Sept. 25, 2015); No. 2:14-cr-00015 (D. Nev. terminated Oct. 02, 2015).
[66] *Program Overview for Renewable Fuel Standard Program*, ENVTL. PROT. AGENCY, http://www.epa.gov/renewable-fuel-standard-program/program-overview-renewable-fuel-standard-program (last updated Sept. 28, 2015).
[67] Plea Agreement at 8, United States v. Jariv, No. 2:14-cr-00006 (D. Nev. Apr. 28, 2015).
[68] *Id.*
[69] Judgment, United States v. Jariv, No. 2:14-cr-00006 (D. Nev. Aug. 18, 2015) (sentencing James Jariv to 120 months imprisonment); Amended Judgment, United States v. Stoliar, No. 2:14-cr-00006 (D. Nev. Aug. 25, 2015) (sentencing Nathan Stoliar to 24 months imprisonment); Judgment, United States v. Jariv, No. 2:14-cr-00015 (D. Nev. Oct. 2, 2015) (sentencing Alexander Jariv to 30 months imprisonment).
[70] Consent Decree, No. 1:15-cv-00841 (D. Colo. June 2, 2015).
[71] *Id.* at 2-3.
[72] *Id.* at 33-36; *Noble Energy, Inc. Settlement*, ENVTL. PROT. AGENCY (Apr. 22, 2015), http://www.epa.gov/enforcement/noble-energy-inc-settlement.

2. *United States v. Citgo Petroleum Corporation*[73]

The Western District of Louisiana determined Citgo was grossly negligent in the 2006 discharge of 54,000 barrels of oil into the waterways surrounding one of its treatment plants.[74] The court found that the economic benefit realized by Citgo was $97.1 million and ordered it to pay a civil penalty of $1,500 per barrel released, for a total penalty of $81 million.[75] Citgo previously paid a $13 million criminal fine in a separate action.[76]

3. *United States v. Continental Carbon Company*[77]

Continental Carbon Company entered into a consent decree in which it did not admit liability after the EPA filed a complaint against it for violations of the CAA at several of its carbon black facilities.[78] Alabama and Oklahoma intervened in the case, joining in the EPA's claims and asserting independent claims.[79] The consent decree requires Continental Carbon Company to pay $455,000 to the United States as a civil penalty, and $97,500 each to Oklahoma and Alabama.[80] The company will also spend at least $550,000 in implementing environmental mitigation projects and installing control technology to monitor and limit emissions.[81]

4. *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010*[82]

Following the Deepwater Horizon spill, the United States filed a complaint alleging CWA violations and seeking civil penalties against various entities, including Anadarko, a non-operator that owned 25% of the Macondo Well.[83] The trial court found that Anadarko was liable under the CWA as an owner of the Macondo Well but was not negligent.[84] In determining the civil penalty, the court balanced the seriousness of the spill against Anadarko's lack of fault and ordered it to pay $159.5 million, 4.5% of the maximum possible penalty of approximately $3.5 billion.[85]

5. *In the Matter of ExxonMobil Pipeline Company*[86]

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[73]Judgment, United States v. Citgo Petroleum Corp., No. 08-893 (W.D. La. Dec. 23, 2015); *see also* Reasons for Judgment, United States v. Citgo Petroleum Corp., No. 08-893 (W.D. La. Dec. 23, 2015).
[74]Judgment, No. 08-893, *supra* note 73.
[75]*Id.*
[76]Reasons for Judgment, No. 08-893, *supra* note 73, at 17.
[77]Consent Decree, No. 5:15-cv-00290-F (W.D. Okla. Mar. 23, 2015).
[78]*Id.* at 2.
[79]*Id.* at 1-2.
[80]*Id.* at 24-25.
[81]*Id.* at 27-39.
[82]Findings of Fact and Conclusions of Law, United States v. BP Explorations & Production, Inc., No. 10-4536 (E.D. La. Nov. 30, 2015).
[83]*Id.* at 5.
[84]*Id.* at 6-7.
[85]*Id.* at 31.
[86]Decision on Petition for Reconsideration, CPF No. 5-2013-5007 (U.S. Dep't of Transp. June 12, 2015).

The Pipeline and Hazardous Materials Safety Administration (PHMSA) issued a notice of probable violation, a proposed civil penalty of $1.7 million, and a proposed compliance order to ExxonMobil after a pipeline failure that occurred during a flood event.[87] On January 23, 2015, the PHMSA issued a final order assessing a civil penalty of $1,045,000 for four violations of pipeline safety regulations.[88] Concluding that ExxonMobil failed to perform an appropriate risk analysis and prepare appropriate emergency response procedures, the PHMSA declined to alter the penalty on reconsideration.[89]

6. *United States v. Arizona Public Service Company*[90] & *Diné Citizens Against Ruining Our Environment v. Arizona Public Service Company*[91]

The EPA concurrently filed a consent decree for injunctive relief and civil penalties under the CAA against the Arizona Public Service Company.[92] Previously, the Diné Citizens Against Ruining Our Environment, To' Nizhoni Ani, and National Parks Conservation Association also filed a complaint against the company for civil penalties under the CAA.[93] The parties entered into a consent decree resolving all claims under which the Arizona Public Service Company denied it committed any violations, but agreed to pay $1.5 million to the United States as a civil penalty and spend $6.7 million on environmental mitigation projects.[94] In addition, the Arizona Public Service Company will install systems to reduce and control emissions of sulfur dioxide and nitrogen oxide.[95]

7. *Hawkes Co., Inc., et al. v. United States Army Corps of Engineers*[96]

In June, the Eighth Circuit held that an approved jurisdictional determination by the United States Army Corps of Engineers concluding that property qualifies as "waters of the United States" under the CWA constitutes a final agency action under the Administrative Procedure Act.[97] A peat mining and processing company had applied to the Corps for a CWA permit and, ultimately, the Corps issued a jurisdictional determination that the property constituted a regulated water.[98] The Eighth Circuit held that the peat mining and processing company was entitled to judicial review of the determination because it (1) marked the consummation of the Corps' decision-making process, and (2) determined rights or obligations from which legal consequences would flow.[99] The decision split from a decision of the Fifth Circuit concluding that although a jurisdictional determination ended the agency decision-making process, it did not

[87] *Id.* at 1.
[88] *Id.*
[89] *Id.* at 1-2.
[90] Consent Decree, No. 1:15-cv-00537 (D.N.M. June 24, 2015).
[91] Consent Decree, No. 1:11-cv-00889-JB-SCY (D.N.M. June 24, 2015).
[92] *Id.* at 4.
[93] *Id.*
[94] *Id.* at 34, 37, App'x A.
[95] *Id.* at 17-27.
[96] 782 F.3d 994 (8th Cir. 2015).
[97] *Id.* at 996.
[98] *Id.* at 998.
[99] *Id.* at 999-1001.

determine rights or obligations from which legal consequences would flow.[100] The United States Supreme Court granted certiorari review of the Eighth Circuit's decision on December 11, 2015.

8. *McGinnes Industrial Maintenance Corporation v. The Phoenix Insurance Company and The Travelers Indemnity Company*[101]

In response to a question certified by the Fifth Circuit, the Supreme Court of Texas concluded that an EPA potentially responsible party letter issued under CERCLA constituted a suit within the meaning of McGinnes Industrial Maintenance Corporation's standard-form commercial general liability insurance policies.[102] The Texas Court reasoned that the term "suit" in the insurance policies covered EPA proceedings conducted outside a courtroom because "CERCLA effectively redefined a 'suit' on cleanup claims to mean proceedings conducted by one of the parties, the EPA, followed by an enforcement action in court, if necessary."[103]

[100]Belle Co., L.L.C. v. United States Army Corps of Eng'rs, 761 F.3d 383, 394 (5th Cir. 2014).
[101]No. 14-0465, 2015 WL 4080146 (Tex. Jan. 15, 2015).
[102]*Id.* at *3.
[103]*Id.* at *4.

Chapter 6 • ENVIRONMENTAL LITIGATION AND TOXIC TORTS
2015 Annual Report[1]

I. HYDROCARBON EXTRACTION AND HYDRAULIC FRACTURING

Litigation of claims related to oil and gas extraction operations, including hydraulic fracturing or fracking as it is sometimes called, in 2015 were an important frontier in toxic tort and environmental litigation in terms of both procedure and substance. In a regulatory environment that can be uncertain at times, these cases challenge litigants and courts alike with complex questions of fact and law and will continue to do so in coming years.

A. Lone Pine *Orders*

As in other complex litigation, some defendants have sought *Lone Pine* orders, so called after a 1986 New Jersey toxic tort case,[2] in tort cases related to hydrocarbon extraction. Such orders require plaintiffs to make certain showings, early on in litigation, to support their claims before the case can proceed. Two decisions—one from the Colorado Supreme Court and the other from a Pennsylvania federal district court—are likely to affect pre-discovery management in other oil and gas cases, and toxic tort cases generally.

In *Antero Resources v. Strudley*, the Colorado Supreme Court issued a sweeping ruling that will limit, if not eliminate, *Lone Pine*-style case management orders in Colorado toxic tort cases.[3] Plaintiffs alleged drilling operations contaminated their property with various substances, causing a bevy of physical ailments and forcing plaintiffs to move from the property. The trial court granted the drilling company's and contractors' motion for a "modified case management order" similar to a *Lone Pine* order. The order required plaintiffs to make a *prima facie* showing of each the plaintiffs' injuries, as well as the causal connection between those injuries and the drilling operations, and a quantification of the alleged contamination of plaintiffs' property. When plaintiffs failed to make some of those showings, the trial court granted a defense motion to dismiss.

The Colorado Supreme Court reversed, holding "Colorado's Rules of Civil Procedure do not allow a trial court to issue a modified case management order, such as a *Lone Pine* order, that requires a plaintiff to present prima facie evidence in support of a claim before a plaintiff can exercise its full rights [to] discovery."[4] While the Colorado Rules of Civil Procedure are closely modeled after the Federal Rules of Civil Procedure, the court found Colorado's rules do not contain the same explicit grant of discretion to fashion early-stage procedures. The court also expressed concern that, "if a *Lone Pine* order cuts off or severely limits the litigant's right to discovery, the order closely

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[1]This report was edited by Graham C. Zorn of Beveridge & Diamond, P.C., Washington, DC, who wishes to thank Beveridge & Diamond, P.C. generally, and specifically Daniel M. Krainin, Sarah A. Kettenmann, Maryam F. Mujahid, Gayatri M. Patel, Andrew C. Silton, Neel Sheth, Hayley Carpenter, Toren Elsen, Robert Sylvester, Victor Podolsky, and Joseph N. Dammann for assistance in compiling the materials for this report. This report summarizes significant decisions, whether published or unpublished, in toxic tort litigation from 2015, but does not purport to summarize all decisions.

[2]Lore v. Lone Pine Corp., No. L-33606-85, 1986 WL 637507 (N.J. Super. Ct. Law Div. Nov. 18, 1986).

[3]347 P.3d 149 (Colo. 2015).

[4]*Id.* at 151.

resembles summary judgment, albeit without the safeguards supplied by the Rules of Civil Procedure."[5]

A federal district court in Pennsylvania stopped well short of the Colorado decision, but cautioned against early *Lone Pine* orders in *Russell v. Chesapeake Appalachia, LLC*, a case involving claims of nuisance, negligence, and negligence *per se* from hydrocarbon exploration and production activities.[6] The court denied a defense motion for a *Lone Pine* case management order without prejudice, concluding that it could not issue such an order without some discovery. The court set a high bar for issuing the order, explaining that it "should issue only in an exceptional case and after the defendant has made a showing of significant evidence calling into question the plaintiffs' ability to bring forward" evidence of causation.[7] Citing defendants' failure to identify any such evidence and the case's pre-discovery posture, the court denied the motion, leaving the door open for a *Lone Pine* order with a more developed record in the future.

B. Deep-Well Wastewater Injection

Underground injection of wastewater from hydrocarbon exploration and production activities continues to be a contentious issue, with reports of increased seismicity in areas of oil and gas exploration and wastewater injection, as well as concerns about groundwater quality.

In *Ladra v. New Dominion, LLC*, the Oklahoma Supreme Court unanimously held that state district courts, and not Oklahoma's oil and gas regulator, have jurisdiction to hear cases that seek to tie deep-well injection of wastewater from hydraulic fracturing operations to damage caused by earthquakes.[8] In 2011, plaintiff was watching television at home with her family when a nearby earthquake made her home shake. Rock facing from her chimney shook loose and struck her, causing injuries to her legs and knees. Plaintiff sued the operators of nearby wastewater injection wells, alleging that the operation of their wells caused the earthquake near her home and was the proximate cause of her injuries. The district court dismissed the case, holding that the Oklahoma Corporation Commission (OCC) had exclusive jurisdiction over cases tied to oil and gas operations. The Oklahoma Supreme Court found, however, that the OCC's exclusive jurisdiction "is limited solely to the resolution of public rights" and does not intrude upon the district court's jurisdiction over "disputes between two or more private persons."[9] The court distinguished between the OCC's exclusive jurisdiction to "regulate oil and gas exploration and production activities" and the district court's jurisdiction to "afford a remedy to those whose common law rights have been infringed by either the violation of these regulations or otherwise."[10] The court's ruling only addressed jurisdiction and expressly stated that it contained no decision on the sufficiency of plaintiff's claim. Further litigation seeking damages stemming from wastewater injection, in Oklahoma and elsewhere, is sure to follow.

In *Environmental Processing Systems, L.C. v. FPL Farming Ltd.*, a case based on claims that wastewater from oil and gas operations, injected deep underground, migrated to the subsurface of others' property, the Supreme Court of Texas held for the first time

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[5] *Id.* at 159.
[6] 305 F.R.D. 78 (M.D. Pa. 2015).
[7] *Id.* at 84 (quoting McManaway v. KBR, Inc., 265 F.R.D. 384, 388 (S.D. Ind. 2009)).
[8] 353 P.3d 529 (Okla. 2015).
[9] *Id.* at 531 (citing Morgan v. Okla. Corp. Comm'n, 910 P.2d 966, 970 (Okla. 1994); Rogers v. Quiktrip Corp., 458 U.S. 50, 70 (1982)).
[10] *Id.* at 532 (citing NBI Servs., Inc. v. Ward, 132 P.3d 619, 626 (Okla. Civ. App. 2005)).

that a plaintiff bears the burden of proving the lack of consent in a suit for trespass.[11] The court surveyed how its cases had defined trespass over time, concluding it had "never departed from the inclusion of lack of consent or authorization in the definition of a trespass."[12] It found no persuasive indication that consent should be an affirmative defense. The court also addressed concerns that future plaintiffs would struggle to prove a negative, observing that the landowner or possessor is the party likely to have better access to evidence of whether or not they consented.[13]

II. EXPERTS

Several courts clarified limits on the admissibility of expert testimony and underscored the importance of reliable experts and methodologies in establishing causation in tort litigation.

A. Seventh Circuit

In *C.W. v. Textron, Inc.*, the Seventh Circuit upheld the exclusion of expert testimony that did not adequately draw or extrapolate from reliable sources.[14] At issue were allegations that defendant's release of vinyl chloride, a toxic gas, contaminated the drinking water in nearby private wells and, as a result, caused certain health problems in children living nearby. To show causation, plaintiffs offered the testimony of three medical doctors who relied on differential etiology, a process-of-elimination approach that establishes causation by ruling out other possible causes. They supported their conclusions in part by citing to studies of the harmful effects of vinyl chloride exposure in adults and animals and by relying on the medical history of plaintiff children. The experts found no studies specifically evaluating the effect of vinyl chloride on children. While that alone was not sufficient to doom the testimony, the district court excluded the experts' testimony because it found the experts did not reliably extrapolate the results of existing studies to the particular facts and circumstances of this case. On review, the Seventh Circuit first found that the district court properly followed the *Daubert* framework by exhaustively evaluating the reliability of the doctors' opinions. The court then affirmed the district court's exercise of discretion to exclude the experts' opinions because the experts failed to adequately "bridge the gap" between their conclusions on causation and the studies they cited when conducting their differential etiology.[15]

B. Louisiana

In *Burst v. Shell Oil Co.*, a federal court in Louisiana refused to allow expert testimony based on exposure to gasoline caused acute myeloid leukemia (AML) in a former gas station attendant and mechanic.[16] Plaintiff claimed defendant gasoline manufacturers negligently manufactured and sold gasoline containing benzene and failed to warn foreseeable users of the health hazards from that gasoline. Plaintiff offered a medical doctor to testify that benzene causes AML and that benzene caused plaintiff's

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[11] 457 S.W.3d 414 (Tex. 2015), *reh'g denied* (Tex. May 1, 2015).
[12] *Id.* at 422.
[13] *Id.* at 424-25 (Disposing of the case on this issue, the court declined to answer another critical question posed by this case: "whether Texas law recognizes a trespass cause of action for deep subsurface water migration").
[14] 807 F.3d 827 (7th Cir. 2015).
[15] *Id.* at 836, 839.
[16] No. 14-109, 2015 WL 4710147 (E.D. La. June 9, 2015).

husband to develop AML. The court granted defendants' motion to exclude the testimony, finding that, although the link between *benzene* and AML is well established, the expert failed to connect *gasoline*, the product at issue in this case, to AML.

The court noted the expert claimed to have used a methodology that involved "identify[ing] all relevant studies."[17] Yet the expert did not cite a single study evaluating any connections between gasoline exposure and AML. Instead, he relied on benzene-specific studies and made "no attempt to demonstrate why benzene-specific studies can reliably support the conclusion that gasoline can cause AML."[18] Moreover, the court noted that reputable studies had been published that did not find a causal connection between gasoline and AML. This, the court held, left too big of a gap between the available data and the expert's conclusions, rendering the expert's opinion unreliable.

C. Texas

A Texas appellate court in *Cerny v. Marathon Oil Corp.* held that claims for damages due to "symptoms caused by discomfort" do not fall within the domain of a layperson's knowledge and experience, and therefore must be supported by expert testimony.[19] Plaintiffs leased mineral rights to Marathon Oil Corp. in the area surrounding plaintiffs' home. After a few years of operations, plaintiffs alleged Marathon's activities exposed them to noxious odors and chemicals, dust, noise, and constant traffic. Plaintiffs alleged defendant's nuisance and negligence worsened their pre-existing mental and physical ailments and caused property damage.

Texas law requires that any plaintiff seeking relief for personal injuries caused by exposure to or migration of a toxic substance must proffer expert testimony to prove causation. In an attempt to avoid this requirement, plaintiffs disclaimed damages for "a diagnosed disease," instead claiming damages for "symptoms which are typical of discomfort rather than disease."[20] Plaintiffs asserted that the causal link between symptoms of discomfort and Marathon's operations fell within the domain of a layperson's knowledge, and therefore causation could be proved using general common law standards of nuisance and negligence. In affirming the trial court's decision to grant defendant's motion for summary judgment, the appellate court found that plaintiffs had generated a false distinction between "symptoms of discomfort" and "symptoms of disease." The court held that because symptoms of both discomfort and disease fall outside a layperson's general knowledge and experience, causation of such symptoms must be proved by expert testimony.[21]

D. Michigan

In contrast to the above cases, particularly the Texas case, the Michigan Court of Appeals in *Lowery v. Enbridge Energy LP* held that direct expert testimony may not be necessary to prove causation in a toxic tort case.[22] Plaintiff lived near the Kalamazoo River, which was affected by a spill from an oil pipeline in July 2010. Plaintiff alleged that following exposure to toxic fumes from the oil spill, he experienced severe migraines, coughing, and vomiting before suffering a ruptured gastric artery and being admitted to the hospital in August 2010. Plaintiff's medical expert, basing his opinion on

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[17] *Id.* at *3.
[18] *Id.* at *4.
[19] No. 04-14-00650-CV, 2015 WL 5852596 (Tex. Ct. App. Oct. 7, 2015).
[20] *Id.* at *2.
[21] *Id.* at *4-5.
[22] No. 319199, 2015 WL 1498896 (Mich. Ct. App. Apr. 2, 2015).

review of only plaintiff's hospital records and no direct examination of plaintiff, testified that the fumes from the spill caused the headaches, coughing, and vomiting, and that violent coughing and vomiting led to the rupture of the artery. The trial court granted partial summary judgment in favor of defendant because plaintiff had not shown a sufficient causal link between the spill and ruptured artery. The Michigan Court of Appeals reversed, holding that direct expert testimony is not required to prove causation in a toxic tort case. Plaintiffs can prove their cases through circumstantial evidence and reasonable inferences. The court held that there was a strong enough connection to infer that the fumes caused the ruptured artery, noting that plaintiff's symptoms arose immediately after the oil spill. The court conceded that there were other plausible explanations for the injury, but that this only lent weight to the idea that there were genuine issues of material fact that a jury must resolve, and thus summary judgment was inappropriate.[23]

III. DAMAGES

A. Real Estate Damages

The Ninth Circuit revived the City of San Diego's claims for some $250 million in damages when it reversed a trial court's dismissal of restoration and real estate damages claims stemming from petroleum releases. In *California v. Kinder Morgan Energy Partners*,[24] plaintiffs alleged defendants were responsible for petroleum that leaked into soil and groundwater, including an aquifer beneath San Diego's Qualcomm Stadium. Plaintiffs' expert based his restoration damages assessment on the assumption that restoration to background conditions was the proper cleanup standard. This, the trial court found, rendered the expert's opinion irrelevant and unreliable. The Ninth Circuit disagreed, finding that any fault in the expert's assumptions on baseline conditions goes to weight and impeachability, not admissibility. The trial court also found plaintiffs' assessment of real estate damages of the stadium property was impermissibly based on the hypothetical highest and best use of the property, finding instead the proper measure of such damages is the rental value of the property as it exists as a stadium. The Ninth Circuit, though, held that California law permits real estate damages arising from nuisance and trespass to be proved based on a hypothetical higher use of the property. Plaintiffs in this case argued that could include a mixed-use development, thereby allowing for a significantly larger potential damages award.

B. Punitive Damages

The judge in *Marino v. Pilot Travel Centers LLC*, a petroleum exposure case, decided to let a Pennsylvania federal jury consider whether a gas station operator and its environmental consultant recklessly failed to inform a plumber of the risks of working in an excavated pit with a documented petroleum release.[25] Plaintiff was hired to repair a water supply line damaged during remediation following a release from a fuel storage and dispensing system. He alleged injuries stemming from exposure to petroleum products while working at the site. Defendants moved for summary judgment on the issue of punitive damages, arguing that there was no evidence of evil motive or reckless indifference to plaintiff's exposure to petroleum products. The court denied the motion, finding that the record contained evidence showing that defendants knew there were

[23] *Id.* at *3.
[24] 613 F. App'x 561 (9th Cir. 2015).
[25] No. 5:14-cv-04672, 2015 WL 6689923 (E.D. Pa. Nov. 3, 2015).

petroleum liquids in the area where plaintiff would be working, but no one told plaintiff of the contamination or to stop working. From those facts, the court found a reasonable jury could conclude that defendants behaved recklessly.

IV. CLASS ACTIONS

A. Ninth Circuit

Creating a Circuit split, the Ninth Circuit in *Allen v. Boeing* held that a tort case against a Washington corporation did not fall under the "local event" exception to the Class Action Fairness Act (CAFA) and, therefore, had been properly removed to federal court.[26] CAFA, which was designed to allow for removal of many class actions to federal court, has an exception for cases where "all of the claims in the action arise from an event or occurrence in the [s]tate" and the alleged harms are also contained within the state.[27] The Ninth Circuit interpreted the exception narrowly, limiting it to a single, isolated event, like a chemical spill. To support its interpretation, the court looked to the plain meaning of the words "event" and "occurrence," to the meaning of the exception within the greater CAFA statute, and also to legislative history suggesting that only single tortious events were meant to fall under the exception.[28]

The court's narrow interpretation of the local event exception means that more mass tort actions will be removable to federal court, at least in the Ninth Circuit. The Ninth Circuit explicitly rejected the Third Circuit's broader reading of the local event exception—that an "event" under the exception could be a series of interconnected events or occurrences. With the split between the Third and Ninth Circuits, the chances are now greater that the U.S. Supreme Court will weigh in on this issue.

B. Eighth Circuit

In *Smith v. ConocoPhillips Pipe Line Co.*, the Eighth Circuit highlighted the difficulty of securing class certification in toxic tort cases involving fear of contamination claims when it reversed a Missouri federal district court's certification of a class of plaintiffs alleging nuisance.[29] In 2002, a homeowner near Phillips Pipe Line Company's petroleum pipeline in West Alton, Missouri, discovered benzene contamination in his well water, prompting Phillips to conduct remediation and monitoring. Benzene, toluene, ethyl benzene, xylenes, and lead were detected in the groundwater beneath the homeowner's land. Nearby homeowners filed a class action, alleging nuisance under Missouri law, seeking monetary damages for purported diminution of property value, complete remediation of the area, and continued monitoring. Despite the lack of contaminants found on some plaintiffs' properties, the district court certified the class for the owners of sixty-one properties within a quarter mile of the site, relying on the detection of contaminants in monitoring wells, the migrating nature of the pollution, and the possibility of "pockets of contamination." In reversing the district court's ruling, the court held that plaintiffs could not satisfy the commonality requirement of Federal Rule of Civil Procedure 23. Plaintiffs failed to show any physical invasion of their property and therefore failed to show any actual injury. In other words the putative class' fear of contamination, in the absence of proof, was not enough to support the nuisance claim.

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[26] 784 F.3d 625, 637 (9th Cir. 2015).
[27] *Id.* at 628; *see also* 28 U.S.C. § 1332(d)(11)(B)(ii)(I) (2015).
[28] *Allen*, 784 F.3d at 630-33.
[29] 801 F.3d 921 (8th Cir. 2015).

C. Third Circuit and Pennsylvania

Highlighting the requirement that class action plaintiffs clearly and objectively define the putative class without reference to the underlying merits of their claims, a Pennsylvania federal district court struck class allegations from a complaint in a suit against a power plant in *Bell v. Cheswick Generating Station*.[30] Plaintiffs filed a class action complaint asserting nuisance, negligence, trespass, and strict liability claims arising from the plant's emissions. Plaintiffs defined the putative class as those living within a one-mile radius of the power plant "who have suffered similar damages to their property by the invasion of particulates, chemicals, and gases from [d]efendant's facility which thereby caused damages to their real property."[31] The district court struck the class allegations because the class definition contained two fatal flaws. First, the court held plaintiffs had proposed a prohibited "fail-safe" class, meaning that determining whether individuals fall within the class would turn on resolving "ultimate issues of liability—damage and causation."[32] Here, class membership would have turned on whether (1) that person was injured and (2) defendant's emissions caused the injury. Second, the court concluded that requiring class members' injuries to be "similar" to plaintiffs' was too subjective a standard to apply, therefore falling short of the class "definiteness" requirement courts have found implicit in the Federal Rules of Civil Procedure.

D. Missouri

Finding that only a narrow evidentiary review is appropriate when certifying a class under Missouri state law, a Missouri appeals court in *Elsea v. U.S. Engineering, Co.* reversed a trial court's decision to deny class certification in a suit that may have implications in other toxic tort litigation.[33] Plaintiff courthouse workers alleged improper removal of asbestos during renovations and sought medical monitoring damages based on negligence and strict liability claims. The trial court held a four-day evidentiary hearing, involving both fact and expert testimony, to determine whether members of the potential class met the standards for class certification set out in Missouri's rules of civil procedure. Although plaintiffs presented testimony that improper asbestos abatement caused elevated asbestos levels in the courthouse, the trial court determined "[t]here is a likelihood that individual hearings would be necessary to categorize class members, and to address individual issues of exposure, dose, causation and monitoring protocol."[34] The court therefore denied plaintiffs' motion for class certification.

Such an in-depth hearing, the appeals court found, was an abuse of the trial court's discretion. The appeals court held the appropriate standard for class certification in Missouri is whether "there is evidence in the record, which if taken as true, would satisfy each and every requirement" for class certification.[35] The trial court erred by "accept[ing] conflicting expert testimony and evidence presented by [the] [d]efen[se]," instead of taking the plaintiffs' evidence as true.[36] The appeals court reversed the trial

[30]No. 12-929, 2015 WL 401443 (W.D. Pa. Jan. 28, 2015). The case was back in district court after the Third Circuit reversed the trial court's dismissal, ruling that the Clean Air Act did not preempt plaintiffs' claims. *See* Bell v. Cheswick Generating Station, 734 F.3d 199 (3d Cir. 2013).
[31]*Bell*, 2015 WL 401443, at *1.
[32]*Id.* at *4.
[33]463 S.W.3d 409 (Mo. Ct. App. 2015).
[34]*Id.* at 415.
[35]*Id.* at 417.
[36]*Id.* at 419.

court's ruling and found that plaintiffs' class definition met Missouri requirements for certification.

V. STATUTE OF LIMITATIONS

In a case that may make it more difficult for plaintiffs to maintain years-old toxic tort cases in Louisiana, a state appellate court ruled that a 1983 chemical spill did not constitute a "continuing tort." The court in *Ned v. Union Pacific Corp.* rejected plaintiffs' argument that the continued presence of perchloroethylene (PCE) released in a 1983 chemical spill was a "continuing tort" that tolled the state's statute of limitations.[37] The case arose from an April 20, 1983 spill of 11,000 gallons of PCE from an open valve in a parked railcar near the Fisherville neighborhood in Lake Charles, Louisiana. Plaintiffs alleged the continued presence of PCE constituted an ongoing tort and therefore Louisiana's one-year statute of limitations did not bar their claims. The appeals court cited prior Louisiana decisions, in which courts found releases from leaking underground storage tanks and an unlined waste disposal pit were one-time releases and not continuous torts. Here, the court found the 1983 PCE release was akin to the releases in those earlier cases, but there was no ongoing unlawful conduct that allowed plaintiffs to rely on the continuing tort theory to avoid Louisiana's statute of limitations.[38]

VI. TRESPASS AND NUISANCE

In a ruling that further delineates the threshold for maintaining private nuisance and trespass claims in New Jersey, the state's highest court held that defendant landowners were not liable for contamination to neighboring landowners' property in the absence of intentional, negligent, or reckless conduct or an abnormally dangerous activity. This decision in *Ross v. Lowitz* keeps New Jersey common law aligned with the Restatement Second of Torts.[39]

Plaintiff landowners sued their current and former neighbors, alleging damages from a leaking underground heating oil tank. Plaintiffs' claims included private nuisance, negligence, and trespass for failing to timely abate the contamination. The court found for defendants, reasoning that section 822 of the Restatement Second of Torts required defendants to have acted intentionally, negligently, or recklessly in order to create an actionable common law nuisance or trespass. Plaintiffs offered no evidence of such conduct. Indeed, the court found that the storage of heating oil did not constitute an abnormally dangerous activity, and that defendants conducted reasonable testing on the oil tank and acted reasonably by contacting their insurance companies to engage in remediation efforts when they became aware of the leak.[40]

VII. MASS TORTS

A. DuPont C-8 Products Liability Litigation

[37] 176 So. 3d 1095 (La. Ct. App. 2015).
[38] Id. at 1103. Plaintiffs also argued CERCLA displaces Louisiana's statute of limitations. The court disagreed, holding the CERCLA provision at issue, 42 U.S.C. § 9658, was designed to preempt state statutes of limitations barring claims for long-latent injuries, which was not the case here. *Id.* at 1104.
[39] Ross v. Lowitz, 120 A.3d 178 (N.J. 2015).
[40] *Id.* at 511-12.

There were several noteworthy events in the long-running litigation against E.I. DuPont de Nemours and Co. (DuPont) over ammonium perfluorooctanoate (C-8) drinking water contamination in Ohio and West Virginia. Plaintiffs—who asserted various product liability, conspiracy, consumer protection, and other tort and statutory claims under Ohio and West Virginia law—alleged C-8 discharges from DuPont's Washington Works plant, where DuPont used C-8 manufactured elsewhere to manufacture Teflon, contaminated their drinking water. Plaintiffs' actions have been consolidated for pre-trial purposes in a multi-district litigation (MDL).[41]

In July, an Ohio federal district court gave DuPont a partial victory by granting summary judgment on several individual plaintiffs' product liability and consumer protection claims.[42] DuPont moved for global summary judgment as to all plaintiffs in all the MDL cases and cited to the claims of several specific plaintiffs as representative of those DuPont faces across the MDL. The court, however, limited its rulings only to the plaintiffs that DuPont specifically identified in its briefing, granting DuPont's motion in part as to them and noting that its opinion would be instructive in other cases in the MDL. The court rejected plaintiffs' product liability claims because DuPont did not manufacture C-8 during the relevant time period; it used C-8 manufactured by others. Likewise, plaintiffs' state consumer protection law claims failed because the claims hinged on whether DuPont sold, or otherwise induced plaintiffs to buy, contaminated drinking water. The court found that "[e]ven a broad interpretation of the term 'seller' [could not] transform DuPont into a seller of drinking water."[43]

The court also granted DuPont's motion as to the following claims: (1) conspiracy, because those claims were based on the product liability and consumer protection claims the court had just dismissed; (2) trespass on the person, because no such claim is available under Ohio or West Virginia law; (3) ultrahazardous or abnormally dangerous activity, because DuPont's activities were neither ultrahazardous nor abnormally dangerous; and (4) negligence *per se*, because the court found no private right of action under Ohio or West Virginia law, or the federal Resource Conservation and Recovery Act, for damage to groundwater. The court denied DuPont's motion on plaintiffs' conscious pain and suffering claims, holding that it can be a separate cause of action from wrongful death.[44] The court also found disputed fact issues as to whether DuPont knew that releasing C-8 "would bring about a harmful or offensive contact" and therefore denied DuPont's motion on plaintiffs' battery claims.[45]

In October, an Ohio federal jury handed out the first verdict against DuPont in the MDL.[46] The verdict, awarding $1.6 million in compensatory damages to a plaintiff who alleged her kidney cancer was caused by C-8, is the first in some 3,500 cases in the MDL. The jury awarded $1.1 million in damages for plaintiff's negligence claim and another $500,000 for her emotional distress claim. In an August 2015 decision, the judge overseeing the MDL held DuPont may face punitive damages.[47] DuPont argued it had implemented affirmative and extensive measures to protect and inform the public, including studying the health effects of C-8 and monitoring worker and public exposure

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[41] In re E.I. DuPont de Nemours and Co., No. 2:13–md–2433, 2015 WL 4092866 at *1-2 (S.D. Ohio July 6, 2015).
[42] *Id.* at *1.
[43] *Id.* at *9.
[44] *Id.* at *9, *10-12, *13, *16-18.
[45] *Id.* at *16.
[46] Jury Verdict Form for Negligence Claim, Bartlett v. E.I. Du Pont de Nemours & Co., No. 2:13-cv-170 (S.D. Ohio Oct. 7, 2015).
[47] *In re* E.I. Du Pont de Nemours & Co., No. 2:13-md-2433, 2015 WL 4943968 (S.D. Ohio Aug. 19, 2015).

to the substance. But the court held that a reasonable jury could find the evidence shows that DuPont knew that C-8 was harmful, that it purposefully manipulated or used inadequate scientific studies to support its position, and/or that it provided false information to the public about the dangers of C-8.[48] The jury here, though, found plaintiff had not shown that DuPont acted with actual malice, and it rejected plaintiff's bid for punitive damages.[49]

B. Elk River MCHM Release

The release of crude MCHM, a chemical used in the coal industry, from a Freedom Industries, Inc. facility to the Elk River near Charleston, West Virginia, interrupted water service to some 300,000 residents in January 2014. Litigation with various components has been working its way through federal court almost ever since.

In June, the court dismissed a private nuisance claim, but not a public nuisance claim, against the MCHM manufacturer and distributor.[50] The court found the only interest invaded here was that of the public generally, which by definition is not a private nuisance. On public nuisance, defendant argued plaintiffs cannot allege they suffered a special injury, as required under West Virginia law. The court, citing a dearth of authority defining special injury, allowed the claim to go forward but expressed doubt that the evidence would support a public nuisance claim.

In October, the court certified a class for purposes of determining defendants' liability, but it denied certification for damages.[51] On defendants' motion, the court excluded the testimony of plaintiffs' damages experts as based on hypothetical or speculative calculations and held the damages issues in the case were too individualized and particular to be given class treatment. The court held, however, that issues related to liability were well suited to class certification, finding "the proposed liability issue certifications provide an orderly means to resolve some of the central issues in the case."[52]

[48] *Id.* at *6.
[49] Jury Verdict Form for Negligence Claim, *supra* note 46.
[50] *See* Good v. Am. Water Works Co., No. CIV-A-2:14-01374, 2015 WL 3506957 (S.D.W.V. June 4, 2015).
[51] Good v. Am. Water Works Co., No. CV 2:14-01374, 2015 WL 5898465 (S.D. W. Va. Oct. 8, 2015).
[52] *Id.* at *19.

I. INDIVIDUAL LIABILITY

In *Coty US LLC v. 680 S. 17th Street LLC*,[2] the Superior Court of New Jersey pierced the veil of a limited liability company and held its sole member liable for environmental cleanup costs that the company agreed to undertake in the purchase of real estate.

Airaj Hasan formed 680 S. 17th Street, LLC (680 LLC) to purchase property contaminated by former industrial operations. Under the purchase agreement, 680 LLC assumed all environmental liabilities and indemnified the seller for its liabilities under all environmental laws. In April 2010, the New Jersey Department of Environmental Protection (NJDEP) notified 680 LLC and Coty US LLC (Coty) that 680 LLC failed to perform vapor intrusion sampling and to submit the required reports to the NJDEP. 680 LLC failed to respond, so Coty retained a consultant to conduct remediation at the property and avoid civil penalties.

In its subsequent lawsuit against 680 LLC, Coty contended Hasan should be held personally liable for Coty's environmental costs in connection with the property because 680 LLC continuously represented (falsely) that it had sufficient resources to conduct remediation at the site and to perform all its obligations under New Jersey's Spill Act. The court agreed, finding that 680 LLC was merely a "shell company" with (by design) no cash flow or assets other than the property. The court found it appropriate to pierce the veil of 680 LLC "in order to prevent fraud and injustice."[3]

In *United States v. Ray Eugene Caldwell*,[4] the Ninth Circuit Court of Appeals upheld the conviction and sentences of Ray Caldwell (and his business) for unlawful discharge of sewage in violation of the Clean Water Act (CWA). The court refused to overturn the sentence based on Caldwell's argument that his assistant was the person who physically performed the discharge, finding that Caldwell could still be held liable under the CWA's responsible corporate officer doctrine because Caldwell was the person with "authority to exercise control over the corporation's activity that is causing the discharges."[5] The court also pointed to evidence that Caldwell knew the nature of the material he was discharging and took steps to conceal his actions.[6]

Similarly, in *People v. J.T. Einoder, Inc.*,[7] the court held the primary owner of a closely held corporation directly liable for violating the Illinois Environmental Protection Act (Act) by accepting illegal waste at a solid waste disposal site.[8] The court acknowledged that to impose individual liability on a corporate officer it must be shown that the corporate officer was "personally involved and actively participated in the violation of the Act, not simply that the individual had personal involvement or active

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[1]Given the breadth of the topics, this chapter discusses only a selection of cases and regulations issued during 2015. Connie Sue Martin and Eric Larson edited this chapter. The chapter's authors are Lisa Decker, Richard Fil, Connie Sue Martin, Sara Peterson, Elise C. Scott, Thomas Utzinger, and May Wall.

[2]No. EXK-C-122-13, 2015 N.J. Super. Unpub. LEXIS 2878 (N.J. Super., Feb. 26, 2015).

[3]*Id.* at *52-53.

[4]Nos. 14-30074, 14-30075, 2015 U.S App. LEXIS 16806 (9th Cir. Sept. 22, 2015).

[5]*Id.* at *3 (quoting United States v. Iverson, 162 F.3d 1015, 1025 (9th Cir. 1998)).

[6]*Id.*

[7]28 N.E.3d 758 (Ill. 2015).

[8]*Id.* at 767-68.

participation in the company's management."[9] Although the court found that the evidence at trial proved the corporate officer was "not part of the day-to-day landfill operations at the Site," that testimony was irrelevant "because a corporate officer, to be personally liable, does not have to perform the physical acts constituting a violation."[10] In this case, the corporate officer had participated in signing more than 250 contracts authorizing various companies and individuals to dump prohibited materials at the solid waste disposal site, and she even signed many of these contracts after she was aware that the state agency had cited the landfill operations for violating the Act and had direct discussions with the agency representatives about the violations.[11]

In *Carmine Greene v. Kenneth R. Will*,[12] the court held the president/principal of a waste dump and processing facility directly liable for violations of the Resource Recovery and Recycling Act based on his responsibilities for the overall and day-to-day operations, management, and control of the Facility and Site, including outdoor storage, handling, grinding, processing, transporting, and disposal of solid waste materials.[13] The court emphasized that, despite the general principal that shareholders, directors, and officers of a corporation are "not liable for the obligations or delicts of the corporation," personal liability of corporate officers and directors is possible where "the individuals 'themselves actually participate in the wrongful conduct prohibited by the Act,'" as the evidence demonstrated in this case.[14]

In *United States v. Washington*,[15] the court refused to hold a co-owner of a shellfish harvesting business liable under the responsible corporate officer doctrine, finding that the doctrine only applies where there are violations of federal public health laws or state environmental laws.[16] At issue in the case was whether the co-owner (individually) and his company were liable for violating the Squaxin Island Tribe's Shellfish Implementation Plan for failing to provide the required notice for shellfish harvesting in a number of locations. Ultimately, the court ruled that the shellfish harvesting company was required to provide the tribe shellfish in the future to replace the shellfish it improperly took from the tribe.[17]

II. BANKRUPTCY

The defendant in *Mehrabian Family Trust v. Joan F. Weiand Trust*[18] unsuccessfully sought to dismiss a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) cost recovery action. The defendant argued the claims were barred by a bankruptcy court's Chapter 11 discharge order, although the plaintiffs did not receive actual notice of those proceedings. The defendant asserted that the site conditions were disclosed to the plaintiffs several years before the discharge order and the failure of the plaintiffs to indicate any intention to pursue claims rendered them unknown creditors that were not entitled to actual notice of the Chapter 11 proceedings.

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[9] *Id.* at 767.
[10] *Id.*
[11] *Id.*
[12] No. 3:09CV510-PPS, 2015 U.S. Dist. LEXIS 158413 (N.D. Ind. Nov. 24, 2015).
[13] *Id.* at *19-24.
[14] *Id.* at *20 (quoting Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund, 25 F.3d 417, 420 (7th Cir. 1994).
[15] No. C70-9213, 2015 U.S. Dist. LEXIS 70252 (W.D. Wash. May 29, 2015).
[16] *Id.* at *48-49.
[17] *Id.* at *52-57.
[18] No. 2:15-cv-02195-ODW (AGRx), 2015 U.S. Dist. LEXIS 121531 (C.D. Cal. Sept. 11, 2015).

The district court denied the defendant's motion based on a lack of proof as to its factual assertions.

In *Town of Lexington vs. Pharmacia Corp.*,[19] a city asserted property damage claims against a number of related entities based on the presence of polychlorinated biphenyls (PCBs) in one of its elementary schools. Defendant Solutia did not exist during the relevant time period of the city's claims but rather was a subsequent spin off from the still existing manufacturer of the PCBs. Solutia sought summary judgment based in relevant part on: (1) the continued existence of the manufacturer; (2) not being the manufacturer or even in existence during the relevant time period; (3) there being no third-party rights to assert a direct cause of action against Solutia because it only provided an indemnity to others; and (4) its indemnity obligations were subject to negations of third-party rights.

However, as part of Solutia's prior Chapter 11 reorganization, Solutia represented to the bankruptcy court that it had assumed the environmental liabilities of the PCB manufacturer, and the district court judicially estopped Solutia from disclaiming such obligations. As such, Solutia was not merely an indemnitor, the purported negations of third-party rights were not effective, and a direct claim could be asserted by a third party.

In *Howard v. Fina Oil & Chemical Co.*,[20] a Chapter 13 debtor opposed the trustee's abandonment of contaminated real property in the debtor's bankruptcy estate. The property was previously acquired by the debtor's father, who later discovered the contamination and filed two actions for damages against various defendants. Following her father's passing, the debtor acquired the property and was substituted as plaintiff in the actions. The bankruptcy court judicially estopped the debtor (but not the trustee) from pursuing damages based on her failure to disclose her interests in the property and those actions.[21]

The debtor argued that abandonment would negatively affect the remediation of the site and her potential liability for environmental conditions. The bankruptcy court rejected the debtor's arguments and held that abandonment under 11 U.S.C. § 554 was warranted because the property was burdensome to the bankruptcy estate and had minimal value.[22]

While a minority of courts have allowed violations of environmental law to serve as a basis for expanding the exception to a trustee's broad discretion in abandoning property, the bankruptcy court agreed with the majority view that the exception cited in *Midlantic National Bank vs. New Jersey Department of Environmental Protection*[23] is narrow and limited to circumstances where an imminent and identifiable harm exists. The bankruptcy court also held that the trustee had no statutory or fiduciary duty to remediate property for the debtor's personal benefit.[24] The debtor's appeal of the bankruptcy court's decision was dismissed.[25]

III. BROWNFIELDS

A. Federal Legislation

[19]No. 12-cv-11545, 2015 U.S. Dist. LEXIS 36815 (D. Mass. Mar. 24, 2015).
[20]No. 2:15-CV-107-KS-MTP, 2015 U.S. Dist. LEXIS 155842 (S.D. Miss. Nov. 18, 2015).
[21]No. 00-51897-NPO, 2015 Bankr. LEXIS 386 (Bankr. S.D. Miss. Feb. 6, 2015).
[22]*In re* Howard, 533 B.R. 532 (Bankr. S.D. Miss. July 23, 2015).
[23]474 U.S. 494 (1986).
[24]*In re Howard*, 533 B.R. at 545.
[25]*Howard*, 2015 U.S. Dist. LEXIS 155842.

Two bills were introduced in the U.S. House of Representatives in 2015. H.R. 2002,[26] the "Brownfields Redevelopment Tax Incentive Reauthorization Act of 2015," was introduced on April 23, 2015, by its sponsor, Rep. Elizabeth Esty (D-CT), and was referred to the House Committee on Ways and Means. The bill extends the election to expense (deduct in the current taxable year) environmental remediation costs related to qualified contaminated sites through 2019.

H.R. 3098,[27] the "Brownfield Redevelopment and Economic Development Innovative Financing Act of 2015," was introduced on July 16, 2015, by its sponsor, Rep. Janice Hahn (D-CA), and was referred to the House Committee on Financial Services. The bill directs the Department of Housing and Urban Development (HUD) to establish a financing program whereby HUD may guarantee the repayment of loans to local governments, local redevelopment agencies, or Base Realignment and Closure Commission redevelopment projects to carry out projects that promote urban renewal. Parties that are responsible for the contamination or who have more than one outstanding loan guaranteed by the program would not be eligible.

B. State Legislation

1. Connecticut

On July 2, 2015, Governor Dannel P. Malloy signed brownfield legislation designed to ensure that redevelopment projects can move to completion financially. Public Act 15-193[28] authorizes awards of up to 50% in additional grant monies to cover project cost overruns. Projects subject to the additional funding must be determined to be "priority" projects by the Department of Economic and Community Development and the Department of Energy and Environmental Protection. The funding must result in "greater environmental benefits" than originally proposed, and the total grant monies cannot exceed $4 million. Additionally, the legislation authorizes grants to municipal and regional governments to create comprehensive plans for multi-site brownfield areas.

2. New York

There were several developments affecting New York's Brownfield Cleanup Program (BCP) in 2015. The adoption of the 2015 budget on April 1, 2015, extended the BCP beyond its prior December 31, 2015, deadline for tax credits. The legislation[29] also amended certain aspects of the BCP, including specific changes for properties located in New York City. With respect to the definition of a "Brownfield Site," the amendments incorporate reference to objective cleanup or other health-based standards applicable to a property based on anticipated use, instead of the prior definition that referred to contamination that "complicates" development.

As for the deadlines and tax advantages available to properties in the BCP, there are now several categories including grandfathered properties. Properties admitted to the BCP currently and prior to December 31, 2022, are eligible for certain tax credits if a Certificate of Completion is obtained by March 31, 2026. New tax credit limits are generally applicable to sites admitted to the BCP in the latter half of 2015.

Sites admitted prior to June 23, 2008, are grandfathered and can take advantage of the prior tax credit scheme if those sites obtain Certificates by December 31, 2017. Sites

[26]H.R. 2002, 114th Cong. (2015).
[27]H.R. 3098, 114th Cong. (2015).
[28]2015 Conn. Acts 15-193 (Reg. Sess.).
[29]37 N.Y. Reg. 23 (June 10, 2015).

admitted from June 23, 2008, until the latter half of 2015 are grandfathered into the prior tax credit scheme if their Certificates are obtained by December 31, 2019.

In addition, for properties located in New York City that are newly admitted to the BCP or that will not obtain a Certificate before the deadlines to be considered grandfathered, tax credits will be available only if the property is located in an Environmental Zone, meets the definition of "affordable housing," or has projected investigation and cleanup costs exceeding 75% of the property's value if uncontaminated, or is "underutilized."

3. Oregon

In June 2015, the Oregon Senate passed H.B. 2734[30] after it was passed by the House of Representatives. Governor Kate Brown signed the bill on July 1, 2015, and it was enacted on July 8, 2015, as Chapter 631 (2015 Laws). The legislation, titled "Relating to the Remediation of Contaminated Property," allows local governments to create "Land Bank Authorities" having the power to acquire, rehabilitate, redevelop, reutilize, or restore brownfield properties located within the local government's geographic jurisdiction.

Land banks would have the authority to clear title, issue bonds, and seek compensation from responsible parties. The use of a quasi-public land bank would relieve government entities from state liability for pre-existing contamination; the land bank would be able to acquire land and hold it for the time it takes to remediate the property.

IV. ENVIRONMENTAL INSURANCE

In *McGinnes Industrial Maintenance Corp. v. Phoenix Insurance Co.*,[31] the Supreme Court of Texas, on certified question from the Fifth Circuit Court of Appeals, held that a Unilateral Administrative Order (UAO) issued by the Environmental Protection Agency (EPA) directing an insured to conduct a remedial investigation and feasibility study was a "suit" for purposes of an insurer's duty to defend under a 1960s Comprehensive General Liability insurance policy.

The court noted that its decision was in agreement with the "overwhelming majority of jurisdictions to have considered the issue."[32] The court concluded that the "coercive nature" of the EPA administrative proceedings under CERCLA's cleanup and cost recovery provisions amount to a suit, and a potentially responsible party's (PRPs) receipt of a CERCLA letter from EPA inviting the recipient to negotiate with EPA is effectively a demand. As a "practical matter, courts afford PRPs no hope of relief, and consequently they have no choice but to comply with EPA's directives."[33] In a sharply-worded dissent, four dissenting justices wrote "[i]f you do not like your insurance policy, the Supreme Court of Texas can now change it for you."[34]

Another Texas Supreme Court decision involved the extent of additional insured coverage for BP in connection with the April 2010 explosion and sinking of the Deepwater Horizon oil-drilling rig. In *In re Deepwater Horizon, No. 13-0670*,[35] the court determined that BP was not an additional insured under Transocean's insurance policies because the additional-insured insurance provisions provided coverage as obligated by

[30]H.B. 2734, 78th Leg. Assemb. (Or. 2015).
[31]No. 14-0465, 2015 Tex. LEXIS 624 (Tex. June 26, 2015).
[32]*Id.* at *2.
[33]*Id.* at *7.
[34]*Id.* at *21-22.
[35]470 S.W.3d 452 (Tex. 2015).

written contract and the parties' drilling contract applies "only to the extent of the liability Transocean assume for above-surface pollution."[36]

The drilling contract contained a "knock-for-knock" allocation of risk, which is standard in the oil and gas industry. Transocean "agreed to indemnify BP for above-surface pollution regardless of fault, and BP agreed to indemnify Transocean for all pollution risk Transocean did not assume, i.e., subsurface pollution."[37] In addition, Transocean was required to maintain multiple types of insurance at its own expense, including commercial general liability insurance for the indemnity agreement, and was obliged to name BP, its affiliates, and other related individuals/entities as additional insureds.[38]

Transocean maintained a $50 million primary general liability policy and four additional layers of excess insurance with various insurers providing an additional $700 million in coverage. BP was not specifically named as an insured in these policies, by endorsement, or on any certificates of insurance, but each of the policies contained language extending "Insured" status to "any person or entity to whom the 'Insured' is obliged by oral or written 'Insured Contract' . . . to provide insurance such as afforded by [the] Policy."[39]

BP argued that the coverage was to be determined solely from the four corners of the insurance policy, without reference to the drilling contract. In rejecting BP's argument, the court noted that BP's analysis "glosses over the inconvenient reality that BP is an 'Insured' only by virtue of the status conferred to it under the Drilling Contract, to which the policies necessarily refer by predicating additional-insured status on the existence of [such] . . . [c]ontract requiring such coverage."[40] Because Transocean did not assume liability for subsurface pollution, Transocean was not obliged to name BP as an additional insured as to that risk; because there was no obligation to provide insurance for that risk, BP lacked status as an additional insured.

In *SI Venture Holdings, LLC v. Catlin Specialty Ins.*,[41] the U.S. District Court for the Southern District of New York answered a question of first impression under New York law—whether a contract that requires an insured party to seek approval from its insurer before expending funds for environmental clean-up is void as against public policy. Catlin Specialty Insurance (Catlin) issued an insurance policy to SI Venture Holdings (SI), a real estate development company. The policy contained a "consent requirement" requiring the insured to obtain the prior written consent of the insurer before, among other things, incurring any clean-up costs.

In February 2013, SI discovered that one of its properties was contaminated with petroleum at concentrations that SI believed required it to transport the soil to a disposal site in New Jersey, which it did. Six months later, SI sent a notice of claim to Catlin, requesting coverage for $250,000 worth of clean-up costs. Catlin denied that request, citing SI's failure to comply with the consent requirement.

SI argued that the consent requirement violated public policy because it would discourage insured parties from conducting environmental remediation expeditiously, if they had to delay their cleanup to seek consent or risk being unreimbursed for cleanup costs. The court rejected SI's argument. New York courts routinely enforce such consent requirements, so adopting SI's position would "revolutionize" New York insurance law;

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[36] *Id.* at 469.
[37] *Id.* at 456.
[38] *Id.* at 456-57.
[39] *Id.* at 457.
[40] *Id.* at 459.
[41] No. 14 Civ. 2261, 2015 U.S. Dist. LEXIS 89925, at *1-2 (S.D.N.Y. July 10, 2015).

it would also be "unfair to insurers, because it would preclude even reasonable withholding of consent to reimburse an insured party's clean-up costs."[42]

V. INSTITUTIONAL CONTROLS

In May, the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) published a report, *State Approaches to Managing Institutional Controls and Ensuring Long-Term Protectiveness at Leaking Underground Storage Tank (LUST) Sites*.[43] The report was developed by the Association's LUST Task Force Tanks Subcommittee and is the result of discussions at ASTSWMO meetings and responses to information requests sent to all states, territories, and the District of Columbia. The report focuses on how state tank programs manage institutional controls and ensure long-term protection of remedies at LUST sites. The report includes summaries, policies, tools, and practices from the thirty-five states that responded.[44]

In September, the Florida Department of Environmental Protection, Division of Waste Management (DWM) issued a draft Institutional Controls Procedures Guidance for agency staff overseeing cleanup of contaminated property. The agency anticipates that parties considering the pursuit of site closures with conditions may use the guidance to "facilitate an understanding of the FDEP internal processing of [institutional controls (ICs)] and result in a quicker processing time."[45]

VI. ENVIRONMENTAL INVESTIGATIONS/DUE DILIGENCE

A. ASTM E1527-13.

As of October 6, 2015, the ASTM E1527-13[46] standard for conducting "all appropriate inquiry" under CERCLA[47] has officially supplanted the prior version, ASTM E1527-05.[48] The updated 2013 standard: (1) clarifies the categories of environmental conditions, including a new defined term for Controlled Recognized Environmental Conditions; (2) clarifies the applicability of the standard to contaminants in vapor form; and (3) tightens requirements for record reviews.[49]

After ASTM adopted the 2013 version of this standard, EPA temporarily allowed parties seeking to avail themselves of liability protections under CERCLA to use either the old standard or the new one in order to complete all appropriate inquiry. As of October 6, 2015, EPA expects parties to meet the requirements of the updated 2013

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[42] *Id.* at *6-7.

[43] ASS'N OF STATE AND TERRITORIAL SOLID WASTE MGMT. OFFICIALS, STATE APPROACHES TO MANAGING INSTITUTIONAL CONTROLS AND ENSURING LONG-TERM PROTECTIVENESS AT LEAKING UNDERGROUND STORAGE TANK (LUST) SITES (May 2015) [hereinafter ASTSWMO REPORT]; *see also* ASS'N OF STATE AND TERRITORIAL SOLID WASTE MGMT. OFFICIALS, http://astswmo.org/index.html (last visited Mar. 12, 2016).

[44] ASTSWMO REPORT, *supra* note 43, at 1.

[45] DIV. OF WASTE MGMT., FLA. DEPT. OF ENV'T PROT., INSTITUTIONAL CONTROLS PROCEDURES GUIDANCE at 5 (Sept. 2015) (draft).

[46] *ASTM E1527-13 – Standard Practice for Envtl. Site Assessments: Phase I Envtl. Site Assessment Process*, ASTM INT'L (2014), *available at* http://bennett-ea.com/wp-content/uploads/2014/01/E1527-13-Phase-I.pdf.

[47] *See* 42 U.S.C. § 9601(35)(B) (2012).

[48] Amendment to Standards and Practices for All Appropriate Inquiries, 79 Fed. Reg. 60,087 (Oct. 6, 2014) (to be codified at 40 C.F.R. pt. 312).

[49] *Id.*

standard rather than the prior 2005 version in order to demonstrate that they have conducted "all appropriate inquiry."[50]

B. Commercial Use of Unmanned Aircraft Systems (UAS) in Environmental Due Diligence

The use of small UAS (drones) in conducting aerial surveys of land and inspections of buildings and infrastructure is quickly gaining momentum.[51] Commercial drone use could dramatically enhance the physical inspection components of the environmental due diligence process. In the past year, many companies have applied for Federal Aviation Administration (FAA) authorization to conduct such activities.[52]

Section 333 of the FAA Modernization and Reform Act of 2012[53] authorized the FAA to issue case-by-case exemptions authorizing the use of drones for commercial purposes. During the fourth quarter of 2014, the FAA issued four such authorizations. During the fourth quarter of 2015, the FAA issued 1,043 such authorizations.[54] The range in commercial services operations authorized under section 333 exemptions to date is broad, with relevant operations including land surveys, aerial photography, property inspection, commercial real estate evaluation, inspections for insurance underwriting and claims adjusting, imaging for construction projects, surveillance of local water supply, industrial infrastructure inspection, wildlife research, use in landfill operations, and many more.

FAA also issued a proposed rule in February 2015,[55] establishing a more comprehensive regulatory framework for the operation and certification of small (under 55 lbs.) UAS. The proposed regulation would establish: (1) specific operational limitations, such as requiring operators to maintain visual line-of-sight with the UAS and not operate over any persons not directly involved in the operation; (2) operator certification requirements and responsibilities; and (3) aircraft requirements such as pre-flight inspection and aircraft registration and marking. The FAA has indicated it expects to issue the Final Rule on Small UAS in mid-2016.[56]

C. Evaluating Carbon Asset Risk – World Resources Institute (WRI) & United Nations Environment Programme Finance Initiative (UNEP FI) Portfolio Carbon Initiative

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[50] *Id.*

[51] Pat Ware, *Drones Could be Boon in Site Assessments but Legal Status Remains Hazy, Parties Say*, Dailey Environment Report, 171 DEN B-1 (Sept. 4, 2014), http://edrnet.com/drones-boon-site-assessments-legal-status-remains-hazy-parties-say/

[52] *Cf. id., and* Press Release, Fed. Aviation Admin., Unmanned Aircraft Registration System Takes Flight, (Dec. 21, 2015).

[53] FAA Modernization and Reform Act of 2012, Pub. L. No. 112–95, 126 Stat. 11 (Feb. 14, 2012).

[54] Unmanned Aircraft Systems, *Authorizations Granted Via Section 333 Exemptions*, FED. AVIATION ADMIN. https://www.faa.gov/uas/legislative_programs/section_333/333_authorizations/ (last visited Mar. 12, 2016).

[55] Operation and Certification of Small Unmanned Aircraft Systems, 80 Fed. Reg. 9543 (Feb. 23, 2015) (to be codified at 14 C.F.R. pts. 21, 43, 45, 47, 61, 91, 101, 107, and 183).

[56] *Id.*

On December 12, 2015, nearly 200 countries, including the United States, adopted the Paris Agreement[57] under the United Nations Framework Convention on Climate Change. The Agreement recognizes that climate change "represents an urgent and potentially irreversible threat to human societies and the planet and thus requires the widest possible cooperation by all countries, and their participation in an effective and appropriate international response, with a view to accelerating the reduction of global greenhouse gas emissions."[58]

Global recognition of climate change and its impacts and the consensus expressed through the Paris Agreement that most fossil fuel use must ultimately be eliminated, will have dramatic economic, social, and financial implications. Several global and national organizations, both public and private, are developing and refining tools for evaluating those implications and incorporating them into due diligence processes.

For example, the World Resources Institute and UNEP Finance Initiative issued a framework in August 2015 for financial institutions and other stakeholders to systematically identify, assess, and manage "carbon asset risk," defined as "the potential financial risk affecting intermediaries and investors with a financial stake in or relationship with" carbon-intensive companies and operators.[59]

D. Evaluating Physical Risks of Climate Change to CERCLA Remedies

EPA continues to focus on and provide new tools for assessing "the vulnerabilities [that] may affect soil, sediment and groundwater remedies" at Superfund sites near or within 100-year and 500-year floodplains, or within a 1-meter sea level rise zone, due to climate change impacts.[60]

The *Climate Change Adaptation Implementation Plan*, released by the EPA Office of Solid Waste and Emergency Response (OSWER)[61] in June 2014, called for several key actions by the Superfund Program, including development of criteria to identify remedies that may be impacted by climate change, development of a site-specific protocol for evaluating remedy protectiveness, and issuance of technical fact sheets on types of remediation systems most likely impacted.[62]

EPA has now issued three technical fact sheets discussing climate change impacts and remedy resilience, including one focused on groundwater remediation systems,[63] one

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[57]Conference of the Parties on its Twenty-first Session, Paris, France, Nov. 30-Dec. 11, 2015, *Adoption of the Paris Agreement*, Draft Decision -/CP.21, U.N. Doc. FCCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015).

[58]*Id.* at 1.

[59]World Resources Insitute & UNEP Fin. Initiative, Carbon Asset Risk: Discussion Framework at 6 (Aug. 2015).

[60]Superfund, *Superfund Climate Change Adaptation*, ENVTL. PROT. AGENCY http://www.epa.gov/superfund/superfund-climate-change-adaptation (last updated Mar. 7, 2015).

[61]Effective December 15, 2015, OSWER has been renamed the Office of Land and Emergency Management. *See* Name Change From the Office of Solid Waste and Emergency Response (OSWER) to the Office of Land and Emergency Mgmt., 80 Fed. Reg. 77,575 (Dec. 15, 2015) (to be codified at 40 C.F.R. pts. 1, 7, 24, 45, 241, 310, and 761) (final rule).

[62]OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, ENVTL. PROT. AGENCY, CLIMATE CHANGE ADAPTATION IMPLEMENTATION PLAN (June 2014).

[63]Superfund Records Collections, *Climate Change Adaptation Technical Fact Sheet: Groundwater Remediation Systems – EPA 542-F-13-004*, ENVTL. PROT. AGENCY (Dec. 1, 2013).

focused on landfills and containment as an element of site remediation,[64] and the most recent, issued in April 2015, focused on contaminated sediment remedies.[65] Issuance of these technical fact sheets is helpful for responsible parties evaluating potential remedies at a particular contaminated site for vulnerability to climate change-related weather events. At the same time, the Implementation Plan and the fact sheets demonstrate that those types of climate-related events have become more foreseeable, meaning that responsible parties who fail to evaluate these vulnerabilities in planning or maintaining remedial actions may find it more difficult than ever to assert an "act of God" defense to CERCLA liability.[66]

VII. IMPACT OF BUILDING ISSUES ON TRANSACTIONS

Building issues, including vapor intrusion, lead-based paint, and radon, continue to require careful evaluation and assessment of potential liability in commercial, industrial, and residential real estate transactions.

A. Vapor Intrusion Developments

Vapor intrusion continues to be a front and center issue on many real estate transactions, and the guidance from EPA and state regulators continues to evolve. Attorneys and other professionals counseling real estate clients need to stay abreast of vapor intrusion guidance, regulatory schemes, and case law because of the potential effects on the marketability and ability to finance the property, the future of building design specifications, and reporting obligations for sellers.

1. Federal Guidance

In June 2015, OSWER issued the *Technical Guide for Assessing and Mitigating the Vapor Intrusion Pathway from Subsurface Vapor Sources to Indoor Air*. This document was accompanied by a *Technical Guide for Addressing Petroleum Vapor Intrusion at Leaking Underground Storage Tank Sites*.[67]

The new guidance details EPA's "recommendations for how to identify and consider key factors when assessing vapor intrusion [VI], making risk management decisions, and implementing mitigation [measures] pertaining to . . ." VI, in an effort to

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[64]Superfund Records Collections, *Climate Change Adaptation Technical Fact SheetLandfills and Containment as an Element of Site Remediation – EPA 542-F-14-001*, ENVTL. PROT. AGENCY (May 1, 2014).

[65]*See* U.S. EPA Office of Superfund Remediation and Technology Innovation, EPA 542-F-15-009 (April 2015). Superfund Records Collections, *Climate Change Adaptation Technical Fact Sheet: Contaminated Sediment Remedies: EPA 542-F-15-009*, ENVTL. PROT. AGENCY (Apr. 1, 2015).

[66]42 U.S.C. § 9601(1) (2012) (defining an "act of God" as "an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.").

[67]OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, ENVTL. PROT. AGENCY, OSWER TECHNICAL GUIDE FOR ASSESSING AND MITIGATING THE VAPOR INTRUSION PATHWAY FROM SUBSURFACE VAPOR SOURCES TO INDOOR AIR (June 2015) [hereinafter 2015 TECHNICAL GUIDE]; OFFICE OF UNDERGROUND STORAGE TANKS, ENVTL. PROT. AGENCY, EPA 510-R-15-001, TECHNICAL GUIDE FOR ADDRESSING PETROLEUM VAPOR INTRUSION AT LEAKING UNDERGROUND STORAGE TANK SITES (June 2015).

"promote national consistency in assessing the vapor intrusion pathway."[68] The guidance is applicable to CERCLA, the Resource Conservation and Recovery Act (RCRA), and brownfield sites. It is also intended to comply with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). EPA notes in the guidance that VI will be re-evaluated in Superfund five-year reviews even if VI was not addressed as part of the original remedial action. This could lead to the reopening of sites due to VI issues, with additional assessment and remedial costs beyond what the responsible parties originally may have projected.[69]

In recent years, many states have adopted their own vapor intrusion regulations.[70] In 2013, for instance, Illinois amended the Tiered Approach to Corrective Action Objectives (TACO) rules to include a risk-based approach for evaluating indoor air exposures using soil gas and groundwater sampling data.[71] EPA regions similarly have vapor intrusion guidance in place, such as Region 9,[72] issued in July 2014. Time will tell whether the new VI guidance will provide national consistency, but commentators are not optimistic.[73]

2. Vapor Intrusion Cases

Given the varying vapor intrusion guidance schemes that exist in the United States, sound science and professional judgment have become particularly critical elements of vapor intrusion litigation. In *Ebert v. General Mills, Inc.*,[74] for instance, homeowners brought a class action suit against General Mills under CERCLA and RCRA, as well as common law nuisance and negligence claims, alleging that their homes were contaminated by Tricheloroethylene (TCE) vapors that had migrated from buried drums at a General Mills facility. On February 27, 2015, the U.S. District Court for the District of Minnesota issued an opinion allowing the admission of expert testimony regarding environmental contamination and epidemiology, finding that the "multiple lines of evidence" methodology, which quite logically considers and weighs all available data and information, is sufficiently reliable so as not to disqualify an expert.[75]

The *Ebert* case illustrates the importance of utilizing well-qualified experts who use a defensible methodology to reach their conclusions. In vapor intrusion cases, environmental scientists and other experts who utilize the "multiple lines of evidence" methodology should be well positioned to fend off a *Daubert* motion.[76]

B. Lead-Based Paint

[68] 2015 TECHNICAL GUIDE, *supra* note 67, at 6.
[69] *Id.* at 7.
[70] Geosyntec has prepared a compendium of state vapor intrusion guidance documents. *See Vapor Intrusion Guidance Documents by State*, GEOSYNTEC CONSULTANTS, http://www.envirogroup.com/links.php (last visited Mar. 12, 2016).
[71] ILL. ADMIN. CODE tit. 35, § 742 (2013).
[72] Memorandum from Enrique Manzanilla, Dir. Of Superfund Div., to Region 9 Superfund Div. Staff and Mgmt. (July 9, 2014).
[73] Matthew E. Cohn, *Vapor Intrusion – A Look at What the Experts Are Saying*, ARNSTEIN & LEHR LLP NEWSLETTER (Dec. 2015).
[74] No. 13-3341 (DWF/JJK), 2015 WL 867994 (D. Minn., Feb. 27, 2015).
[75] *Id.* at *5.
[76] Cohn, *supra* note 73, at 6.

On January 14, 2015, EPA proposed revisions to the Lead Renovation, Repair, and Painting (RRP) rule.[77] The revisions propose to eliminate the requirement that the renovator refresher training have a hands-on component, remove jurisdiction-specific certification and accreditation requirements under the Lead-Based Paint Activities program, and add "clarifying language" to the requirements for training providers under both the RRP and Lead-Based Paint Activities programs (correcting the inadvertent omission of a requirement for renovation training providers to notify EPA after each training course the provider delivers).

On October 27, 2015, EPA announced seventy-five enforcement actions from the past year (October 2014 to September 2015) for violations of EPA's Lead Renovation, Repair, and Painting (RRP) regulations.[78] Each enforcement action requires that the alleged violator certify compliance with RRP regulations to the EPA and, in most cases, pay civil penalties to resolve the alleged violations. According to EPA, the enforcement actions "reflect EPA's goal to reduce illegal and unsafe renovations, and the lead hazards risks that result from them."[79]

C. Radon

On November 10, 2015, EPA, along with the American Lung Association and other partners, announced the National Radon Action Plan (Plan).[80] The Plan presents a "long-range strategy for eliminating avoidable radon-induced lung cancer in the United States."[81] The Plan intends to build upon the Federal Radon Action Plan and launch more than thirty new projects aimed at "[t]esting for and mitigating high radon using professional radon services[;] [p]roviding financial incentives and direct support where needed for radon risk reduction[;] [and] [d]emonstrating the importance, feasibility and value of radon risk reduction."[82]

[77] Lead-Based Paint Programs; Amendment to Jurisdiction-Specific Certification and Accreditation Requirements and Renovator Refresher Training Requirements, 80 Fed. Reg. 1873 (Jan. 14, 2015) (to be codified as 40 C.F.R. pt. 745).

[78] Press Release, Envtl. Prot. Agency, EPA Settlements Help Protect Public Against Health Hazards from Lead Exposure (Oct. 27, 2015).

[79] *Id.*

[80] AM. LUNG ASS'N, ET AL, THE NAT'L RADON ACTION PLAN: A STRATEGY FOR SAVING LIVES (2015).

[81] *Id.* at 2.

[82] *Id.*

Chapter 8 • PESTICIDES, CHEMICAL REGULATION, AND RIGHT-TO-KNOW
2015 Annual Report[1]

I. TOXIC SUBSTANCES CONTROL ACT (TSCA)

In June, the House of Representatives passed the TSCA Modernization Act of 2015[2] with a 398 to 1 vote. A Senate bill[3] to amend TSCA was passed on the final day of the 2015 legislative session. The Senate version amends or replaces virtually every section of the current law, whereas the House version makes more targeted amendments to TSCA's risk assessment and risk management provisions. Both versions would amend TSCA's preemption provisions, which has drawn considerable attention in light of recent efforts by numerous state legislatures to enact their own versions of chemical-regulatory legislation. Attempts to reconcile the two bills will be undertaken in 2016.

The Environmental Protection Agency (EPA) moved forward with its implementation of the *TSCA Work Plan for Chemical Assessments*, which identifies ninety existing chemical substances for assessment, and, if necessary, risk management.[4] EPA completed a risk assessment for one Work Plan Chemical, N-Methylpyrrolidone (NMP) in paint and coating removal products.[5] EPA completed problem formulations and initial assessments for three groups of flame retardant chemicals and released a data needs assessment for a fourth cluster of flame retardants in polyurethane foams.[6] EPA released a problem formulation and initial assessment for 1,4-dioxane in which it concluded that there were no risks to the general population through exposure to air emissions and that EPA should continue to assess consumer and worker exposure through certain uses.[7]

EPA published a proposed Significant New Use Rule (SNUR) under section 5 for trichloroethylene (TCE), which applies to the manufacture and processing of TCE for use in consumer products[8] and intends to issue a proposed section 6 rule for TCE in January

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[1]Lawrence E. Culleen and L. Margaret Barry, Arnold & Porter LLP; Claudia O'Brien, Latham & Watkins LLP; Charles Franklin, Akin Gump Strauss Hauer & Feld LLP; Warren U. Lehrenbaum, Crowell & Moring LLP; James Votaw, Manatt, Phelps & Phillips, LLP; Lori Warner, Jackson Gilmour & Dobbs, PC; Lynn L. Bergeson and Richard E. Engler, Ph.D., Bergeson & Campbell, P.C.; Alicia J. Edwards, GableGotwals.

[2]H.R. 2576, 114th Cong. (2015).

[3]S. 697, 114th Cong. (2015).

[4]OFFICE OF POLLUTION PREVENTION & TOXICS, EPA, TSCA WORK PLAN FOR CHEMICAL ASSESSMENTS: 2014 UPDATE at 3 (Oct. 2014).

[5]OFFICE OF CHEMICAL SAFETY AND POLLUTION PREVENTION, ENVTL. PROT. AGENCY, EPA 740-R1-5002, TSCA WORK PLAN CHEMICAL RISK ASSESSMENT N-METHYLPYRROLIDONE: PAINT STRIPPER USE (Mar. 2015). *See generally Assessing and Managing Chemicals Under TSCA*, ENVTL. PROT. AGENCY, http://www2.epa.gov/assessing-and-managing-chemicals-under-tsca/assessments-tsca-work-plan-chemicals (last updated Mar. 8, 2016).

[6]*Assessing and Managing Chemicals Under TSCA*, *supra* note 5 (problem formulation and initial assessments for Chlorinated Phosphate Esters Cluster, Cyclic Aliphatic Bromides Cluster, Tetrabromobisphenol A and Related Chemicals Cluster, and Brominated Phthalate Cluster).

[7]*Id.* (problem formulation and initial assessment for 1,4-Dioxane).

[8]Trichloroethylene (TCE); Significant New Use Rule; TCE in Certain Consumer Products, 80 Fed. Reg. 47,441 (proposed Aug. 7, 2015) (to be codified at 40 C.F.R. pt. 721).

2016.[9] EPA reached a phase-out agreement with the last remaining domestic manufacturer of TCE-containing aerosol arts and crafts spray fixative products.[10] EPA also said that it would issue a notice of proposed rulemaking to jointly regulate NMP and methylene chloride under section 6 to address risks associated with commercial and consumer paint and varnish stripping uses.[11]

EPA finalized a SNUR under section 5 for the flame retardant hexabromocyclododecane,[12] which was added to the TSCA Work Plan in 2014. EPA continued to issue or modify other SNURs for chemical substances that had been the subject of premanufacture notices and other forms of scrutiny.[13] EPA proposed a SNUR for long-chain perfluoroalkyl carboxylate (LCPFAC) chemical substances intended to further codify a voluntary industry phase-out.[14] This SNUR would also eliminate the exemption for manufacturers and importers of articles that contain LCPFAC chemical substances and would amend a SNUR for perfluoroalkyl sulfonate (PFAS) chemical substances so that it would apply to processors of the listed substances as well as importers of PFAS chemical substances as part of carpets. In addition, a proposed SNUR for toluene diisocyanates and related compounds would apply to consumer product uses,

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[9]Trichloroethylene (TCE); Rulemaking Under TSCA Section 6(a), RIN 2070-AK03 (May 21, 2015), *available at* http://resources.regulations.gov/public/ContentViewer?objectId=0900006481b05fff&disposition=attachment&contentType=pdf.

[10]Press Release, Envtl. Prot. Agency, EPA Reaches Agreement with Manufacturer to Stop Use of TCE in Spray Fixative Products Used on Arts and Crafts/EPA also Taking Regulatory Action to Reduce Exposure to this Chemical (July 30, 2015).

[11]N-Methylpyrrolidone (NMP) and Methylene Chloride; Rulemaking Under TSCA Section 6(a), RIN 2070-AK07 (May 21, 2015), *available at* http://resources.regulations.gov/public/ContentViewer?objectId=0900006481b05fff&disposition=attachment&contentType=pdf.

[12]Significant New Use Rule for Hexabromocyclododecane and 1,2,5,6,9,10-Hexabromocyclododecane, 80 Fed. Reg. 57,293 (Sept. 23, 2015) (to be codified at 40 C.F.R. pts. 9 and 721).

[13]*See* Modification of Significant New Uses of Certain Chemical Substances, 80 Fed. Reg. 70,171 (Nov. 13, 2015) (to be codified at 40 C.F.R. pt. 721); Significant New Use Rules on Certain Chemical Substances, 80 Fed. Reg. 59,593 (Oct. 2, 2015) (to be codified at 40 C.F.R. pts. 9 and 721) (direct final rule); Modification of Significant New Uses of Certain Chemical Substances, 80 Fed. Reg. 37,161 (June 30, 2015) (to be codified at 40 C.F.R. pt. 721); Significant New Use Rule on Certain Chemical Substances, 80 Fed. Reg. 32,879 (proposed June 10, 2015) (to be codified at 40 C.F.R. pt. 721); Significant New Use Rules on Certain Chemical Substances, 80 Fed. Reg. 32,003 (June 5, 2015) (to be codified at 40 C.F.R. pts. 9 and 721) (direct final rule); Significant New Use Rules on Certain Chemical Substances, 80 Fed. Reg. 26,448 (May 8, 2015) (to be codified at 40 C.F.R. pts. 9 and 721) (direct final rule); Modification of Significant New Uses of Certain Chemical Substances, 80 Fed. Reg. 19,037 (proposed Apr. 9, 2015) (to be codified at 40 C.F.R. pt. 721); Significant New Use Rule for Pentane, 1,1,1,2,3,3-hexafluoro-4-(1,1,2,3,3,3-hexafluoropropoxy), 80 Fed. Reg. 12,083 (Mar. 6, 2015) (to be codified at 40 C.F.R. pts. 9 and 721); Significant New Use Rules on Certain Chemical Substances, 80 Fed. Reg. 5457 (Feb. 2, 2015) (to be codified at 40 C.F.R. pts. 9 and 721) (direct final rule).

[14]Long-Chain Perfluoroalkyl Carboxylate and Perfluoroalkyl Sulfonate Chemical Substances; Significant New Use Rule, 80 Fed. Reg. 2885 (proposed Jan. 21, 2015) (to be codified at 40 C.F.R. pt. 721).

with specified exceptions.[15] EPA revoked a SNUR for two flame retardants issued in 1990, concluding that both substances had inherently low toxicity.[16]

EPA denied two section 21 rulemaking petitions by environmental organizations. One asked EPA to regulate carbon dioxide emissions through either a section 6 or a section 4 rule to address the serious harms associated with anthropogenic emissions of carbon dioxide, including ocean acidification.[17] The other petition sought a data collection rule under section 8(a) for mercury, mercury compounds, and mercury-added products.[18]

EPA released a direct final rule that as of January 19, 2016, will make changes to the way that section 5 notices are electronically submitted.[19] EPA continued its efforts to finalize a rule under Title VI of TSCA, the Formaldehyde Standards for Composite Wood Products Act.[20] In particular, EPA announced plans to finalize rules establishing a framework for third-party certification for composite wood panels and implementing formaldehyde emission standards for hardwood plywood, particleboard, and medium-density fiberboard[21] by November 2015.[22]

The Environmental Appeals Board (EAB) set aside a $2.5-million penalty imposed on a hexavalent chromium chemicals producer for failure to comply with its obligation under section 8(e)[23] to submit to EPA information which "reasonably supports the conclusion" that a chemical substance presents a "substantial risk of injury" to health or the environment. The EAB said that a study linking hexavalent chromium exposure to lung cancer was reportable information, but the study was exempt from reporting under longstanding EPA guidance that interpreted the section 8(e) reporting obligation to include an exemption for "corroborative" information.[24] The EAB's decision was also

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[15]Toluene Diisocyanates (TDI) and Related Compounds; Significant New Use Rule, 80 Fed. Reg. 2068 (proposed Jan. 15, 2015) (to be codified at 40 C.F.R. pt. 721).

[16]Revocation of Significant New Uses of Metal Salts of Complex Inorganic Oxyacids, 80 Fed. Reg. 15,515 (Mar. 24, 2015) (to be codified at 40 C.F.R. pt. 721).

[17] Petition for Rulemaking Pursuant to Section 21 of the Toxic Substances Control Act, 15 U.S.C. §2620, Concerning the Regulation of Carbon Dioxide, from Ctr. for Biological Diversity & Donn J. Viviani, to Gina McCarthy, Adm'r, EPA (June 30, 2015); Carbon Dioxide Emissions and Ocean Acidification; TSCA Section 21 Petition; Reasons for Agency Response, 80 Fed. Reg. 60,577 (Oct. 7, 2015) (to be codified at 40 C.F.R. ch. I).

[18]Petition to Promulgate Reporting Rules for Mercury Manufacturing, Processing, and Importation Under Section 8(a) of the Toxic Substances Control Act, from Natural Res. Def. Council & Ne. Waste Mgmt. Officials' Ass'n, to Gina McCarthy, Adm'r, EPA (June 24, 2015); Mercury; TSCA Section 21 Petition; Reasons for Agency Response, 80 Fed. Reg. 60,584 (Oct. 7, 2015) (to be codified at 40 C.F.R. ch. I).

[19]TSCA Section 5 Premanufacture and Significant New Use Notification Electronic Reporting, 80 Fed. Reg. 42,739 (July 20, 2015) (to be codified at 40 C.F.R. pts. 720, 721, 723, and 725) (direct final rule).

[20]15 U.S.C. § 2697 (2012).

[21]Formaldehyde; Third-Party Certification Framework for the Formaldehyde Standards for Composite Wood Products, 78 Fed. Reg. 34,796 (proposed June 10, 2013) (to be codified at 40 C.F.R. pt. 770); Formaldehyde Emissions Standards for Composite Wood Products, 78 Fed. Reg. 34,820 (proposed June 10, 2013) (to be codified at 40 C.F.R. pt. 770).

[22]Spring 2015 Regulatory Agenda, 80 Fed. Reg. 35,082 (June 18, 2015) (to be codified at 40 C.F.R. ch. I).

[23]15 U.S.C. § 2607(e) (2012).

[24]*In re* Elementis Chromium, Inc., TSCA Appeal No. 13-03 (Envtl. Appeals Bd. Mar. 13, 2015).

notable for its conclusion that the enforcement action was not time-barred because the failure to comply with the reporting obligation was a continuing violation. A federal court in West Virginia denied a motion to dismiss a claim of a section 8(e) violation in a class action lawsuit related to the spill into the Elk River from a Freedom Enterprises facility in 2014.[25] Other enforcement developments included EPA's settlement of an alleged TSCA violation with a company that develops products such as pesticides and herbicides for agricultural use.[26]

II. PESTICIDES

In a significant case involving EPA's relatively new Pollinator Risk Assessment Framework, commercial bee keepers and related organizations filed a petition to challenge EPA's decision to unconditionally register sulfoxaflor on the grounds that EPA's decision was not supported by substantial evidence in the record as a whole.[27] Reviewing the Agency's decision pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),[28] the Ninth Circuit Court of Appeals rejected EPA's argument that its measurement for the level of concern in the framework had been too conservative.[29] The court also held that the agency's action must be upheld on the agency's own rationale, and in this case, "the data was insufficient to evaluate the effect of sulfoxaflor on brood development and long-term colony strength."[30] Consequently, the Ninth Circuit found that EPA's decision to register sulfoxaflor was not supported by substantial evidence, vacated the unconditional registration, and remanded the case to EPA.[31] EPA subsequently issued a final cancellation order governing the disposition of existing stocks of sulfoxaflor pesticide products.[32]

III. EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW

President Obama issued an Executive Order calling on agencies to "advance waste prevention and pollution prevention by: reporting in accordance with the requirements . . . of the Emergency Planning and Community Right-to-Know Act [(EPCRA)]" and requiring agency contractors to provide information needed by federal facilities to comply with EPCRA.[33]

EPA affirmed its intent to review its Risk Management Planning (RMP) program under section 112(r) of the Clean Air Act[34] and identified RMP program modernization

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[25]Good v. Am. Water Works Co., No. 2:14-01374, 2015 U.S. Dist. LEXIS 72143, at *16–18 (S.D. W. Va. June 4, 2015).

[26]Press Release, Envtl. Prot. Agency, EPA Resolves Violations with Newport Beach, Calif. Co. for Failure to Report Imp. Agric. Chem. (Oct. 23, 2015).

[27]Pollinator Stewardship Council v. EPA, 806 F.3d 520 (9th Cir. 2015).

[28]7 U.S.C. § 136n(b) (2012).

[29]*Pollinator*, 806 F.3d at 531.

[30]*Id.* at 530.

[31]*Id.* at 532.

[32]Envtl. Prot. Agency, Sulfoxaflor – Final Cancellation Order (Nov. 12, 2015), *available at* https://www.epa.gov/sites/production/files/2015-11/documents/final_cancellation_order-sulfoxaflor.pdf.

[33]Exec. Order No. 13,693, 80 Fed. Reg. 15,871 (Mar. 19, 2015).

[34]OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, ENVTL. PROT. AGENCY, EPA 530R15001, FY 2016-2017 NAT'L PROGRAM MANAGER'S GUIDANCE (Apr. 28, 2015) *available at* http://www.epa.gov/sites/production/files/2015-

as a priority for the next year.[35] EPA also issued new guidance on calculating reporting requirements under EPCRA sections 311 and 312 thresholds for hazardous chemical and extremely hazardous substances in non-consumer lead-acid batteries.[36] EPA responded to a 2012 petition submitted by seventeen non-governmental organizations seeking to impose Toxic Release Inventory (TRI) reporting requirements on the oil and gas extraction industrial sector.[37] Administrator McCarthy granted the portion of the petition asking EPA to initiate a rulemaking process to propose bringing natural gas processing facilities under the scope of TRI, but denied the petition's call to regulate the broader oil and gas industry, concluding that EPA was precluded from aggregating multiple units into larger "facilities" capable of triggering TRI reporting thresholds.[38] The Administrator also cited EPA's engagement in a wide array of rulemaking, guidance, research, and other outreach activities targeting the oil and gas extraction sector using its air, water, and chemical control authorities.[39] EPA added 1-bromopropane, a substance classified by the National Toxicology Program as "reasonably anticipated to be a human carcinogen," to the list of chemicals subject to TRI reporting.[40]

EPA announced a $12 million settlement with Tonawanda Coke Corporation, which included a civil penalty for failing to report the manufacture of benzene and ammonia in quantities exceeding the reporting threshold.[41] EPA and state regulators actively investigated and enforced many other violations of EPCRA, CAA section 112(r), and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) section 103, imposing penalties ranging from $7,000 to $600,000 or more against facilities that failed to conduct the necessary emergency planning, reporting, and notification activities.[42]

04/documents/oswer_fy_16_17_npm_guidance_final.pdf [hereinafter NAT'L PROGRAM MANAGER'S GUIDANCE].

[35]*See, e.g.*, *Statement of Priorities*, Envtl. Prot. Agency (Oct. 2015), http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201510/Statement_2000.html (linking RMP modernization to reductions in the likelihood and severity of accidental releases, improvements in emergency response when those releases occur, and enhanced state and local emergency preparedness and response to mitigate the effects of accidents); Modernization of the Accidental Release Prevention Regulations Under the Clean Air Act, RIN 2050-AG82 (Nov. 16, 2015), http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201510&RIN=2050-AG82 (predicting proposed RMP rule in November 2015).

[36]*See* Memorandum from Deborah Y. Dietrich, Dir., Office of Emergency Mgmt., to Reg'l Div. Directors, Regions I-X (Apr. 25, 2015).

[37]*See* Letter from Gina McCarthy, Adm'r, EPA, to Eric Schaeffer, Exec. Dir., Envtl. Integrity Project, and Adam Kron, Att'y, Envtl. Integrity Project (Oct. 22, 2015).

[38]*Id.* at 5-9.

[39]*Id.* at 6, 9-12.

[40]Addition of 1-Bromopropane; Community Right-to-Know Toxic Chemical Release Reporting, 80 Fed. Reg. 72,906 (Nov. 23, 2015) (to be codified at 40 C.F.R. pt. 372).

[41]Press Release, Envtl. Prot. Agency, Fed. and State Gov'ts Reach Legal Agreement with Tonawanda Coke to Reduce Pollution; Co. to Pay $12 million to Address Violations of Envtl. Laws (May 11, 2015).

[42]*See, e.g.*, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, ENVTL. PROT. AGENCY, EPA 550-B-15-001, LIST OF LISTS (Mar. 2015), *available at* http://www.epa.gov/sites/production/files/2015-03/documents/list_of_lists.pdf.

EPA's National Program Manager's Guidance identifies a variety of headquarters and regional activities to advance compliance and enforcement efforts.[43] Many of these initiatives paid dividends during 2015, including new online training materials for regulators and businesses,[44] updated TRI reporting forms and instructions,[45] updated electronic reporting software,[46] and an updated "Consolidated List of Lists."[47]

The U.S. District Court for the Eastern District of Louisiana issued an important ruling on the scope of the petroleum exclusion under CERCLA and EPCRA.[48] Citing "the plain language of the statute, EPA's interpretation of the exclusion, and the settled view of the courts," the district court concluded that the petroleum exclusion applies to both petroleum products and hazardous substances that are inherent in petroleum.[49]

IV. NANOTECHNOLOGY

EPA published its long-anticipated proposed rule under TSCA section 8(a) to impose one-time reporting and recordkeeping requirements on manufacturers and processors of selected nanoscale materials.[50] Materials that would be subject to regulation are those that: (1) are solids at 25˚C; (2) have primary particles that are 1 to 100 nanometers (nm) in size; and (3) exhibit unique and novel characteristics or properties because of their size. The proposed rule, which would be EPA's first regulation governing nanoscale materials as a generic class, represents a rare instance in which EPA proposes to use TSCA section 8(a) to require reporting by processors of covered materials as well as manufacturers. Persons subject to the rule would have to provide

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[43] NAT'L PROGRAM MANAGER'S GUIDANCE, *supra* note 34, at 18-19.

[44] *See EPCRA Training for States, Tribes, LEPCs, Local Planners and Responders (Non-Section 313)*, ENVTL. PROT. AGENCY, http://www.epa.gov/epcra/epcra-training-states-tribes-lepcs-local-planners-and-responders-non-section-313 (last updated Dec. 4, 2015).

[45] *See Toxics Chemicals Release Inventory Reporting Forms and Instructions for Reporting Year 2015* (EPA 260-R-10-001), ENVTL. PROT. AGENCY, http://www3.epa.gov/twebhelp/WebHelp/tri_forms_and_instructions/tri_forms_and_instructions6_new_tri_forms_and_instructions.htm (last visited Mar. 13, 2015); *Table II, EPCRA Section 313 Chemical List for Reporting Year 2014 (including Toxic Chemical Categories)*, Envtl. Prot. Agency, *available at* http://www.epa.gov/sites/production/files/2015-01/documents/chemical_list_for_reporting_year_2014.pdf.

[46] *See Tier2 Submit Software*, ENVTL. PROT. AGENCY, http://www.epa.gov/epcra/tier2-submit-software (last updated Dec. 18, 2015). EPCRA allows facilities to report aggregate amounts of chemicals with similar health and environmental effects in a process called "Tier I" reporting. Tier 2 reports provide additional chemical-specific information.

[47] *EPCRA/CERCLA/CAA § 112(r) Consolidated List of Lists – March 2015 Version*, ENVTL. PROT. AGENCY, http://www.epa.gov/epcra/epcracerclacaa-ss112r-consolidated-list-lists-march-2015-version (last updated Feb. 19, 2016).

[48] *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, Nos. 10-2454, 10-1768, 2015 WL 5363039 (E.D. La. Sept. 14, 2015).

[49] *Id.* at *6; *see also* Memorandum from Francis S. Blake, General Counsel, EPA, to J. Winston Porter, Assistant Adm'r, EPA (July 31, 1987). In contrast, hazardous substances that are added to or mixed with petroleum products would not be excluded. *In re Oil Spill*, 2015 WL 5363039, at *6.

[50] Chemical Substances When Manufactured or Processed as Nanoscale Materials; TSCA Reporting and Recordkeeping Requirements, 80 Fed. Reg. 18,330 (proposed Apr. 6, 2015) (to be codified at 40 C.F.R. pt. 704).

extensive information on each nanoscale material that they manufacture or process. The projected date for finalization of the rule is October 2016.[51] EPA also continued its practice of issuing TSCA section 5(e) SNURs for new nanoscale materials, including a polymer-nanotube combination[52] and graphene nanoplatelets.[53]

For the second time in the history of FIFRA, EPA issued a registration for a nanosilver pesticide product.[54] The product, called "NSPW-L30SS" or "Nanosilva," is registered for use as an antimicrobial additive to protect plastics and textiles. Environmental groups have challenged EPA's registration decision.[55] EPA also responded to a petition filed several years ago by the International Center for Technology Assessment (ICTA), in which ICTA requested, among other things, that EPA initiate rulemaking to regulate all products containing nanosilver as pesticides.[56] EPA rejected that request in its response.[57]

The U.S. Food and Drug Administration (FDA) issued a final guidance document entitled *Guidance for Industry: Use of Nanomaterials in Food for Animals*.[58] Among other things, the guidance asserts that the FDA is unaware of any animal food ingredient engineered at the nanoscale level for which a "Generally Recognized as Safe" determination could be supported. In addition, the USDA's National Organic Program issued a guidance document clarifying that "no engineered nanomaterial will be allowed for use in organic production and handling unless the substance has been: (1) petitioned for use; (2) reviewed, and recommended by the [National Organic Standards Board]; and (3) added to the National List" of Allowed and Prohibited Substances through notice and comment rulemaking.[59]

In Europe, Belgium established a web-based portal for companies to register nanoscale materials that they place on the market in that country.[60] Nanoscale substances

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[51]*Nanoscale Material; Chemical Substances When Manufactured, Imported, or Processed as Nanoscale Materials; Reporting and Recordkeeping Requirements*, ENVTL. PROT. AGENCY, http://yosemite.epa.gov/opei/RuleGate.nsf/byRIN/2070-AJ54 (last visited Mar. 13, 2016).

[52]Significant New Use Rules on Certain Chemical Substances, 80 Fed. Reg. 5457 (Feb. 2, 2015) (to be codified at 40 C.F.R. pts. 9 and 721) (direct final rule).

[53]Significant New Use Rules on Certain Chemical Substances, 80 Fed. Reg. 32,003 (June 5, 2015) (to be codified at 40 C.F.R. pts. 9 and 721) (direct final rule).

[54]Envtl. Prot. Agency, No. 84610-2, Notice of Registration of Pesticide (May 15, 2015), *available at* http://www3.epa.gov/pesticides/chem_search/ppls/084610-00002-20150515.pdf.

[55]Ctr. for Food Safety v. EPA, No. 15-72312 (9th Cir. filed July 28, 2015); Natural Res. Def. Council v. EPA, No. 15-72308 (9th Cir. filed July 27, 2015).

[56]*See* Petition for Rulemaking Requesting EPA Regulate Nanoscale Silver Products as Pesticides; Notice of Availability, 73 Fed. Reg. 69,644 (Nov. 19, 2008).

[57]Letter from Jack Housenger, Dir., Office of Pesticide Programs, to Petitioners (Mar. 19, 2015).

[58]Use of Nanomaterials in Food for Animals; Guidance for Industry; Availability, 80 Fed. Reg. 46,587 (Aug. 5, 2015); *see also* Press Release, Food & Drug Admin., FDA Issues Guidance on the Use of Nanomaterials in Food for Animals (Aug. 4, 2015).

[59]Memorandum from Miles McEvory, Depty Adm'r, U.S. Dep't of Agric., to Stakeholders and Other Interested Parties (Mar. 24, 2015).

[60]*Register*, HEALTH, FOOD CHAIN SAFETY AND ENVIRONMENT, http://www.health.belgium.be/eportal/Environment/Chemicalsubstances/Nanomaterials/Register/index.htm#.VtywhvkrJpj (last updated Jan. 12, 2015).

currently on the market in Belgium must be registered by January 1, 2016. Mixtures containing such substances must be registered by January 1, 2017.[61]

V. HYDRAULIC FRACTURING

The Bureau of Land Management (BLM) promulgated final hydraulic fracturing (HF) rules for wells on federal and tribal lands.[62] However, a Wyoming federal court blocked enforcement of the regulation pending judicial review of challenges filed by several individual states and two industry organizations.[63] The National Park Service proposed rules for oil and gas extraction operations within national park properties, which closely track BLM's final rules.[64]

EPA promulgated amendments to the greenhouse gas (GHG) reporting rules for petroleum and natural gas systems that would require GHG emissions reporting on completions and workovers of oil wells with hydraulic fracturing.[65] EPA proposed to amend the 2012 New Source Performance Standards for the oil and gas industry to impose, among other things, methane and VOC emission control standards for hydraulically fractured oil wells.[66] EPA also proposed Clean Water Act categorical pretreatment standards for indirect discharges of wastewater from new and existing onshore hydraulic fracturing operations[67] and changing the restricted use pesticide (RUP) applicator certification regulations to include a "limited use" category for applying RUPs in hydraulic fracturing fluids.[68] EPA took no further action on TSCA sections 8(a) and 8(d) information collection rulemaking for hydraulic fracturing chemicals and mixtures that it started in 2014,[69] and no proposed rule is likely in 2016.[70] Finally, EPA determined to initiate rulemaking to require natural gas processing facilities to start conducting annual TRI reporting under EPCRA but declined to impose TRI reporting on

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[61] *Id.*

[62] Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 80 Fed. Reg. 16,128 (Mar. 26, 2015) (to be codified at 43 C.F.R. pt. 3160); Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 80 Fed. Reg. 16,577 (Mar. 30, 2015) (to be codified at 40 C.F.R. pt. 3160) (correction).

[63] Wyoming v. Dep't of Interior, No. 2:15-CV-043-SWS, 2015 WL 5845145 (D. Wyo. Sept. 30, 2015), *appeal docketed*, No. 15-8134 (10th Cir. Dec. 15, 2015).

[64] General Provisions and Non-Federal Oil and Gas Rights, 80 Fed. Reg. 65,572 (proposed Oct. 26, 2015) (to be codified at 36 C.F.R. pts. 1 and 9).

[65] Greenhouse Gas Reporting Rule: 2015 Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems, 80 Fed. Reg. 64,262 (Oct. 22, 2015) (to be codified at 40 C.F.R. pt. 98).

[66] Oil and Natural Gas Sector: Emission Standards for New and Modified Sources, 80 Fed. Reg. 56,593 (proposed Sept. 18, 2015) (to be codified at 40 C.F.R. pt. 60).

[67] Effluent Limitations Guidelines and Standards for the Oil and Gas Extraction Point Source Category, 80 Fed. Reg. 18,557 (proposed Apr. 7, 2015) (to be codified at 40 C.F.R. pt. 435).

[68] Pesticides; Certification of Pesticide Applicators, 80 Fed. Reg. 51,356 (proposed Aug. 24, 2015) (to be codified at 40 C.F.R. pt. 171).

[69] Hydraulic Fracturing Chemicals and Mixtures, 79 Fed. Reg. 28,664 (May 19, 2014) (to be codified at 40 C.F.R. ch. I).

[70] *See* Hydraulic Fracturing Chemicals and Mixtures, RIN 2070-AJ93, http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201504&RIN=2070-AJ93 (last visited Mar. 13, 2016).

hydraulic fracturing activities or any other oil and gas drilling and exploration activities.[71]

EPA's Inspector General evaluated EPA's use of its legal authorities to manage the potential impacts of hydraulic fracturing on water resources, concluding that current actions were inadequate.[72] EPA released a long-awaited draft state-of-the-science assessment of the potential impacts of hydraulic fracturing on drinking water resources,[73] along with nine other peer-reviewed studies upon which the assessment is based.[74] The assessment remains under review by EPA's Science Advisory Board.[75] EPA also released reports providing strategies to manage or minimize the potential for significant earthquakes induced by class II disposal wells for drilling wastewaters[76] and broadly assessing the nature of the hydraulic fracturing fluid chemicals disclosed on FracFocus between 2011 and 2013.[77] The U.S. Geological Survey (USGS) released a similar report on trends in hydraulic fracturing activities over the past sixty years.[78]

In California, final permanent regulations went into effect covering hydraulic fracturing and other well stimulation techniques,[79] and the California Water Resources Control Board issued groundwater monitoring criteria for areas where hydraulic fracturing will be used.[80] A coalition of interest organizations sought to enjoin any hydraulic fracturing permitting under the new regulations, asserting that the required

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[71]Letter from Gina McCarthy, *supra* note 37.

[72]EPA Inspector General, Enhanced EPA Oversight and Action Can Further Protect Water Resources From the Potential Impacts of Hydraulic Fracturing, Report No. 15-P-0204 (July 16, 2015), http://www.epa.gov/office-inspector-general/report-enhanced-epa-oversight-and-action-can-further-protect-water.

[73]Envtl. Prot. Agency, EP/600/R-15/047a, ASSESSMENT OF THE POTENTIAL IMPACTS OF HYDRAULIC FRACTURING FOR OIL AND GAS ON DRINKING WATER RESOURCES (June 2015).

[74]*See EPA's Study of Hydraulic Fracturing and Its Potential Impact on Drinking Water Resources*, EPA, http://www2.epa.gov/hfstudy/published-scientific-papers (last updated Aug. 14, 2015).

[75]Notification of Teleconferences and a Public Meeting of the Science Advisory Board Hydraulic Fracturing Research Advisory Panel, 80 Fed. Reg. 32,111 (June 5, 2015).

[76]UNDERGROUND INJECTION CONTROL NAT'L TECH. WORKGROUP, ENVTL. PROT. AGENCY, MINIMIZING AND MANAGING POTENTIAL IMPACTS OF INJECTION-INDUCED SEISMICITY FROM CLASS II DISPOSAL WELLS: PRACTICAL APPROACHES (Nov. 12, 2014), *available at* http://www.epa.gov/sites/production/files/2015-08/documents/induced-seismicity-201502.pdf.

[77]Envtl. Prot. Agency, EPA/601/R-14/003, ANALYSIS OF HYDRAULIC FRACTURING FLUID DATA FROM THE FRACFOCUS CHEMICAL DISCLOSURE REGISTRY 1.0 (Mar. 2015), *available at* http://www.epa.gov/sites/production/files/2015-03/documents/fracfocus_analysis_report_and_appendices_final_032015_508_0.pdf.

[78]Tanya J. Gallegos & Brian A. Varela, TRENDS IN HYDRAULIC FRACTURING DISTRIBUTIONS AND TREATMENT FLUIDS, ADDITIVES, PROPPANTS, AND WATER VOLUMES APPLIED TO WELLS DRILLED IN THE UNITED STATES FROM 1947 THROUGH 2010—DATA ANALYSIS AND COMPARISON TO THE LITERATURE, U.S. GEOLOGICAL SURVEY (2015), *available at* http://pubs.usgs.gov/sir/2014/5131/pdf/sir2014-5131.pdf#.

[79]CAL. CODE REGS. tit. 14, §§ 1780-1789 (2015).

[80]CAL. WATER RES. CONTROL BD., MODEL CRITERIA FOR GROUNDWATER MONITORING IN AREAS OF OIL AND GAS WELL STIMULATION (Jul. 7, 2015).

Environmental Impact Report was deficient.[81] The Michigan Department of Environmental Quality issued regulations governing high-volume hydraulic fracturing,[82] with similar rules proposed by the Virginia Department of Mines, Minerals and Energy[83] and the Pennsylvania Department of Environmental Protection.[84]

VI. BIOTECH DEVELOPMENTS

The U.S. Department of Agriculture (USDA) Animal and Plant Health Inspection Service (APHIS) withdrew its proposed rule that would have amended the regulations regarding the introduction of certain genetically engineered (GE) organisms.[85] APHIS approved six petitions for deregulation, including one "next-generation" product engineered to be resistant to more than one herbicide mode of action.[86] APHIS held a two-day, invitation-only workshop on agricultural coexistence.[87] The FDA denied a petition to require labeling on GMO foods, claiming the petition lacked sufficient evidence showing GMO derived foods differ from non-GMO derived foods.[88]

EPA proposed improving the existing corn rootworm insect resistance management program for registrations of plant-incorporated protectants derived from *Bacillus thuringiensis* (Bt).[89] EPA is also "developing a project [intended] to support public dialog concerning the development and use of biotechnology,"[90] focused on GE algae and cyanobacteria.[91] Various federal agencies issued a memorandum directing the

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[81]Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, Ctr. for Biological Diversity v. Cal. Dep't of Conservation, Div. of Oil, Gas, and Geothermal Res., No. 34-2015-80002149 (Cal. App. Dep't Super. Ct. Jul. 30, 2015).

[82]MICH. ADMIN. CODE r. 324.1406 (2015); 2015 Mich. Reg. No. 5 (Apr. 1, 2015).

[83]32 VA. REG. REGS. 369 (Oct. 5, 2015) (amending Virginia Gas and Oil Regulation 4 VAC § 25-150).

[84]Press Release, Pa. Dep't of Envtl. Prot., DEP Releases Latest Revisions of Oil and Gas Rulemaking (Aug. 12, 2015).

[85]Importation, Interstate Movement, and Release Into the Environment of Certain Genetically Engineered Organisms, 80 Fed. Reg. 11,598 (Mar. 4, 2015).

[86]*Petitions for Determination of Nonregulated Status*, USDA ANIMAL AND PLANT HEALTH INSPECTION SERV., https://www.aphis.usda.gov/biotechnology/petitions_table_pending.shtml (last visited Mar. 13, 2016). APHIS approved Dow AgroSciences traits tolerant to 2,4-D and Glufosinate (cotton).

[87]U.S. Department of Agriculture Stakeholder Workshop on Coexistence, 80 Fed. Reg. 5729 (Feb. 3, 2015).

[88]Dave Fusaro, *FDA Denies Petition for GMO Labeling*, FOOD PROCESSING (Nov. 19, 2015), http://www.foodprocessing.com/industrynews/2015/fda-denies-petition-for-gmo-labeling/.

[89]EPA Proposal to Improve Corn Rootworm Resistance Management; Notice of Availability, 80 Fed. Reg. 4564 (Jan. 28, 2015).

[90] *U.S. Environmental Protection Agency Biotechnology Algae Project* (Aug. 5, 2015), Envtl. Prot. Agency, *available at* http://www2.epa.gov/sites/production/files/2015-09/documents/biotechnology_algae_project.pdf.

[91]*EPA Workshop for Public Input on Considerations for Risk Assessment of Genetically Engineered Algae*, ENVTL. PROT. AGENCY, https://projects.erg.com/conferences/oppt/workshophome.htm (last visited Mar. 6, 2016).

EPA, FDA, and USDA to update the Coordinated Framework for the Regulation of Biotechnology.[92]

Idaho enacted a law prohibiting local jurisdictions from regulating genetically modified seeds.[93] The federal Safe and Accurate Food Labeling Act was reintroduced in Congress.[94] The Genetically Engineered Food Right-to-Know Act, which would prohibit the sale of GE food or food that contains GE ingredients unless that information is clearly disclosed, was introduced but no action has been taken.[95]

The U.S. District Court for the District of Columbia ruled that when determining whether to allow farming of genetically modified crops on wildlife refuges, the U.S. Fish and Wildlife Service (FWS) must conduct environmental assessments for each individual refuge being considered.[96] The U.S. District Court for the District of Vermont denied a request from industry groups for a preliminary injunction to block the Vermont law mandating the labeling of genetically modified food,[97] which is currently on appeal.[98] The U.S. District Court for the District of Kansas sent two of the hundreds of suits against Syngenta regarding its marketing of genetically modified corn to state court.[99] The U.S. District Court for the District of Oregon refused to overturn a county ban on GE crops.[100] The U.S. District Court for the District of Hawaii invalidated a Maui ordinance that would have barred all agriculture related to GMOs as preempted by federal and state law and exceeding the county's authority to impose fines,[101] which has also been appealed.[102] The Court of Appeals for the Ninth Circuit denied the request of environmental groups to block the sale of Enlist Duo while the case was pending.[103]

VII. GREEN CHEMISTRY

EPA renamed its "Design for the Environment Program" to the "Safer Choice Program" and unveiled the new Safer Choice label logo.[104] The Safer Choice Program also updated the eligibility criteria,[105] including adding a "fragrance free" option,[106]

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[92]Memorandum from John P. Holdren, Dir., Office of Sci. and Tech. Policy, et. al., to Heads of FDA, EPA, and USDA (Jul. 2, 2015).

[93]Idaho Code Ann. § 22-413 (2015) (as amended by H.B. 114); H.B. 114, 63d Leg., 1st Reg. Sess. (Idaho 2015) (amending IDAHO CODE ANN. § 22-413).

[94]H.R. 1599, 114th Cong. (2015). The House passed the bill on July 23, 2015, but Senate action remains uncertain.

[95]S. 511, 114th Cong. (2015); H.R. 913, 114th Cong. (2015).

[96]Ctr. for Food Safety v. Jewell, 83 F. Supp. 3d 126 (D.D.C. 2015).

[97]Grocery Mfr. Ass'n v. Sorrell, 102 F. Supp. 3d 583 (D. Vt. 2015).

[98]Grocery Mfr. Ass'n v. Sorrell, No. 15-1504cv (2d. Cir. filed Oct. 8, 2015).

[99]*In re:* Syngenta AG MIR162 Corn Litig., No. 2:14-md-02591, 2015 WL 2092435 (D. Kan. May 5, 2015).

[100]Schultz Family Farms v. Jackson Cnty., No. 1:14-cv-01975, 2015 WL 3448069 (D. Or. May 29, 2015).

[101]Robert Ito Farm, Inc. v. Cnty. of Maui, 111 F. Supp. 3d 1088 (D. Haw. 2015).

[102]Robert Ito Farm, Inc. v. Cnty. of Maui, No. 15-16552 (9th Cir. filed Aug. 5, 2015).

[103]Natural Res. Def. Council v. EPA, Nos. 14-73353 and 14-73359 (consolidated) (9th Cir. Aug. 11, 2015).

[104]*Learn About the Safer Choice Label*, ENVTL. PROT. AGENCY, http://www2.epa.gov/saferchoice/learn-about-safer-choice-label (last updated Feb. 22, 2016).

[105]*Safer Choice Standard*, Envtl. Prot. Agency, http://www2.epa.gov/saferchoice/safer-choice-standard (last updated Apr. 21, 2015).

published final alternative assessments for flame retardants used in flexible polyurethane foam[107] and printed circuit boards,[108] and launched the Partner of the Year Awards.[109] EPA also celebrated the 20th annual Presidential Green Chemistry Challenge Awards.[110]

The California Department of Toxic Substances Control published its Three-Year Priority Product Work Plan under its Safer Consumer Products program.[111] The Northwest Green Chemistry Center in Washington is applying Green Screen and alternatives assessments to the phase-out of copper antifoulant use in Puget Sound, helping identify preferable alternatives to copper-based coatings.[112]

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[106]*Safer Choice Criteria for Fragrance-Free Products*, ENVTL. PROT. AGENCY, http://www2.epa.gov/saferchoice/safer-choice-criteria-fragrance-free-products (last updated Jan. 27, 2016).

[107]*Flame Retardants Used in Flexible Polyurethane Foam*, ENVTL. PROT. AGENCY, http://www.epa.gov/saferchoice/flame-retardants-used-flexible-polyurethane-foam (last updated Sept. 8, 2015).

[108]*Alternatives Assessment: Partnership to Evaluate Flame Retardants in Printed Circuit Boards*, Envtl. Prot. Agency, http://www.epa.gov/saferchoice/alternatives-assessment-partnership-evaluate-flame-retardants-printed-circuit-boards (last updated Sept. 8, 2015).

[109]Press Release, Envtl. Prot. Agency, EPA Recognizes Partners for Creating and Using Safer Choice Products (June 10, 2015).

[110]*Presidential Green Chemistry Challenge Winners*, EPA, http://www.epa.gov/greenchemistry/presidential-green-chemistry-challenge-winners (last updated Feb. 29, 2016).

[111]CAL. DEP'T OF TOXIC SUBSTANCES CONTROL, SAFER CONSUMER PRODUCTS, PRIORITY PRODUCT WORK PLAN (Apr. 2015), *available at* https://www.dtsc.ca.gov/SCP/upload/PriorityProductWorkPlan_2015.pdf.

[112]Northwest Green Chemistry, What Can I as a Boat Owner do to Help Clean up Puget Sound?, *available at* http://www.northwestgreenchemistry.org/uploads/4/3/2/5/43259041/version_0.0_cbp_scorecard.pdf.

CHAPTER 9 • SUPERFUND AND NATURAL RESOURCE DAMAGES LITIGATION
2015 Annual Report[1]

I. SUPERFUND: ADMINISTRATIVE AND REGULATORY DEVELOPMENTS

There were no significant Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)-related administrative or regulatory developments in 2015.

II. SUPERFUND: JUDICIAL DEVELOPMENTS

There were no Supreme Court rulings in 2015 concerning CERCLA related issues. However, the courts of appeal issued numerous important rulings, and the Eastern District of Washington addressed one novel issue. Despite there being no substantive rulings in the Supreme Court, the Court did deny a petition for a writ of certiorari in *Arizona v. Ashton Company Inc.*, where a split decision by the Ninth Circuit held that a court cannot give state agencies the same level of judicial deference as they do to EPA when weighing state-backed consent decrees under Superfund law.[2]

In *Anderson v. Teck Metals, Ltd.*, the U.S. District Court for the Eastern District of Washington became the first federal court to rule that CERCLA supplants federal common law public nuisance claims for damages.[3] In *American Elec. Power Co., Inc. v. Connecticut*, the Supreme Court articulated the test for whether federal common law claims had been displaced by statute as "whether congressional legislation excludes the declaration of federal common law is simply whether the statute 'speak[s] directly to [the] question' at issue."[4] In *Native Village of Kivalina v. ExxonMobil Corp.*, plaintiffs sought to distinguish their claim from *Kivalina* by seeking only damages, a remedy the relevant statute—the Clean Air Act—did not provide.[5] However, the Ninth Circuit held in this complementary opinion that "under current Supreme Court jurisprudence, if a cause of action is displaced, displacement is extended to all remedies."[6] Following these opinions, the *Teck Metals* court held that federal nuisance claims brought by Washington State residents living downstream and downwind of a Canadian metal smelter were displaced by CERCLA. It reasoned that the plaintiffs' focus on the alleged injuries viewed the question at issue too narrowly.[7] Instead, the court chose to focus on the activities giving rise to the injuries—the release and threatened release of hazardous substances into the environment—as an issue under CERCLA.[8]

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[1]Jonathan S. King, Matthew L. Rojas, and Christopher D. Thomas, Squire Patton Boggs (US) LLP, Phoenix, Arizona. This chapter reviews significant administrative and judicial developments during 2015.

[2]Arizona v. Ashton Co., 136 S. Ct. 30 (2015). *See also* Arizona v. City of Tuscon, 761 F.3d 1005 (9th Cir. 2014).

[3]Anderson v. Teck Metals, Ltd., No. CV-13-420-LRS, 2015 U.S. Dist. LEXIS 1035 (E.D. Wash. Jan. 5, 2015).

[4]Am. Elec. Power Co., Inc. v. Conn., 131 S. Ct. 2527, 2537 (2011) (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978)).

[5]Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012).

[6]*Id.* at 857.

[7]*Teck Metals, Ltd.*, 2015 U.S. Dist. LEXIS 1035, at *28-29.

[8]*Id.* at *29.

A. Arranger Liability

The Fourth, Fifth, and Eighth Circuits all issued rulings addressing the distinction between arrangements for disposal and sale of useful products.

In *Vine Street LLC v. Borg Warner Corp.*, the Fifth Circuit reversed a Texas federal district court that had held Borg Warner liable for leaks of perchloroethylene from equipment it sold to a dry cleaning business during the 1960s and 1970s.[9] The appeals court held that the corporation could not be held liable as an arranger under CERCLA because the sale of solvent and equipment did not constitute the requisite intent to dispose of a hazardous substance. The court followed the Supreme Court's ruling in *Burlington Northern and Santa Fe Railway Co. v. United States* that "knowledge alone is insufficient to prove that an entity 'planned for' the disposal, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product."[10] The appeals court held that disposal of waste solvent was merely "a peripheral result of the legitimate sale of an unused, useful product."[11]

In *Consolidation Coal Co. v. Georgia Power Co.*, the Fourth Circuit elected not to impose arranger liability on a company that sold used transformers containing polychlorinated biphenyls (PCBs) to a reconditioning company.[12] In a 2-1 split decision, the appeals court found no evidence that an electric utility intended to dispose of the PCBs. The majority opined the "intent to sell a product that happens to contain a hazardous substance is not equivalent to intent to dispose of a hazardous substance under CERCLA. For arranger liability to attach, there must be something more."[13] The seller's intent when it sold the transformers was central to the case. The Fourth Circuit found no evidence that the defendant had sold the transformers "'with the intention that at least a portion of the product be disposed of during the transfer process by one or more of the methods' within the statutory definition of disposal."[14]

In *United States v. Dico, Inc.*,[15] the Eight Circuit reversed a lower court decision, finding an Iowa company liable for arranging to dispose of PCBs by selling contaminated buildings. The appeals court held that the district court improperly granted summary judgment for the United States on the issue of arranger liability. It reasoned that the district court placed too much emphasis on the value of the buildings, and the fact that building parts had no value after disassembly from the building was insufficient evidence to conclude that the sale was an attempt to dispose of a hazardous substance rather than a legitimate business transaction.

B. Statute of Limitations After Bankruptcy Proceedings

In *ASARCO, LLC v. Celanese Chemical Co.*, the Ninth Circuit rejected ASARCO's attempt to restart the clock on section 113(g)'s three-year statute of limitations for contribution claims by claiming its bankruptcy settlement altered its claim in 2008.[16] The three-judge panel held that "a later bankruptcy settlement that fixes the

[9]Vine St. LLC v. Borg Warner Corp., 776 F.3d 312 (5th Cir. 2015).
[10]Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 612 (2009).
[11]*Vine St.*, 776 F.3d at 317-18 (quoting *Burlington N.*, 556 U.S. at 612).
[12]Consolidation Coal Co. v. Ga. Power Co., 781 F.3d 129 (4th Cir. 2015).
[13]*Id.* at 149.
[14]*Id.* at 155 (quoting *Burlington N.*, 556 U.S. at 612).
[15]808 F.3d 342 (8th Cir. 2015).
[16]ASARCO, LLC v. Celanese Chem. Co., 792 F.3d 1203 (9th Cir. 2015).

costs of such a cost-recovery settlement agreement does not revive a contribution claim that has otherwise expired."[17]

C. Indemnity and Contribution Claims

In *The Peoples Gas Light & Coke Co. v. Beazer East, Inc.*, the Seventh Circuit found that indemnity language in a contract written sixty years before the passage of CERCLA was broad enough to include contribution claims.[18] The original contract stated that the defendant's predecessor assumed the obligation to operate the coke plant "without liability of any character."[19] The court held that the general release language from the 1920s agreement was broad enough to shield the successor operator of the coke plant from liability for contribution under CERCLA.[20]

D. Liability Distinctions in Pre-2005 Cleanup Orders

In *Florida Power Corp. v. FirstEnergy Corp.*, the Sixth Circuit again addressed whether EPA orders on consent issued prior to a revision of the model in 2005 constitute a resolution of liability and hence start the clock on filing contributions claims as of their effective date.[21] Because of conditional language regarding EPA's covenant not to sue, the court found that the plaintiff did not resolve its liability when it entered into two separate administrative orders on consent in 1998 and 2003. As a result, the court found the orders did not give rise to a contribution claim under section 113 and did not trigger the statute of limitations. EPA modified its model consent order in 2005 to address similar rulings in prior cases.

E. Divisibility

In the long-running Fox River litigation, the U.S. District Court for the Eastern District of Wisconsin briefly approved and later rejected the divisibility defense of NCR. In May, the court initially held that NCR had demonstrated harm resulting from contaminated sediment in the Lower Fox River to be divisible and that remediation costs could be apportioned.[22] At that time, the court found that NCR's expert witness' estimate of its share of liability was reasonably accurate. Therefore, the court found NCR established that the harm is theoretically capable of division and that there was a reasonable basis for apportioning its share of remediation costs at 28%.

In October, the court reversed itself, deciding that NCR's evidence was not sufficiently reliable.[23] The court cited the fact that some of the NCR expert's analysis was included only in a post-trial surreply brief, preventing the opposing parties from contesting it. The court held it was now clear that NCR's "late-inning use" of the disputed evidence was insufficient to meet its burden for its divisibility argument.

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[17] *Id.* at 1208.
[18] The Peoples Gas Light & Coke Co. v. Beazer E., Inc., 802 F.3d 876 (7th Cir. 2015).
[19] *Id.* at 881.
[20] *Id.* at 882.
[21] Fla. Power Corp. v. FirstEnergy Corp., No. 14-4126, 2015 U.S. App. LEXIS 19309 (6th Cir. Nov. 5, 2015).
[22] United States v. NCR Corp., 107 F. Supp. 3d 950 (E.D. Wisc. 2015).
[23] United States v. NCR Corp., No. 10-C-910, 2015 WL 6142993 (E.D. Wisc. Oct. 19, 2015).

Chapter 10 • WASTE AND RESOURCE RECOVERY
2015 Annual Report[1]

I. LITIGATION DEVELOPMENTS

A. Regulation of Pesticide Residue as Solid Waste under RCRA

In *Chart v. Town of Parma*,[2] the U.S. District Court for the Western District of New York ruled that pesticide residue in topsoil that had been moved from a former apple orchard to a town park to construct a football field was solid waste under the Resource Conservation and Recovery Act (RCRA). The pesticide residue in the topsoil ceased to serve its intended purpose when the orchard owner converted the former apple orchard to a residential subdivision and sold the pesticide-containing topsoil to the Town.[3] Therefore, the district court held that the pesticide residue contained in the topsoil was "discarded" within the meaning of RCRA when it was removed from the apple orchard and relocated to the town park.[4] In reaching this conclusion, the court rejected the Town's argument that a reasonable extension of the ruling would render all soils with naturally occurring levels of pesticides solid wastes because "(1) the topsoil had been used in an agricultural setting where pesticide was presumably applied in concentrations much greater than would be expected to be found in non-agricultural settings, and (2) the topsoil was then sold to other individuals and entities, including the Town, who were unaware of the pesticide concentration within the soil."[5]

B. Regulation of Manure as Solid Waste under RCRA

In *Community Association for Restoration of the Environment v. Cow Palace, LLC*,[6] the U.S. District Court for the Eastern District of Washington found that manure, when over-applied to soil and when leaked from earthen lagoons, may be characterized as a "solid waste" under RCRA. A local community group and national food safety organization filed citizen suits against a group of dairy concentrated animal feeding operations (CAFOs),[7] alleging that the dairies' manure management practices constituted open dumping and that the dairies' operations may present an imminent and substantial endangerment to human health or to the environment.[8]

Plaintiffs presented evidence and expert testimony demonstrating that: (1) manure applications did not follow the facility's Best Management Practices and were done

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[1]This report was authored by Naeha Dixit, Babst Calland Clements and Zomnir PC; Andrew Fowler, Jacobi Case & Speranzini, P.C.; Sarah Matsumoto, Tebutt Law Offices; Dan McKillop, Beattie Padovano, LLC; Bridget O'Toole, Bansbach Zoghlin, P.C.; Peggy Otum, Arnold & Porter, LLP; Jon Schaefer, Robinson & Cole LLP; and Cristopher ("Smitty") Smith, Squire Patton Boggs. This report was edited by Emily McKinney, Vice Chair for *The Year in Review*, with the assistance of the student editors at the University of Tulsa College of Law.

[2]No. 10-CV-6179P, 2014 WL 4923166, at *31-34 (W.D.N.Y. Sept. 30, 2014).

[3]*Id.* at *33.

[4]*Id.*

[5]*Id.* at *34.

[6]80 F. Supp. 3d 1180, 1225 (E.D. Wash. 2015).

[7]The court recognized that Cow Palace Dairy is a "large concentrated animal feeding operation" as defined by relevant state and federal laws. 80 F. Supp. 3d at 1187. *See* 40 C.F.R. § 122.23 (2016); WASH. ADMIN. CODE § 173-224-030 (2015).

[8]80 F. Supp. 3d at 1187.

without regard to crop fertilization needs; and (2) the facility's manure storage lagoons leaked and resulted in accumulations of nitrate in the underlying soil and elevated nitrate in groundwater.[9] Based on this evidence, the court found that "a reasonable trier-of-fact…could come to no other conclusion than that the Dairy's operations are contributing to the high levels of nitrate that are currently contaminating—and will continue to contaminate as nitrate present below the root zone continues to migrate—the underlying groundwater."[10] The court concluded there was "no genuine issue of material fact" that the defendants' "application, storage, and management of manure at Cow Palace Dairy violated RCRA's substantial and imminent endangerment and open dumping provisions and that all [d]efendants [were] responsible parties under RCRA."[11]

C. Regulation of Air Emissions under RCRA

In *Little Hocking Water Association, Inc. v. E.I. du Pont de Nemours and Company*,[12] the U.S. District Court for the Southern District of Ohio held that air emissions are considered solid waste under RCRA. A public water provider argued that air emissions containing hazardous wastes, including perfluorooctanoic acid (C8) particulate matter, from a manufacturing facility's stacks were transported by wind and deposited onto the water provider's wellfields, subsequently leaching into the groundwater. Breaking with a recent Ninth Circuit decision in *Center for Community Action v. BNSF Railway Co. Ctr. for Cmty. Action v. BNSF Ry. Co.*,[13] the district court held that aerial emissions containing C8, which landed on the water provider's wellfield, contaminating the soil and groundwater, constitute "disposal" of solid waste under RCRA. In reaching its conclusion, the district court eschewed "the Ninth Circuit's narrow reading of RCRA" in lieu of broader interpretation by the same district court a decade prior in *Citizens Against Pollution v. Ohio Power Co.*[14] Limiting the potential implications of its decision, the district court concluded by holding "that when interpreting what constitutes land disposal of solid waste under RCRA, the court should proceed on a case-by-case basis, keeping in mind as the guiding principle that 'RCRA is a remedial statute that is to be interpreted broadly.'"[15]

D. Organizations Lack Standing To Challenge CO_2 Injection Exclusion

In *Carbon Sequestration Council v. EPA*,[16] the Court of Appeals for the D.C. Circuit held that organizations representing a provider of energy-related regulatory and engineering services and an oil and gas producer did not have standing to challenge the Environmental Protection Agency's (EPA) determination that supercritical fluid carbon dioxide injected into Class VI underground wells for the purpose of carbon sequestration is "solid waste" within the meaning of RCRA. Plaintiffs are involved in testing carbon sequestration technology using experimental "Class V" wells and using carbon dioxide for enhanced oil recovery. The court found that plaintiffs would not be directly regulated by the challenged determination, and that they had not established the necessary "distinct

[9] *Id.* at 1222-25.
[10] *Id.* at 1226.
[11] *Id.* at 1230.
[12] 91 F. Supp. 3d 940, 966 (S.D. Ohio 2015).
[13] *Id.* at 965. *See* Ctr. for Cmty. Action v. BNSF Ry. Co., 764 F.3d 1019 (9th Cir. 2014).
[14] 91 F. Supp. 3d at 965.
[15] *Id.* (quoting Citizens Against Pollution v. Ohio Power Co., No. C2-04-CV-371, 2006 WL 6870564, at *5 (S.D. Ohio July 13, 2006)).
[16] 787 F.3d 1129, 1142 (D.C. Cir. 2015).

and palpable injury."[17] Plaintiffs' "purely . . . speculative concern that [the] EPA might choose to regulate its business at some point in the indefinite future" is not sufficient to establish Article III standing.[18]

E. Failure to Give Notice of Citizen Suit Not Jurisdictional Defect Under RCRA

In *Eppenstein v. Berks Prods. Corp.*,[19] the U.S. District Court for the Eastern District of Pennsylvania dismissed a complaint for failure to observe the notice requirements under the citizen suit provisions of RCRA and the Clean Water Act (CWA),[20] but held that the complaint could be re-filed because the failure to give proper notice is not a jurisdictional defect. Plaintiffs "conceded at oral argument that they did not provide any written notice as contemplated by the applicable statutes."[21] Attempting to save their complaint, which was filed in federal court based on the supplemental jurisdiction of the RCRA and CWA claims, the plaintiffs unsuccessfully presented two arguments: (1) that notice of the claim was sufficient to satisfy the statutory notice requirements; and (2) the subchapter III exception to the RCRA notice requirement was applicable. The district court quickly dispatched the first argument, noting that the Supreme Court has recognized in *Hallstrom v. Tillamook County*[22] that mere notice of a citizen suit claim by filing a complaint is insufficient.[23] Similarly, the district court addressed the second argument by citing the reasoning in *Hallstrom* that the subchapter III exception to the RCRA notice requirement did not obviate the need to provide written notice; rather, it only obviated the need to wait the statutory notice period before filing a claim.[24] Because the dismissal was without prejudice, the court noted that plaintiffs are free to come back to federal court once they have complied with the conditions for filing citizen suits under RCRA and CWA, including the notice requirements.

II. REGULATORY DEVELOPMENTS

A. Proposed Revisions to Hazardous Waste Generator Regulations

On August 31, 2015, the EPA Administrator signed a proposed Hazardous Waste Generator Improvements Rule (HWGIR).[25] According to EPA, the HWGIR "proposes a much-needed update to the hazardous waste generator regulations to make the rules easier to understand, facilitate better compliance, provide greater flexibility in how hazardous waste is managed, and close important gaps in the regulations."[26]

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[17] *Id.* at 1141-42.
[18] *Id.*
[19] No. 15-CV-02188, 2015 U.S. Dist. LEXIS 150794, at *13-14 (E.D. Pa. Nov. 6, 2015).
[20] *See* 42 U.S.C. § 6972(b)(1)(A) (2012) (notice requirement in RCRA); 33 U.S.C. § 1365(b)(1)(A) (2012) (notice requirement in CWA).
[21] *Eppenstein*, 2015 U.S. Dist. LEXIS 150794, at *10.
[22] 493 U.S. 20 (1989).
[23] *Eppenstein*, 2015 U.S. Dist. LEXIS 150794, at *11.
[24] *Id.* at *13.
[25] Hazardous Waste Generator Improvements, 80 Fed. Reg. 57,918 (Sept. 25, 2015) (to be codified at 40 C.F.R. pts. 260-265, 268, 270, 273, 279).
[26] *Proposed Rule: Hazardous Waste Generator Improvements*, ENVTL. PROT. AGENCY, http://www2.epa.gov/hwgenerators/proposed-rule-hazardous-waste-generator-improvements (last updated Jan. 5, 2016).

The HWGIR sets forth dozens of proposed revisions to the current RCRA hazardous waste generator regulatory program. Some of of the key revisions are summarized below:

> Allowances for Episodic Waste Generation and Inter-Generator Waste Transport: Generators are classified according to the volume of hazardous waste that they generate each month as either conditionally exempt small quantity generators (CESQGs), small quantity generators (SQGs), or large quantity generators (LQGs). Episodic generation occurs when a generator produces a volume of hazardous waste beyond its normal monthly allowance. The HWGIR would allow "very small quantity generators" (the proposed new designation for current CESQGs) and SQGs to avoid the increased regulation and costs associated with a higher generator status when this occurs, provided that the generator fulfills several related frequency, notice, recordkeeping, and waste management requirements. The HWGIR also proposes to allow very small quantity generators to send waste to LQGs where both are under common control, affording these generators greater flexibility in managing hazardous wastes at their facilities.[27]
>
> Enhanced Documentation and Recordkeeping Requirements: Generators must currently determine whether their solid wastes are hazardous or non-hazardous, and SQGs and LQGs must maintain records of these determinations for at least three years after disposition of the waste. The HWGIR proposes to require SQGs and LQGs to make such determinations upon the generation of the waste and again "at any time in the course of its management that it has, or may have, changed its properties as a result of exposure to the environment or other factors that may change the properties of the waste."[28] The HWGIR would also require SQGs and LQGs to maintain records regarding all solid waste generated at a facility, regardless of whether it is hazardous or non-hazardous. Also, the preamble to the HWGIR invites comment regarding a possible requirement that SQGs and LQGs maintain all records until closure of the facility rather than for only three years. The HWGIR would also require LQGs to revise their contingency plans in several respects. Costs associated with these potential new documentation and recordkeeping requirements would be significant.
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> Mandatory Arrangements with Local Emergency Planning Committees: Currently, SQGs and LQGs must "attempt" to coordinate and make arrangements with local first responders "as appropriate" based on the wastes present at their respective facilities and potential related emergencies. The HWGIR would require that SQGs and LQGs actually make such arrangements with Local Emergency Planning Committees (LEPC), or with other appropriate responders if coordination with the LEPC cannot be achieved. SQGs and LQGs would also have to maintain records certifying to the existence and viability of the emergency arrangements.[29]

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[27] Hazardous Waste Generator Improvements, 80 Fed. Reg. at 57,925-27.
[28] *Id.* at 57,939.
[29] *Id.* at 57,956-64.

The HWGIR will likely be finalized in 2016, and will be effective six months after publication in the Federal Register at the federal level and in states not authorized to implement RCRA. RCRA-authorized states will individually adopt the HWGIR and modify their respective programs to include any portions of the HWGIR that are more stringent than their state regulations.

B. Proposed Hazardous Waste Pharmaceutical Rule

In September 2015, EPA issued a proposed rule on Management Standards for Hazardous Waste Pharmaceuticals[30] (Proposed Rule) to regulate how healthcare facilities—including hospitals and even some retailers—manage and dispose of hazardous waste pharmaceuticals. This Proposed Rule comes after EPA's failed rulemaking attempt in 2008 to classify such pharmaceuticals as "Universal Waste."

The Proposed Rule examines the "reverse distribution" market for waste pharmaceuticals, whereby healthcare facilities may return valuable waste pharmaceuticals for credit, as opposed to disposing of them at a RCRA facility. To facilitate reverse distribution, the Proposed Rule creates different management standards for "creditable" and "non-creditable" hazardous waste pharmaceuticals. "Creditable" pharmaceuticals will endure fewer regulations, and may be sent to reverse distributors for processing. (As may be expected, the Proposed Rule will regulate these reverse distributors.) On the other hand, "non-creditable" pharmaceuticals will remain subject to the existing management, labeling, shipping, and disposal requirements that apply to generic hazardous waste.[31]

The Proposed Rule also formally bans the practice of disposing of hazardous waste drugs by flushing them down the toilet or drain. Apart from the flushing ban and the new blessing for "reverse distributors," this Proposed Rule would have no impact on "very small" quantity generators. By contrast, the Proposed Rule imposes upon small and large quantity generators a plethora of procedural and technical requirements that are worth examining in detail.[32]

C. Implementation of Final Coal Combustion Residuals Rule

On April 17, 2015, EPA published the Final Rule on the Disposal of Coal Combustion Residuals from Electric Utilities[33] (CCR Rule) to regulate coal combustion residuals (CCR) as a solid waste under subtitle (D) of RCRA. EPA later published a rule correcting the effective date of the Final Rule to be October 19, 2015.[34] A redline version of the CCR Rule showing changes from the December 19, 2014 pre-publication version is also available.[35]

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[30]Management Standards for Hazardous Waste Pharmaceuticals, 80 Fed. Reg. 58,014 (Sept. 25, 2015) (to be codified at 40 C.F.R. pts. 261, 262, 266, 268, 273).
[31]*Id.* at 58,030-35.
[32]*See id.*
[33]Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. 21,302 (Apr. 17, 2015) (to be codified at 40 C.F.R. pts. 257, 261) (direct final rule).
[34]Technical Amendments to the Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities—Correction of the Effective Date, 80 Fed. Reg. 37,988 (July 2, 2015) (to be codified at 40 C.F.R. pt. 257).
[35]ENVTL. PROT. AGENCY, EPA-HQ-RCRA-2009-0640, REDLINE VERSION OF THE FINAL RULE: DISPOSAL OF COAL COMBUSTION RESIDUALS FROM ELECTRIC UTILITIES (2015).

CCR is defined in the rule to include "fly ash, bottom ash, boiler slag, and flue gas desulfurization materials generated from burning coal for the purpose of generating electricity by electric utilities and independent power producers."[36] The CCR Rule establishes minimum federal criteria for existing and new CCR landfills and surface impoundments. These minimum federal criteria include location restrictions, design and operating criteria, inspections, groundwater monitoring, corrective action, closure, and various reporting and recordkeeping requirements.

The CCR Rule is self-implementing, meaning that it is not enforced by state or federal agencies. States are not required to adopt regulations, develop permitting programs, or submit a program to EPA for approval. When a state elects to develop a program to implement the CCR Rule, facilities in that state will become subject to dual requirements and enforcement. However, because the CCR Rule does not include the typical "backstop" enforcement authority, the development of a state program implementing the CCR Rule will not prevent RCRA citizen suits from being brought under the federal program.[37]

While some aspects of the CCR Rule have implementation schedules as far out as October 2018, affected facilities were required to begin complying with inspection, fugitive dust control, and recordkeeping requirements by October 19, 2015. Due to the timing of the compliance deadlines under the CCR Rule, it is unlikely that any state will be able to adopt new rules before many of the other deadlines are triggered. This incongruity may result in affected facilities in some states establishing certain management practices to comply with the CCR Rule that have to be modified if their state adopts stricter requirements (i.e., additional groundwater wells or more stringent closure requirements). EPA has encouraged states with existing Solid Waste Management Plans (SWMPs) to revise their SWMPs to address the CCR Rule and submit these revisions to EPA for approval. Although EPA approval of a SWMP revision does not mean that the state program operates "in lieu of" the federal program, EPA has noted that operating in accordance with an EPA-approved SWMP would likely carry significant weight in a citizen suit brought to enforce the federal minimum requirements.[38]

A number of petitions for review of the CCR Rule were timely filed and ultimately consolidated in the D.C. Circuit.[39] These petitions for review come from both environmentalists and the industry. Industry petitioners have expressed frustration with the CCR Rule's "one size fits all" set of requirements and the regulating of inactive impoundments. Concerns have similarly been expressed over the CCR Rule's regulation of beneficial use of CCR.

D. New Definition of Solid Waste

On January 13, 2015, EPA's final rule revising many of the recycling provisions associated with RCRA's definition of solid waste (DSW) was published in the Federal

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[36] 40 C.F.R. § 257.53 (2015) (as amended by the CCR Rule).

[37] Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. at 21,309.

[38] *Id.* at 21,333.

[39] AIR & WASTE MGMT. ASSOC., EPA'S COAL COMBUSTION RESIDUALS (CCR) RULE at 21 (Oct. 28, 2015), *available at* http://floridasection.awma.org/Conference_Files/2015_Conference_Presentations/CCR%20Presentation.pdf.

Register.[40] Both environmentalists and industry groups have filed challenges to the 2015 DSW Rule in the U.S. Court of Appeals for the D.C. Circuit. Filed separately, both suits have been consolidated with pre-existing litigation related to the prior DSW revision.[41] Briefs are currently being filed. The D.C. Circuit has not issued a stay of the final rule. As such, the 2015 DSW Rule, which became federally effective on July 13, 2015, continues to remain in effect while the case is pending.

III. DEVELOPMENTS IN ELECTRONIC WASTE

A. Enforcement and Litigation

1. Criminal Conviction of E-Waste Company Executives

In 2013, two electronic waste (e-waste) recycling company executives, Brandon Richter and Tor Olsen, were found guilty of illegally exporting e-waste overseas as well as other criminal charges including fraud and obstruction of justice. The executives moved for a new trial, which was denied, and then filed an appeal with the Court of Appeals for the Tenth Circuit. On July 31, 2015, in *United States v. Richter*,[42] the Tenth Circuit affirmed Mr. Richter's conviction for obstruction of justice but reversed and remanded the defendants' conviction for smuggling and fraud due to certain evidentiary problems in the trial court.

2. E-Waste Recycler Settles with EPA and Faces Civil Penalties

On September 30, 2015, EPA and ECO International, LLC, an e-waste recycler, entered into a Consent Agreement and Final Order,[43] whereby ECO agreed to properly dispose more than 26 million pounds of lead-containing cathode ray tubes (CRTs) and crushed glass generated from two of its facilities in Vestal, New York, and Hallstead, Pennsylvania. EPA ordered ECO to properly dispose all of the CRTs and crushed glass by November 2015; clean up the areas where the CRTs, e-waste, and glass were handled and stored; provide EPA with regular status reports; and pay EPA a civil penalty of $9,180.

3. Michigan Broker Pleads Guilty to Conspiracy for Fraudulent Export Filings

On March 13, 2015, Michigan resident Lip Bor Ng pleaded guilty to one count of conspiracy related to Ng's alleged submittal of fraudulent export information to the U.S. Customs and Border Protection database on two separate occasions in 2011. According to the charges, Ng falsely declared that he was exporting plastic and metal scrap, and not e-waste and computer components, including CRT monitors. Ng also failed to file a notice of intent with the EPA to export the CRTs or receive permission from the country he

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[40]Definition of Solid Waste, 80 Fed. Reg. 1694 (Jan. 13, 2015) (to be codified at 40 C.F.R. pts. 260 and 261). The DSW Rule was discussed in depth in the 2014 Year in Review. *See* Dennis J. Conniff, et al., *Waste and Resource Recovery*, ABA ENV'T, ENERGY & RES. L. THE YEAR IN REVIEW 2014 98-99 (2015).

[41]Am. Petroleum Inst. v. EPA, No. 09-1038 (D.C. Cir. May 18, 2015) (order consolidating dockets 09-1038 and 15-1085).

[42]796 F.3d 1173, 1201 (10th Cir. 2015).

[43]ECO Int'l LLC, No. RCRA-02-2015-7101 (Envtl. Prot. Agency Sept. 30, 2015) (consent agreement and final order).

shipped the e-waste to—China—to allow import of the materials into that country as required under the EPA's CRT export regulations. On July 14, 2015, Ng was sentenced to sixty months of probation and fined $25,000.[44]

4. Self-Reported Violations at Vermont E-Waste Facility Results in Minimal Fine

On March 18, 2015, the Superior Court of Vermont entered a Judgment Order[45] against Earth, Waste & Metal, Inc. for its alleged use of an unregistered facility to collect e-waste. Due to the company's self-reporting, its prompt correction of the violation, and its request for assistance from Vermont's Agency of Natural Resources, Earth, Waste & Metal was ordered to pay a fine of $450.

5. Texas E-Waste Facility Settles Regulatory Violations

The Texas Commission on Environmental Quality (TCEQ) and Eureka! Computer Scrap Recycler's L.L.C. entered into an Agreed Order[46] on April 13, 2015, to settle various allegations of Eureka's violations of the Texas Administrative Code. Among the allegations, Eureka failed to provide a notice of intent to operate an electronics recycling facility; failed to provide a cost estimate indicating the cost of hiring a third party to close the facility by disposition of all processed or unprocessed materials; failed to provide financial assurance for closure, post-closure, and corrective action for the facility; and failed to maintain and provide records that demonstrate the amount of material that was recycled or transferred to a different facility for recycling. Eureka is required to pay an administrative penalty to TCEQ in the amount of $14,413.

B. State Legislative Developments

1. Illinois

Illinois Senate Resolution No. 184 and House Resolution No. 328 were adopted on March 26, 2015 and May 6, 2015, respectively, and urged the Basel Action Network and the e-Stewards Leadership Council to approve a petition submitted by Kuusakoski Recycling and Peoria Disposal Company in November 2014. The petitioners requested that treated CRT glass be allowed to be placed into dedicated retrievable storage cells in a permitted disposal facility.[47]

On July 10, 2015, the governor of Illinois signed into law House Bill 1455,[48] which amends the Electronic Products Recycling and Reuse Act. The bill took effect immediately. The amendments increase the amount of electronics that manufacturers are required to recycle or reuse each year and allows manufacturers to apply the total weight of a CRT device towards its annual recycling or reuse goal. Beginning in 2016, all recycling and refurbishing facilities must be accredited by the Responsible Recycling

[44]Press Release, Dep't of Justice, Michigan Resident Pleads Guilty to Conspiracy to Violate Customs and Environmental Laws Regarding Export of E-Waste (Mar. 13, 2015); DEP'T OF JUSTICE, ENVTL. CRIMES MONTHLY BULLETIN 18 (Aug. 2015).
[45]Agency of Natural Resources v. Earth Waste & Metal, Inc., No. 14-EC-00986 (Vt. Super. Ct. Mar. 18, 2015) (judgment order).
[46]Eureka! Computer Scrap Recycler's L.L.C., No. 2013-1752-MSW-E (Tex. Comm'n Envtl. Quality Feb. 24, 2015) (agreed order).
[47]S. Res. 184, 99th Gen. Assemb. (Ill. 2015); H. Res. 329, 99th Gen. Assemb. (Ill. 2015).
[48]H.B. 1455, 99th Gen. Assemb. (Ill. 2015) (enacted).

(R2) Practices, e-Stewards certification programs, or an equivalent certification program recognized by EPA. Manufacturers will now also be financially penalized if the total weight of covered electronic devices recycled or processed for reuse is less than 100% of the manufacturer's individual recycling or reuse goal as set forth in the amended law. For program years 2015 and 2016, a manufacturer will earn recycling credits equal to 25% of the weight the manufacturer collects over its recycling target for the year. The credits can be used or sold to another manufacturer for use in the following program year.

2. Hawaii

On July 1, 2015, the Legislature in Hawaii adopted Hawaii Senate Bill No. 1049,[49] which amends the state's Electronic Device and Television Recycling Law to prohibit the approval of any manufacturer's recycling plan that exclusively provides a mail-back option for the collection, transportation, and recycling of its covered electronic device. The amendment will become effective on January 1, 2016.

3. California

On August 21, 2015, the California Office of Administrative Law (OAL) approved emergency regulations[50] amending Title 14 of the California Code of Regulations, which governs management and disposition of CRTs. The law now requires recyclers to demonstrate that treatment residual CRT or CRT glass has reached its ultimate disposition within one year of shipment. The amended law also updates the documentation requirements to demonstrate that treatment residuals reached their ultimate disposition.

The California OAL also approved an emergency rulemaking[51] on October 5, 2015, which allows the California Department of Resources, Recycling, and Recovery to impose civil liabilities for violations of its Electronic Waste Program. The violations range from minor ($500 to $4,000 in penalties), to moderate ($4,000 to $15,000 in penalties), to major ($15,000 to $25,000 in penalties).

C. International Developments

1. China

In February 2015, the Hong Kong Legislative Council approved funding for the development of a waste electrical and electronic equipment (WEEE) treatment and recycling facility.[52]

2. India

[49]S.B. 1049, 28th Leg. (Haw. 2015) (enacted).

[50]CAL. OFFICE OF ADMIN. LAW, NOTICE OF APPROVAL OF EMERGENCY REGULATORY ACTION (Aug. 21, 2015) (amending CAL. CODE REGS. tit. 14, §§ 18660.5, 18660.6, 18660.21, 18660.22, 18660.23, and 18660.24).

[51]CAL. OFFICE OF ADMIN. LAW, NOTICE OF APPROVAL OF EMERGENCY REGULATORY ACTION (Oct. 5, 2015) (adopting CAL. CODE REGS. tit. 14, §§ 18660.44, 18660.45, and 18660.46; amending 18660.7).

[52]Press Release, GovHK, Construction of Waste Electrical and Electronic Equipment Treatment and Recycling Facility Commences (Jan. 21, 2016).

The Ministry of Environment in India released six new draft legislations in June 2015, one of which covers e-waste. The draft e-waste law proposes a framework for the registration and authorization for e-waste recyclers.[53]

3. Poland

In July 2015, the Polish Sejm passed a new law regarding WEEE, as mandated by European Union directive 2012/19/EU on WEEE.[54]

[53]Deepa Philip, *Environment Ministry Drafts New Waste Laws*, TEHELKA (June 30, 2015), http://www.tehelka.com/2015/06/environment-ministry-drafts-new-waste-laws/.
[54]*Poland's WEEE Act Will Come Into Force 1 January 2016*, PINCVISION (Nov. 24, 2015), http://www.pincvision.com/en/insights/news/polands_weee_act_will_come_into_force_on_1_january_2016.

Chapter 11 • WATER QUALITY AND WETLANDS
2015 Annual Report[1]

I. JUDICIAL DEVELOPMENTS

A. Clean Water Act (CWA) Section 303—Water Quality Standards

On July 7, the Eleventh Circuit upheld the modified consent decree in *Florida Wildlife Federation v. Jackson*.[2] The appeal sought to overturn the district court's modification of a consent decree concerning the establishment of Florida's nutrient water quality standards in the proceeding because the modification was done without an opportunity for evidentiary hearing. The Court of Appeals held that it was not arbitrary and capricious to modify the consent order without evidentiary hearing because there were no disputed facts to warrant a hearing about the modifications.[3]

The U.S. District Court for the Middle District of Florida upheld EPA's approval of Florida's Impaired Waters Rule.[4] Plaintiffs argued that EPA's review of only the revised portions of the rule was improper, stating that EPA must review the rule in its entirety as a new or revised water quality standard. The court held that EPA's review conformed to the requirements of the CWA and that portions of the Impaired Waters Rule that are not a new or revised water quality standard do not need to be reviewed by EPA, even when some portions of the same rule must be reviewed.

EPA's decision to not make a necessity determination on a petition for multi-state action on developing water quality standards for nutrients was upheld by the Fifth Circuit.[5] A petition was filed requesting that EPA use its authority to develop water quality standards to control nitrogen and phosphorus pollution within the Mississippi River basin and Gulf of Mexico. EPA declined to make the necessity determination. Petitioners filed suit, asserting that EPA had a mandatory duty to make the necessity determination. The district court agreed, relying on the Supreme Court's decision in *Massachusetts v. EPA*,[6] and remanded the case to the agency to conduct a necessity determination. The Fifth Circuit reversed, distinguishing *Massachusetts v. EPA* and

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[1]This report was compiled and edited by Susan Kirsch of Ass'n of Clean Water Administrators, Washington, D.C., and Gene Wasson of Brunini, Grantham, Grower & Hewes, PLLC, Jackson, Miss. Contributing authors include Marla S. Nelson, Rewilding Attorney, WildEarth Guardians, Portland, Or.; Lynn A. Long, Office of the Solicitor, U.S. Department of the Interior; Albert P. Barker of Barker Rosholt & Simpson LLP, Boise, Idaho; Julie Wilson-McNerney, Meredith Weinberg & Laura Kerr of Perkins Coie LLP, Seattle, Wash.; Elizabeth Wheeler, Staff Attorney, Clean Wisconsin, Madison, Wi.; Stephanie G. Weir of Foster Pepper PLLC, Seattle, Wash.; and Gene Wasson of Brunini, Grantham, Grower & Hewes, PLLC, Jackson, Miss.

[2]Fla. Wildlife Fed'n v. Jackson, 620 F. App'x 705 (11th Cir. 2015). *See also* Susan Kirsch et al., *Water Quality and Wetlands*, ABA ENV'T, ENERGY & RES. L. THE YEAR IN REVIEW 2012, at 106 (2013); Susan Kirsch et al., *Water Quality and Wetlands*, ABA ENV'T, ENERGY & RES. L. THE YEAR IN REVIEW 2014 at 102 (2015).

[3]For a more in-depth discussion about this case, see Mohammad O. Jazil and David W. Childs, *Numeric Nutrient Criteria in Florida: The Road to Cooperative Federalism*, 42 ABA TRENDS 2 at 17, Nov.-Dec. 2015.

[4]Fla. Wildlife Fed'n v. McCarthy, No. 8:13-cv-2084-T-23-EAJ, 2015 U.S. Dist. LEXIS 31908(M.D. Fla. Mar. 16, 2015).

[5]Gulf Restoration Network v. McCarthy, 783 F.3d 227 (5th Cir. 2015).

[6]549 U.S. 497 (2007).

holding that under the CWA, EPA has the discretion to deny a necessity determination request.

A 2013 law passed in Pennsylvania that allows the use of certain on-lot sewage systems to satisfy the state's antidegredation requirements was challenged by a group of environmental organizations as a loophole for antidegredation review.[7] At a minimum, the plaintiffs asserted that EPA must review the provision as a revised water quality standard for conformance pursuant to CWA section 303(c)(2)(A). The district court held that the law did not constitute a "revised water quality standard," and therefore EPA did not have a mandatory duty to review it. The court based its conclusion on EPA's regulations defining "water quality standards," concluding that antidegredation is not a water quality standard but is rather an "element of a water quality standard."[8]

The State of Maine has filed suit against EPA for its final action disapproving a number of Maine's water quality standards. EPA's decision was based on its determination that Maine's water quality standards were not protective of designated uses, particularly as applied to Indian Waters within the state. Maine contends that EPA's action affords members of Maine's Indian tribes "special rights and a status that is greater than the rest of Maine's general population . . . ."[9] Maine further contends that if different water quality standards are ultimately required for Maine's Indian Waters, they may have a "regulatory reach beyond those Indian Waters into Maine' [sic] non-Indian Waters within the same watersheds . . . ."[10]

B. CWA Section 303(d)—Total Maximum Daily Loads (TMDLs)

In *American Farm Bureau Federation v. EPA*,[11] the Third Circuit upheld an EPA total maximum daily load (TMDL) plan for discharges of nitrogen, phosphorous, and sediment from Virginia, West Virginia, Maryland, Delaware, Pennsylvania, New York, and the District of Columbia into the Chesapeake Bay. Farm Bureau argued EPA's authority was limited to setting numeric limits necessary to achieve the water quality standards applicable to the Bay and that EPA exceeded its authority by allocating pollutant loads among different types of sources, promulgating target dates for meeting the TMDLs, and obtaining assurances from the affected states that they would fulfill the TMDL's objectives.[12] Applying *Chevron* deference, the court found that the phrase "total maximum daily load" was ambiguous and that EPA's interpretation was reasonable, so the court affirmed the grant of summary judgment in favor of EPA. Farm Bureau filed a petition for certiorari on November 6, 2015.

In *Conway v. State Water Resources Control Board*,[13] the court upheld a TMDL for a small lake even though the TMDL was based on the concentration of pollutants in the lakebed sediment instead of the loading of pollutants in the water discharged to the lake. The court found that the regulatory agency's interpretation of "other appropriate measure" was reasonable.[14]

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[7]Pine Creek Valley Watershed Ass'n v. EPA, 97 F. Supp. 3d 590 (E.D. Pa. 2015), *reconsideration denied by* No. 14-1478, 2015 U.S. Dist. Lexis 129858 (E.D. Pa. Sept. 28, 2015).
[8]*Id.* at 603.
[9]Second Amended Complaint ¶ 7, Maine v. McCarthy, No. 1:14-CV-264 (D. Me., filed July 7, 2014).
[10]*Id.* ¶ 8.
[11]792 F.3d 281 (3rd Cir. 2015), *cert. filed*, No. 15-599 (U.S. Nov. 9, 2015).
[12]*Id.* at 294.
[13]235 Cal. App. 4th 671 (2015), *cert. denied*, 136 S. Ct. 374 (Oct. 19, 2015).
[14]*Id.* at 677-679.

In *Sierra Club v. McLerran*,[15] the court required EPA to submit a TMDL for polychlorinated biphenyls (PCBs) in the Spokane River because the State of Washington had failed to do so. Even though the state had conducted significant work toward a TMDL, the court applied the doctrine of constructive submission because the state had elected to address water quality via a task force as an alternative to a TMDL.[16]

C. CWA Sections 304 and 306—Criteria and Guidelines, and Performance Standards

In *Natural Resources Defense Council (NRDC) v. EPA*, the Second Circuit remanded portions of the 2013 Vessel General Permit to EPA following challenges from environmental groups who argued that EPA had acted arbitrarily and capriciously in setting technology-based effluent limits (TBELs) and water quality-based effluent limits (WQBELs) for ballast water discharge from vessels.[17] The Second Circuit agreed in part and remanded the permit to EPA to set TBELs based on the best available technology (BAT), to fully consider both onshore and shipboard ballast water treatment systems, to conduct an appropriate and factually supported cost-benefit analysis of whether vessels built prior to 2009 should be exempt from the permit, and to establish WQBELs based on numeric criteria instead of narratives. The court noted that in fashioning the TBELs in the permit, EPA had ignored the technology-forcing aspects of the CWA and took EPA to task for crafting narrative WQBELs that do not specify how they will ensure compliance with water quality standards. The court also found EPA acted arbitrarily and capriciously in failing to require that permitees monitor ballast water discharges to ensure WQBEL compliance. The court upheld EPA's decision not to set numeric TBELs for viruses and protists because EPA had no way to test for them and the permit's TBEL monitoring requirements.

D. CWA Section 309—Enforcement

In late December 2014, XTO Energy, Inc. (XTO), a wholly owned subsidiary of ExxonMobil, agreed to pay a civil penalty of $2.3 million and spend approximately $3 million to restore eight sites in West Virginia arising out of state and federal allegations of unpermitted discharges of dredge and/or fill material to waters associated with the construction of natural gas extraction facilities.[18]

In March 2015, XPLOR Energy SPV-1, Inc. was sentenced to serve three years of probation and pay a $3.1 million monetary penalty for knowingly discharging produced water (brine) to the Gulf of Mexico, a felony violation of the CWA.[19] The discharges were discovered and immediately reported when ownership and operations were transferred to a new entity.

Duke Energy Progress, Inc., Duke Energy Business Services, LLC, and Duke Energy Carolinas, LLC, pleaded guilty to nine misdemeanor violations of the CWA and

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[15]No. 11-CV-1759-BJR, 2015 U.S. Dist. LEXIS 32152 (W.D. Wash. Mar. 16, 2015).
[16]*Id.* at *12-13.
[17]Nat. Res. Def. Council v. EPA, 804 F.3d 149 (2d Cir. 2015), *amended by* 808 F.3d 556 (2d Cir. 2015).
[18]*XTO Energy, Inc. Settlement—2014*, ENVTL. PROT. AGENCY, http://www.epa.gov/enforcement/xto-energy-inc-settlement-2014 (last updated Nov. 24, 2015).
[19]Summary of Criminal Prosecutions, ENVTL. PROT. AGENCY (last visited Mar. 13, 2016) (Xplor Energy).

agreed to pay a $68 million criminal fine and $34 million toward environmental projects in North Carolina and Virginia.[20]

In April 2015, Tap Root Dairy, LLC was fined $80,000 and placed on four years of probation for criminal violations of the CWA.[21] In addition, the dairy owner was sentenced to four years of probation, six months of which will be spent in home detention. In December 2012, following approximately ninety-three days without checking or maintaining the levels of waste in containment lagoons, approximately 11,000 gallons of waste spilled into the French Broad River.

In August 2015, Mississippi Phosphates Corp. (MPC), a diammonium phosphate fertilizer manufacturer, pleaded guilty to felony violations of the CWA.[22] MPC admitted discharging more than thirty-eight million gallons of acidic wastewater in excess of permit limits (resulting in the death of more than 47,000 fish) and discharging oily wastewater. Because MPC is in bankruptcy and participating in an estimated $120 million cleanup of its facility, MPC agreed to transfer 320 acres of property to become part of an estuarine research reserve as part of its plea.

E. CWA Section 401—State Certification

In *Natural Resources Defense Council v. EPA*,[23] the court held EPA acted arbitrarily and capriciously in adopting the Vessel General Permit because the narrative water quality based effluent limits were too general to ensure compliance with water quality standards. Intervenors argued that a previous determination upholding the state 401 certification of the narrative standards established conclusively that the narrative standards did protect water quality standards. The court disagreed and stated EPA could add requirements above the 401 certifications because state standards "might be" less stringent than required by the CWA.

In *Friends of Merrymeeting Bay v. Hydro Kennebec, LLC*,[24] the court granted summary judgment in favor of the dam operator. The court held the operator did not intend to pass fish through the turbines and instead intended for the fish to bypass the turbines, even though there was some incidental passage of fish through the turbines.

In *Ohio v. United States Army Corps of Eng'rs*,[25] the court issued a preliminary injunction requiring the Corps to complete all dredging and dispose of all sediment in a special disposal facility. The court ordered Ohio to set aside funds for the costs of the disposal until the case was decided on the merits. The case arose after Congress directed the Corps to dredge Cleveland Harbor and the Cuyahoga River, and Ohio issued a 401 certification requiring the Corps to dispose of dredged material in a specialized disposal facility. The Corps did not appeal the 401 certification, but it refused to dredge a portion of the harbor unless it was allowed to dispose of some sediment into Lake Erie.

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[20] *Summary of Criminal Prosecutions*, ENVTL. PROT. AGENCY (last visited Mar. 13, 2016) (Duke Energy Progress, Inc.; Duke Energy Business Services, LLC; and Duke Energy Carolinas, LLC).

[21] *Summary of Criminal Prosecutions*, ENVTL. PROT. AGENCY (last visited Mar. 13, 2016) (Tap Root Dairy, LLC).

[22] *Summary of Criminal Prosecutions*, ENVTL. PROT. AGENCY (last visited Mar. 13, 2016) (Mississippi Phosphates Corp.).

[23] 804 F.3d 149 (2d Cir. 2015), *amended by* 808 F.3d 556 (2d Cir. 2015).

[24] No. 1:11-cv-00035-GZS, 2015 U.S. Dist. LEXIS 43383 (D. Me. Apr. 2, 2015).

[25] No. 1:15-CV-679, 2015 U.S. Dist. LEXIS 62921 (N.D. Ohio May 12, 2015).

In *Oxford Mining Co., LLC v. Nally*,[26] the court held the Ohio EPA could impose reasonable restrictions in a 401 certification which were related to water quality impacts on endangered species.

F. CWA Section 402—Nonpoint Source Pollution

1. Permits & Permit Shields

The Sixth Circuit in *Sierra Club v. ICG Hazard, LLC* upheld the dismissal of plaintiff's suit, which alleged that defendant mining company's selenium discharges violated the CWA.[27] The court held that facilities holding a general permit may avail themselves of the permit shield provision, which "insulates permit holders from liability for certain discharges of pollutants that the permit does not explicitly mention."[28] The court followed the district court's rationale that a permit is meant to identify the most harmful pollutants while requiring the permit holder to disclose the "vast number of other pollutants."[29]

Plaintiff fishermen in *Ortiz-Osorio v. Municipality of Loíza* alleged that the Municipality violated its Municipal Separate Storm Sewer System (MS4) NPDES permit because a stormwater outfall discharged raw sewage into the Atlantic.[30] The court found that plaintiffs were not entitled to summary judgment because they failed to adequately assert that the Municipality had not developed and implemented a Storm Water Management Plan (SWMP), an essential element to prove a violation of the MS4 permit.

The defendant in *United States v. Wolf* worked for Sioux-Preme Packing Corporation, which held a NPDES permit.[31] His responsibilities included managing Sioux-Preme's wastewater treatment lagoons. During a two-day period in October 2012, defendant knowingly violated the permit when he intentionally discharged biological materials and agricultural wastes from one of the waste lagoons. Defendant plead guilty and was sentenced to a one-year of probation, with a special condition of six weekends in jail.

Plaintiffs in *Jones Creek Investors, LLC v. Columbia County* alleged, among other things, that defendant violated its NPDES permit by failing to implement and enforce a SWMP, which is "designed to reduce the discharge of pollutants from the MS4 to the maximum extent practicable."[32] The court determined that no violation occurred since the permit only required defendant to implement and enforce the SWMP, because the "maximum extent practicable" standard governed the design goals of the SWMP, and not implementation and enforcement.

The court in *Ohio Valley Environmental Coalition v. McCarthy* requested that EPA evaluate the systemic failure of West Virginia to administer and enforce its NPDES program and to withdraw the delegation of the program from the state.[33] The court held that "the CWA does not impose a mandatory duty on EPA to respond to a petition brought pursuant to [section] 402(c)(3)" because the statute makes no attempt to specify

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[26] 27 N.E.3d 920 (Ohio Ct. App. 2015).
[27] 781 F.3d 281, 282 (6th Cir. 2015).
[28] *Id.* at 285.
[29] *Id.* at 286.
[30] No. 13-1352 (BJM), 2015 U.S. Dist. LEXIS 20818, at *8 (D.P.R. Feb. 19, 2015).
[31] No. 14-CR-4091-DEO, 2015 U.S. Dist. LEXIS 22301, at *1-2 (N.D. Iowa Feb. 25, 2015).
[32] 98 F. Supp. 3d 1279, 1298-99 (S.D. Ga. 2015).
[33] No. 3:15-0277, 2015 U.S. Dist. LEXIS 79630, at *7 (S.D. W. Va. June 19, 2015).

when, if ever, EPA must either hold a public hearing or make a determination regarding the adequacy of a state NPDES permit program.[34]

In *Alaska Eskimo Whaling Commission v. EPA*, petitioner AEWC challenged a NPDES permit that authorized the discharge by oil and gas exploration facilities of 13 waste streams into the Beaufort Sea.[35] AEWC did not seek to have the permit vacated but sought additional restrictions on the permitted discharges. The court granted the petition on an error in the record by EPA regarding the modeling that applied to a wide range of discharges. But the court denied the petition in all other respects because the issuance of the permit was supported by the evidence, did not reflect a failure to consider an important aspect of the problem, and was not arbitrary or capricious.

The defendant in *United States v. STABL, Inc.* received a state issued NPDES permit for discharges from its rendering plant that processed dead cattle and offal into the city's wastewater treatment plant.[36] EPA alleged that defendant violated its NPDES permit by discharging pollutants in excess of the permit limitations and failing to sample for oil and grease as required by the permit. The district court found defendant liable for 1,533 CWA violations and imposed a $2.2 million civil penalty. On appeal, defendant disputed the admissibility and reliability of the discharge monitoring reports (DMRs).[37] The Eighth Circuit affirmed the district court's decision, as it found defendant failed to produce sufficient evidence to show the information in the DMRs was unreliable. The court held that "[w]hen a defendant's own DMRs demonstrate permit exceedances, they constitute sufficient evidence to meet a [CWA] plaintiff's burden of production on liability and in some circumstances may be sufficient to entitle the plaintiff to summary judgment."[38]

2. Permit Interpretation

Plaintiff in *Little Hocking Water Association, Inc. v. E.I. du Pont de Nemours & Co.*, a potable water provider that operated a wellfield approximately 1,300 feet from defendant's facility, brought an action under the Resource Conservation and Recovery Act (RCRA).[39] Plaintiff alleged that defendant contaminated the soil and groundwater by disposing a solid or hazardous waste, i.e., PFOA (perfluorooctanoic acid) otherwise known as C8, via industrial discharges. Defendant argued that industrial discharges from point sources subject regulation under CWA section 402 are excluded from the definition of "solid waste." Plaintiff asserted that C8 was not excluded under RCRA because defendant's NPDES permit did not include C8. The court determined that RCRA and its regulations "state unambiguously that all point source discharges subject to regulation under section 402 of the CWA, regardless of whether there is a permit in place, cannot be considered solid waste under RCRA."[40] The court held that if a discharge is subject to the NPDES permit scheme, then it is not solid waste under RCRA.

In *Altamaha Riverkeeper v. Rayonier, Inc.*, the court considered whether defendant's NPDES permit, which allowed it to discharge wastewater under certain

[34] *Id.* at *6-7.
[35] 791 F.3d 1088 (9th Cir. 2015).
[36] 800 F.3d 476 (8th Cir. 2015).
[37] *Id.* at 484.
[38] *Id.* at 484-85 (citing United States v. Allegheny Ludlum Corp., 366 F.3d 164, 174 (3d Cir. 2004) and Friends of the Earth v. Eastman Kodak Co., 834 F.2d 295, 298 (2d Cir. 1987)).
[39] 91 F. Supp. 3d 940 (S.D. Ohio 2015).
[40] *Id.* (citing RCRA § 6903(27), 40 C.F.R. § 261.4, and Inland Steel Co. v. EPA, 901 F.2d 1419, 1422 (7th Cir. 1990)).

conditions, included narrative water quality standards (e.g., standards for color, odor, and turbidity).[41] Defendant argued that the water quality standards were not incorporated into its permit, and the CWA's "permit shield" provisions shield it from liability. The court determined the issue was akin to contract law, in that the court had to interpret the language of the permit as if it were a contract. Based on established principles of contractual interpretation, the court held that the narrative water quality standards were not a condition of the permit.

In comparison, the court in *Ohio Valley Environmental Coalition v. Fola Coal* rejected defendant's argument that it is shielded from liability because its NPDES permit did not specifically limit discharges of ionic pollutants.[42] The court ruled that the defendant's permit did incorporate, by reference to a regulation, the state's narrative biological water quality standards. As a consequence, the court determined that defendant's discharge violated its NPDES permit because "all NPDES permits must comply 'with the applicable water quality requirements of all affected States.'"[43]

3. No Permit

Defendants in *Ohio Valley Environmental Coalition v. Pocahontas Land Corp.* took possession of two tracts of land, each of which included valley fills that "are constructed from and used to dispose of the spoil or coal mine waste material generated during mining operations."[44] Plaintiffs alleged that defendants violated the CWA by discharging pollutants from valley fills. The court considered whether the valley fills constitute "point sources," and therefore required NPDES permits. Defendant argued that because the sites did have valid permits when operational, that no permit should be required. The court found that whether the sites were points sources remained a material issue of fact, but held that "CWA liability cannot be avoided merely because the valley fills were previously constructed and are not presently actively managed."[45]

In *PennEnvironment v. PPG Indus., Inc.*, plaintiffs brought a citizen's suit pursuant to the CWA, as well as RCRA and the Pennsylvania Clean Streams Law, for making discharges without a permit.[46] Defendant had used parts of the property from 1949 to 1970 to dispose of slurry waste and solid waste. When stormwater and groundwater passed through the waste, it picked up the contaminants and emerged as leachate, containing multiple metals, with "very high pH" levels.[47] The court found defendant liable for discharging toxic contaminants and stormwater and failing to address a treatment plan outlined in a 2009 state administrative order.

The court in *Puget Soundkeeper Alliance v. Whitley Manufacturing Co.* found defendant liable for violating the CWA when it discharged stormwater associated with its industrial activities without a permit.[48] The court explained that Congress found that stormwater was a pollutant subject to regulation under the CWA when it created the statute.

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[41]No. CV 214-44, 2015 U.S. Dist. LEXIS 42849 (S.D. Ga. Mar. 31, 2015).
[42]No. 2:13-21588, 2015 U.S. Dist. LEXIS 69457 (S.D. W. Va. May 29, 2015).
[43]*Id.* at *43 (quoting 40 C.F.R. § 122.4(d)).
[44]No. 3:14-11333, 2015 U.S. Dist. LEXIS 59910, at *6-7 (S.D. W. Va. May 7, 2015) (quoting West Virginia Coal Ass'n v. Reilly, 728 F. Supp. 1276, 1281 (S.D. W. Va. 1989)).
[45]*Id.* at *27-28.
[46]No. 12-342, 2015 U.S. Dist. LEXIS 115359 (W.D. Pa. Aug. 31, 2015).
[47]*Id.* at *6-8.
[48]2015 U.S. Dist. LEXIS 151901 (W.D. Wash. Nov. 9, 2015).

> Even if the definition of "pollutant" is strictly and narrowly construed to include only those items specifically listed (a theory that does not have universal acceptance), Congress was well within its discretion to clarify that the phrase "industrial, municipal, and agricultural waste" includes stormwater that comes in contact with those materials.[49]

Plaintiff in *Puget Soundkeeper Alliance v. Cruise Terminals of America, LLC* alleged that defendants violated the CWA by discharging industrial stormwater runoff and other pollutants without a NPDES permit.[50] The court noted that the CWA does not regulate stormwater runoff, but it does require a NPDES permit for stormwater discharge from industrial facilities. CWA regulations clarify that when one entity owns the discharging facility, but another operates it, it is the operator's duty to obtain the permit. While the court agreed with plaintiff that the stormwater drainage system was a sufficient point source as contemplated by the CWA, it did not find the cruise terminal itself was a point source, stating that point sources are determined by "whether the pollution reaches the water through a confined, discrete conveyance."[51] On cross motions for summary judgment, the court declined to determine liability because it lacked sufficient information to do so.

G. CWA Section 404—Wetlands

1. Jurisdictional Determinations

The Eighth Circuit held that a jurisdictional determination (JD) issued by the Army Corps of Engineers was reviewable as a final agency action in *Hawkes Co., Inc. v. U.S. Army Corps of Engineers*.[52] In 2014, the Fifth Circuit came to the opposite conclusion in *Belle Company, LLC v. U.S. Army Corps of Engineers*, holding that a JD issued by the Corps was not reviewable as a final agency action.[53] The *Hawkes* decision creates a circuit split on the issue of whether a JD is a final agency action. The Eighth Circuit applied the U.S. Supreme Court's two-part test from *Sackett* to determine that the JD is a final agency action. First, the court found that a JD is the "consummation of the Corps' decisionmaking process." Second, the court disagreed with both the lower court and the Fifth Circuit, finding that a JD is an action by which rights or obligations have been determined, or from which legal consequences flow—according to the court, a JD "requires appellants either to incur substantial compliance costs (the permitting process), forego what they assert is lawful use of their property, or risk substantial enforcement penalties."[54] The government has filed a petition for a writ of certiorari at the U.S. Supreme Court,[55] which the Court granted on December 11.[56]

In *National Association of Homebuilders (NAHB) v. EPA*, the D.C. Circuit affirmed the district court's dismissal of NAHB's challenge to a Corps' determination that several portions of the Santa Cruz River in Arizona were traditional navigable waters

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[49] *Id.* at *9.
[50] No. C14-0476 JCC, 2015 U.S. Dist. LEXIS 157416 (W.D. Wash. Nov. 20, 2015).
[51] *Id.* at *19 (quoting Trustees for Alaska v. E.P.A., 749 F.2d 549, 558 (9th Cir. 1984)).
[52] 782 F.3d 994 (8th Cir. 2015).
[53] 761 F.3d 383 (5th Cir. 2014).
[54] *Hawkes Co.*, 782 F.3d at 999-1000.
[55] No. 15-290, 2015 WL 5265284 (U.S. filed Sept. 8, 2015).
[56] 136 S. Ct. 615 (U.S. Dec. 11, 2015); *Docket*, SUPREMECOURT.GOV, http://www.supremecourt.gov/search.aspx?filename=/docketfiles/15-290.htm (last visited Mar. 13, 2016).

(TNW) and thus "[w]aters of the U.S."[57] An earlier and similar complaint had been dismissed for lack of standing (and the dismissal affirmed), so NAHB re-filed the complaint on the basis that the Corps had issued preliminary jurisdictional determinations concerning waters on their properties within the Santa Cruz watershed. The D.C. Circuit upheld the dismissal of the second related complaint on the grounds of issue preclusion, holding that none of the homebuilders' properties were actually on the Santa Cruz River, and there was no allegation that the TNW determination actually injured them for purposes of standing.

2. Waters of the U.S.

In *Jones Creek Investors v. Columbia County*, a golf course owner and an environmental group, brought claims against a railroad that its discharges without a 404 permit into a creek, lake, and associated tributaries violated the CWA.[58] The court granted summary judgment to defendants on these claims, holding that the evidence did not support a finding that the waters in question were "waters of the U.S." because there was no evidence of a significant nexus between these waters and a TNW. The court followed the Fourth Circuit's decision in *Precon Development Corp. v. U.S. Army Corps of Engineers*,[59] in that plaintiffs had to show evidence of both a nexus and its significance, the latter of which plaintiffs here could not demonstrate.

In *Eoff v. EPA*, the court denied plaintiff's motion for judgment on his claim that EPA's issuance of an administrative compliance order was arbitrary and capricious because the water in which plaintiff had deposited fill to construct a dam was relatively permanent and thus a "water of the United States."[60] The court also found that plaintiff was not entitled as a matter of law to judgment that his activity fell under section 404(f)(2)'s stock pond exemption; however, the court allowed plaintiff to attempt to prove the exemption as an affirmative defense to EPA's counterclaim.

3. Challenges to Permitting Decisions

In *Black Warrior Riverkeeper v. U.S. Army Corps of Engineers*, an environmental citizen group challenged the Corps' issuance of Nationwide Permit 21 (NWP 21), allowing coal mining operations to discharge dredged or fill materials into waters of the United States.[61] The district court had granted summary judgment to the Corps and intervenor mining groups, but the Eleventh Circuit found that the Corps erred in its review of the effects of NWP 21 under both the CWA and the National Environmental Policy Act (NEPA) and remanded to the district court to remand to the Corps with instructions for the agency to fully reconsider its CWA and NEPA determinations.

In *Resource Investments, Inc. v. United States*, the Federal Circuit affirmed the Court of Federal Claims dismissal of plaintiff's complaint alleging that the Army Corps' denial of a section 404 permit was a taking.[62] Because plaintiff had already challenged the Corps' decision under the Administrative Procedure Act, the court found that it had no subject matter jurisdiction under 28 U.S.C. § 1500 (removing the Court of Federal Claims' jurisdiction where a plaintiff has another suit pending against the U.S. in another court on the same subject matter).

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[57]786 F.3d 34 (D.C. Cir. 2015).
[58]98 F. Supp. 3d 1279 (S.D. Ga. 2015).
[59]633 F.3d 278 (4th Cir. 2011).
[60]No. 4:13-cv-368-DPM, 2015 WL 2405658 (E.D. Ark. May 19, 2015).
[61]781 F.3d 1271 (11th Cir. 2015).
[62]785 F.3d 660 (Fed. Cir. 2015).

In *Kunaknana v. U.S. Army Corps of Engineers*, the court granted the Corps' motion for summary judgment on plaintiff's claim challenging its issuance of a section 404 permit to ConocoPhillips.[63] While the Corps had initially rejected the proponent's project proposal because it did not adequately address environmental concerns under the 404(b)(1) Guidelines analysis (i.e., it was not the Least Environmentally Damaging Practicable Alternative (LEDPA)), the Corps' final decision that the project was the LEDPA was not arbitrary because the agency received new information regarding environmental consequences and the proponent redesigned the subject alternative to reduce environmental impacts.

In *Pebble Ltd. Partnership v. EPA*, the Ninth Circuit affirmed the district court's decision to grant EPA's motion to dismiss a mining operation's challenge to the agency's initiation of the four-step section 404(c) process.[64] The Ninth Circuit agreed with the district court that the initiation of proceedings was not the consummation of the agency's decision-making process and thus did not create right or obligations from which legal consequences would flow to the mining operation.

In *Lost Tree Village Corp. v. United States*, the Federal Circuit affirmed the Court of Federal Claims' (Claims Court) holding that the Corps' denial of a section 404 permit effected a regulatory taking on a land developer.[65] Earlier, the Claims Court had dismissed the complaint, but the Federal Circuit reversed and remanded with instructions that the Claims Court determine the loss in economic value of the Corps' decision. On remand (and affirmed by the Federal Circuit), the court held that the permit denial deprived plaintiff of 99.4% of the value of land at issue and thus it deprived the landowner of "all economically beneficial uses in the name of the common good," leaving the landowner with "economically idle" property.[66] The Federal Circuit disagreed with the government's argument that any sale of the property would constitute value and avoid a taking.

In *Quad Cities Waterkeeper v. Ballegeer*, the district court denied summary judgment motions regarding whether the defendant discharged fill material without a permit.[67] In that case, there was no dispute that the Green River was a "water of the U.S," or that the excavator removing dirt from the River was a point source. Instead, there were factual disputes over whether the excavation discharged incidental fallback or some other material requiring a permit. In addition, the court granted plaintiff's summary judgment motion regarding the application of NWP 3 or 13—by examining whether the defendant met each of the NWPs' conditions, the court determined as a matter of law that the NWPs could not have authorized defendant's activities.

In 2015, there were multiple challenges to the Corps' NWP 12 and verifications issued under it. Two of these challenges arose out of lawsuits challenging the Gulf Coast Pipeline. In *Sierra Club v. Bostick*, plaintiffs challenged NWP 12 as unlawful under the CWA because it both allows the Corps to authorize linear projects with substantial environmental impacts and allows project-level personnel to make the minimal-impacts decision.[68] The court rejected both arguments and upheld the lower courts' finding that NWP 12 was lawful under CWA section 404. Similarly, in *Bishop v. Bostick*, plaintiff claimed that both the Corps' issuance of NWP 12 and the letter of verification for the Gulf Coast Pipeline were unlawful under the CWA.[69] The district court held that both the

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[63]No. 3:13-cv-00044-SLG, 2015 WL 3397150 (D. Alaska May 26, 2015).
[64]604 Fed. App'x 623 (9th Cir. 2015).
[65]787 F.3d 1111 (Fed. Cir. 2015).
[66]*Id.* at 1115.
[67]84 F. Supp. 3d 848 (C.D. Ill. 2015).
[68]787 F.3d 1043 (10th Cir. 2015).
[69]No. 9:13-CV-82, 2015 WL 5913191 (E.D. Tex. Sept. 21, 2015).

issuance of NWP 12 and the verification letter were supported by a substantial basis in fact.

In *Sierra Club v. U.S. Army Corps of Engineers*, the D.C. Circuit affirmed the district court's grant of summary judgment in favor of the Corps regarding whether the Corps' verification of the Flanagan South pipeline under NWP 12 was consistent with the CWA.[70] According to plaintiffs, the Corps unlawfully conducted its analyses of cumulative impacts of the pipeline's water crossings by region as opposed to on a pipeline basis. The court held the NWP 12 allows the Corps' to examine cumulative impacts on a regional basis. Next, plaintiffs argued that the Corps failed to adequately explain its issuance of the permit. According to the D.C. Circuit, the Corps' adequately explained its verification decision.

4. Challenges to the Clean Water Rule

Numerous lawsuits were filed in both the federal district courts and Circuit Courts of Appeal by industry groups, environmental groups, and states in response to the issuance of the final Clean Water Rule on June 29. Most notably, the U.S. District Court for the District of North Dakota issued a preliminary injunction on August 27, blocking implementation of the rule in North Dakota and in the twelve other states that joined in that petition.[71] On October 9, the Sixth Circuit issued a ruling that stayed the rule nationwide.[72] The Army Corps and EPA continue to use the previous definition of "Water of the U.S." to assess the jurisdictional reach of the CWA. On December 8, the Sixth Circuit heard oral arguments on the issue of whether the circuit courts have subject matter jurisdiction to review the rule challenges.[73] The Sixth Circuit has yet to issue its decision.

H. CWA Section 505—Citizen Suits

In *San Francisco Herring Association v. Pacific Gas and Electric Co.*,[74] commercial fishermen accused the utility of contaminating the water quality and soil in San Francisco Bay through its operation of manufactured gas plants. The court denied Pacific Gas' challenge to the fishermen's standing, holding a plaintiff need not demonstrate an injury directly related to the affected navigable water. Because the plaintiff alleged the discharge of waste into the bay without a permit contaminated his soil, it did not matter that his injury was unrelated to the contamination of water.

In *California Communities Against Toxics v. Weber Metals, Inc.*,[75] the district court explained that a person who sends a sixty-day notice letter need not understand the cause of a violation in advance or provide suggested corrective actions. In denying Weber Metals' motion to dismiss and to strike, the court held additional allegations in the complaint were sufficiently similar to those contained in the notice letter.

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[70]803 F.3d 31 (D.C. Cir. 2015).
[71]North Dakota v. EPA, No. 3:15-cv-59, 2015 WL 5060744 (D.N.D. Aug. 27, 2015).
[72]*In re* EPA, 803 F.3d 804 (6th Cir. 2015).
[73]Katerina E. Milenkovski, *Sixth Circuit Hears Arguments Over Jurisdiction to Decide WOTUS Challenge*, THE NAT'L LAW REVIEW (Jan. 7, 2016), http://www.natlawreview.com/article/sixth-circuit-hears-arguments-over-jurisdiction-to-decide-wotus-challenge.
[74]81 F. Supp. 3d 847 (N.D. Cal. 2015).
[75]No. 15-0148, 2015 WL 2084580 (C.D. Cal. May 4, 2015).

In *Yadkin Riverkeeper v. Duke Energy Carolinas, LLC*,[76] the petitioners alleged defendant's coal-fired power plant violated its discharge permit. The district court held the CWA regulates the discharge of pollutants to navigable waters via groundwater and the factual allegations in the complaint allowed the court to reasonably infer that "substances removed in the course of wastewater treatment at [the power plant] have been disposed of in a manner that has allowed pollutants to enter protected waters."[77]

In *Sierra Club v. Virginia Electric and Power Co.*,[78] petitioners alleged the defendant power plant's disposal of combustion waste has contaminated and continues to contaminate groundwater with arsenic and other heavy metals. The district court denied the power company's motion to dismiss, instead accepting the Sierra Club's claim that the CWA applies to discharges which reach navigable waters through groundwater. The court also rejected the power plant's argument that the court should abstain from asserting jurisdiction under *Buford v. Sun Oil Co.*[79] because plaintiffs had alleged a permit violation and not challenged the issuance of the permit itself.

In *Pine Creek Valley Watershed Association v. EPA*,[80] an environmental group claimed EPA had a duty to review an amendment to the Pennsylvania Sewage Facilities Act and alleged the amendment effectively changes existing water quality standards by allowing anti-degradation review to be evaded. Relying on EPA's regulations which preclude the conclusion that the amendment constitutes a water quality standard, the court determined EPA had no mandatory duty to act so the court lacked jurisdiction.

In *Ohio Valley Environmental Coalition, Inc. v. Fola Coal Co.*,[81] environmental organizations alleged a coal mine operator violated the CWA by discharging excessive amounts of ionic pollution, measured as conductivity and sulfates, in violation of its NPDES permits. The court looked to a benchmark developed by EPA to conclude high conductivity levels in streams caused by the coal mine's discharges resulted or contributed to significant chemical and biological impairment of aquatic ecosystems.

The Eleventh Circuit held that Riverkeeper is a prevailing or substantially prevailing party in *Black Warrior Riverkeeper v. Metro Recycling*.[82] The court explained that Riverkeeper's aim was not just to shut down the tire recycling landfill but to prevent the shutdown landfill from continuing to pollute the Black Warrior River.

II. ADMINISTRATIVE DEVELOPMENTS

A. CWA Section 303—Water Quality Standards

On August 21, EPA published its final Water Quality Standards Regulatory Revisions.[83] The rulemaking revises the requirements in six program areas: (1) clarifying when an EPA document constitutes an Administrator's determination that new or revised water quality standards are necessary; (2) clarifying when a use attainability analysis is required; (3) requiring states and authorized tribes to transparently communicate their consideration of EPA's CWA 304(a) criteria recommendations when deciding whether to revise their water quality standards and clarifying which standards must be reviewed as

[76]No 1:14-cv-00753, 2015 WL 6157706 (M.D.N.C. Oct. 20, 2015).
[77]*Id.* at *12.
[78]No. 2:15-cv-112, 2015 WL 6830301 (E.D. Va. Nov. 6, 2015).
[79]319 U.S. 315 (1943).
[80]97 F. Supp. 3d 590 (E.D. Pa. 2015).
[81]82 F. Supp. 3d 673 (S.D. W. Va. 2015).
[82]No. 14-14800, 2015 WL 3484303 (11th Cir. June 3, 2015).
[83]Water Quality Standards Regulatory Revisions, 80 Fed. Reg. 51,020, (August 21, 2015) (to be codified at 40 C.F.R. pt. 131.2).

part of the triennial review process; (4) requiring identification of high quality waters, analysis of alternatives, and antidegredation implementation methods; (5) creating a framework for water quality standard variances; and finally (6) correcting grammar and spelling errors and other inconsistencies in the previous rule language.

In a series of three letters between February and June 2015, U.S. EPA Region 1 issued final approvals and disapprovals of Maine's water quality standards. The approvals and disapprovals came pursuant to EPA's recognition that Maine has statewide environmental regulatory authority to set water quality standards for all Maine waters, including Indian waters consistent with a 2007 court ruling in *Maine v. Johnson*. In the letters, EPA disapproved of a number of Maine's water quality standards, finding that the standards did not meet the applicable designated uses for the waters.[84] Maine has filed suit over the disapprovals, discussed above.

B. CWA Sections 304 and 306—Criteria and Guidelines, and Performance Standards

On February 19, EPA published the proposed Clean Water Act Methods Update Rule for the Analysis of Effluent, which would revise the current pollutant analysis methods established by EPA and by voluntary consensus standard bodies that are used by industries and municipalities to analyze the chemical, physical, and biological components of wastewater and other environmental samples. The rule would also amend the procedure for determining the method detection limit to address laboratory contamination and to better account for intra-laboratory variability.[85]

On April 7, EPA published a proposed rule for Effluent Limitations Guidelines and Standards for the Oil and Gas Extraction Point Source Category, which would create technology-based pretreatment standards for this category (at 40 C.F.R. pt. 435) to control the discharge of pollutants in wastewater to publicly owned treatment works (POTWs) from existing and new onshore unconventional oil and gas extraction facilities.[86]

On June 29, EPA published the Final Updated Ambient Water Quality Criteria for the Protection of Human Health, which provides technical information to states and tribes to establish water quality standards for the protection of human health for ninety-four chemical pollutants.[87] The revised criteria are a systematic update of EPA's national recommended human health criteria and supersede EPA's previous recommendations.

On July 27, EPA published a Request for Scientific Views: Draft Recommended Aquatic Life Ambient Water Quality Chronic Criterion for Selenium—Freshwater 2015

[84]The relevant correspondence between EPA and the state of Maine as well as the Maine standards can be found online. *See generally Maine's Water Quality Standards*, MAINE.GOV, http://www.maine.gov/dep/water/wqs/ (last visited Mar. 13, 2016). *See also* Maine v. Johnson, 498 F.3d 37 (1st Cir. 2007)

[85]Clean Water Act Methods Update Rule for the Analysis of Effluent, 80 Fed. Reg. 8955 (proposed Feb. 19, 2015) (to be codified at 40 C.F.R. pt. 136); Clean Water Act Methods Update Rule for the Analysis of Effluent, 80 Fed. Reg. 21,691 (Apr. 20, 2015) (extension of comment period).

[86]Effluent Limitations Guidelines and Standards for the Oil and Gas Extraction Point Source Category, 80 Fed. Reg. 18,557 (proposed Apr. 7, 2015) (to be codified at 40 C.F.R. pt. 435); Effluent Limitations Guidelines and Standards for the Oil and Gas Extraction Point Source Category, 80 Fed. Reg. 31,342 (June 2, 2015) (extension of comment period).

[87]Final Updated Ambient Water Quality Criteria for the Protection of Human Health, 80 Fed. Reg. 36,986 (June 29, 2015) (notice of availability).

for public comment.[88] The draft criterion has four elements, two of which are fish-tissue based and two of which are based on the water column. EPA's draft criteria recommends that states and authorized tribes adopt into their water quality standards a selenium criterion that includes all four elements and that fish tissue elements generally be given precedence over the water column elements when both types of data are available.

On August 4, EPA published its Final 2014 Effluent Guidelines Program Plan and 2014 Annual Effluent Guidelines Review Report.[89] Section 304(m) of the CWA requires EPA to biennially publish a plan to issue new regulations or to revise existing regulations for industrial wastewater discharges.

On September 14, EPA published a proposed rule for the Revision of Certain Federal Water Quality Criteria Applicable to Washington, which would revise the federal human health criteria applicable to waters under Washington's jurisdiction to ensure that the criteria are set to adequately protect Washington residents from exposure to toxic pollutants.[90] EPA proposes to establish new human health criteria for fourteen additional chemicals for which EPA now has 304(a) recommended criteria. EPA proposed this revision based on its finding that the existing criteria are not protective of designated uses in Washington state and in light of new data to update the fish-consumption rate and toxicity and exposure parameters. EPA proposes to derive 195 Washington-specific human health criteria for ninety-nine priority toxic pollutants.

On November 3, EPA published its Final Rule on Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, which establishes the first nationally applicable limits (at 40 C.F.R. pt. 423) on the amount of arsenic, mercury, selenium, chromium, cadmium, nitrogen, and other harmful pollutants that steam electric power plants are allowed to discharge in their largest sources of wastewater.[91] The final rule specifically regulates six types of wastestreams: flue gas desulfurization wastewater, fly ash transport water, bottom ash transport water, flue gas mercury control wastewater, gasification wastewater, and combustion residual leachate. The rule establishes numeric BAT limits for direct discharges from all existing sources, pretreatment standards for discharges to POTWs by existing sources, new source performance standards for direct discharges by new sources, and pretreatment standards for discharges to POTWs by new sources. The final rule is set to become effective on January 4, 2016.

C. CWA Section 401—State Certification

[88]Request for Scientific Views: Draft Recommended Aquatic Life Ambient Water Quality Chronic Criterion for Selenium—Freshwater 2015, 80 Fed. Reg. 44,350 (July 27, 2015) (notice of availability); Reopening of Request for Scientific Views: Draft Recommended Aquatic Life Ambient Water Quality Criterion for Selenium—Freshwater 2015, 80 Fed. Reg. 63,552 (published Oct. 20, 2015) (extension of comment period).

[89]Final 2014 Effluent Guidelines Program Plan and 2014 Annual Effluent Guidelines Review Report, 80 Fed. Reg. 46,280 (Aug. 4, 2015) (notice of availability).

[90]Revision of Certain Federal Water Quality Criteria Applicable to Washington, 80 Fed. Reg. 55,063 (proposed Sept. 14, 2015) (to be codified at 40 C.F.R. pt. 131); Extension of Public Comment Period for the Revision of Certain Federal Water Quality Criteria Applicable to Washington, 80 Fed. Reg. 65,980 (Oct. 28, 2015).

[91]Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 80 Fed. Reg. 67,837 (Nov. 3, 2015) (to be codified at 40 C.F.R. pt. 423).

In *Alcoa Power Generating, Inc. v. Division of Water Resources, Department of Environment and Natural Resources*,[92] which involved an Alcoa application for a 401 certification for a renewed license for its hydroelectric dams on the Yadkin River, the ALJ concluded that a dispute over ownership of the submerged lands between the state and Alcoa was not a water quality issue which could be considered under a 401 certification, that the agency was unduly influenced by the state agency which claimed ownership, and that the agency's new interpretation of its authority was not entitled to deference.

In *South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control*,[93] the South Carolina administrative law court found the League lacked standing because there was no evidence of impact to downstream waters and held that the evidence supported issuance of the 401 certification.

In the Matter of Edward LeNormand,[94] a Massachusetts administrative law judge held that the appeal notice by an adjoining landowner of a 401 certification was untimely and failed to identify specific facts which would demonstrate "personal aggrievement."

D. CWA Section 402—Nonpoint Source Pollution

On June 16, EPA issued the final rule for the NPDES Multi-Sector General Permit (MSGP).[95] This permit replaces the existing permit covering stormwater discharges from industrial facilities in EPA's Regions 1, 2, 3, 5, 6, 9, and 10 that expired September 29, 2013, and provides coverage for industrial facilities in areas where EPA is the NPDES permitting authority in EPA's Regions 7 and 8. EPA is issuing this permit for five years.

E. CWA Section 404—Wetlands

On June 29, EPA and the U.S. Army Corps of Engineers published the "Clean Water Rule," which clarifies the definition of "waters of the United States" under the CWA.[96] While the Clean Water Rule's definition applies to several sections of the CWA (including Section 402), it applies directly to permitting requirements in Section 404. The Clean Water Rule essentially adopted three categories of waterbodies for purposes of CWA jurisdiction: waters automatically subject to federal jurisdiction, waters that may be subject to jurisdiction on a case-by-case basis, and waters that are not subject to jurisdiction. The Clean Water Rule adopted in part Justice Kennedy's definition of waters of the U.S. as those with a "significant nexus" to a jurisdictional water, as described in his concurring opinion in *Rapanos v. United States*. Many states and organizations disagreed with the changes made in the Clean Water Rule, particularly with respect to the new definitions of "tributary" and "adjacent" waters. As a result, a number of lawsuits were filed, as described in the judicial developments above.

III. LEGISLATIVE DEVELOPMENTS

[92]No. 13-HER-18085, 2015 N.C. ENV LEXIS 4 (May 29, 2015).
[93]No. 14-ALJ-07-0221-CC, 2015 SC ENV LEXIS 29 (Oct. 21, 2015).
[94]No. 2015-013, 2015 MA ENV LEXIS 69 (Aug. 18, 2015).
[95]Final National Pollutant Discharge Elimination System (NPDES) General Permit for Stormwater Discharges From Industrial Activities, 80 Fed. Reg. 34,403 (June 16, 2015).
[96]Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,053 (June 29, 2015) (to be codified at 30 C.F.R. pt 328 and 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401). *See also* Rapanos v. United States, 547 U.S. 715 (2006).

A. CWA Section 303(d)—Total Maximum Daily Loads (TMDLs)

Vermont enacted legislation[97] in 2015 to enhance, implement, and enforce regulatory requirements for water quality and to finance water quality programs in the state in order to protect the waters of the state, including measures to meet the impending TMDL plan for Lake Champlain.

The Clean Water Affordability Act of 2015 was introduced in the House on March 26, 2015, and was referred to the House Committee on Transportation and Infrastructure on the same day. The House Committee on Transportation and Infrastructure referred the bill to the House Subcommittee on Water Resources and the Environment on March 27, 2015. This bill would amend the CWA to direct EPA to publish guidelines for peak wet weather wastewater management practices at POTWs that would prevent damage to the facility, maximize the delivery of flow to the facility, and provide for appropriate cost-effective controls during peak wet weather events. EPA would be required to include in its guidelines the types of technologies and management approaches available to manage peak wet weather flows.[98]

B. CWA Section 402—Nonpoint Source Pollution

Senator Lisa Murkowski (R-AK) introduced a bill to remove a limitation on a prohibition relating to permits for discharges incidental to normal operation of vessels.[99]

C. CWA Section 404—Wetlands

A number of bills were introduced in response to the Clean Water Rule. Senator Jeff Flake (R-AZ) introduced a bill to prohibit implementation of the Clean Water Rule until a Supplemental Scientific Review Panel and Ephemeral and Intermittent Streams Advisory Committee produce certain reports.[100] Representative Daniel T. Kildee (D-MI) introduced an amendment of the CWA to give states two years to become compliant with the Clean Water Rule in order to protect a state from automatically losing its state permitting program because of the new rule. Senator John Barrasso (R-WY) introduced a bill to require EPA and the Corps to withdraw the Clean Water Rule and propose a regulation revising the definition of the term "Waters of the United States."[101] Senator Joni Smith (R-IA) introduced a resolution to nullify the Clean Water Rule.[102]

Representative Sam Graves (R-MO) introduced a bill to amend the CWA to authorize states to issue permits to discharge pollutants into navigable waters for up to twenty years.[103] Currently, permits are allowed to be issued for up to five years.

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[97]H. 35, 2015-2016 Sess., Gen. Assemb. (Vt. 2015).
[98]H.R. 1705, 114th Cong. (2015).
[99]S. 371, 114th Cong. (2015).
[100]Defending Rivers from Overreaching Policies Act of 2015, S. 1178, 114th Cong. (2015).
[101]Federal Water Quality Protection Act, S. 1140, 114th Cong. (2015) (as reported by S. Comm. on Environment and Public Works (July 16, 2015)). *See also* Defense of Environment and Property Act of 2015, S. 980, 114th Cong. (2015) *and* Federal Regulatory Certainty for Water Act, H.R. 2705, 114th Cong. (2015).
[102]S.J. Res. 22, 114th Cong. (2015). *See also* H.J. Res. 59, 114th Cong. (2015); H.R. 231, 114th Cong. (2015).
[103]H.R. 1623, 114th Cong. (2015).

Chapter 12 • ENERGY AND NATURAL RESOURCES LITIGATION
2015 Annual Report[1]

The ABA Section of Environment, Energy, and Resources has formed a distinct committee for each area of energy and resources law. The legal developments in the substantive law areas of the other energy and resources committees are covered by their separate, annual recent developments reports contained in the *Year in Review*. Since the Energy and Natural Resources Litigation Committee's underlying areas of substantive law—energy and resources—overlap with the other energy and resources committees of the Section, this report is intended to avoid duplicate coverage of the developments noted in the separate reports of the other Committees. The discussion below will, by design, focus on only a sampling of the 2015 court decisions that should be of interest to energy and natural resources litigators, with the number of cases covered being dictated by the page limitation applicable to this report. In the interest of providing an accurate description of the factual background and specific rulings in each case, most of the text in the below case summaries is taken directly from the wording of the courts in the cited opinions.

I. LITIGATION OVER INTERNATIONAL ENERGY & RESOURCES OPERATIONS

A. Motion to dismiss suit filed in the U.S. courts between foreign governments, involving dispute over stored crude oil, is granted in part and denied in part.

The case of *Ministry of Oil of the Republic of Iraq v. 1,032,212 Barrels of Crude Oil Aboard the United Kalavrvta*[2] presented the court with "a dispute between Iraq and the Kurdistan region of Iraq as to the ownership of more than one million barrels of crude oil."[3] The oil had been held in storage aboard a tanker near the coast of Galveston, Texas, since July 2014. The Ministry of Oil of the Republic of Iraq (MoO) filed a complaint asking the court to seize the oil from the tanker on the grounds that the oil was the property of Iraq and had been converted by the Ministry of Natural Resources of the Kurdistan Regional Government of Iraq (KRG). The court granted a seizure order, and "a warrant issued to be executed once the tanker entered United States ('U.S.') waters."[4] The KRG moved the court to vacate the seizure order. The court dismissed the MoO's action without prejudice, finding that it lacked jurisdiction, and vacated the seizure order. In response, the MoO filed its second amended complaint, and the KRG filed another motion to dismiss, which is the subject of the present decision of the court.

In granting the motion to dismiss in part and denying it in part, the court ruled in primary part as follows:

First, the court considered the political question doctrine which "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the

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[1]This report was written by Mark D. Christiansen, an energy and natural resources litigation attorney with the Oklahoma City office of McAfee & Taft. The 2015-2016 Co-Chairs of the Energy and Natural Resources Litigation Committee are Brandon H. Barnes, Senior Energy Litigation Analyst, Bloomberg LP, Washington, DC, and John McDermott of Archer & Greiner, P.C., Haddonfield, NJ.

[2]No. G-14-249, 2015 WL 93900 (S.D. Tex. Jan. 7, 2015).

[3]*Id.* at *1.

[4]*Id.*

confines of the Executive Branch."[5] It found that the claims presented in this suit "seek an interpretation of the text of the Iraqi Constitution and application of that interpretation to the facts of the case to determine if the oil was converted."[6] Those issues were found to involve classic judiciary functions rather than political questions, so the court denied the motion to dismiss the amended complaint based on the political question doctrine.

Second, the court considered whether the MoO's claims should be dismissed under the Foreign Sovereign Immunities Act (FSIA),[7] which provides foreign states with immunity from suit in U.S. courts, subject to certain exceptions. Here, the exception allegedly applying to the actions of KRG was the commercial activities exception: "[t]he activity complained of is the taking of Iraqi oil for sale, there are specific allegations that it has been sold in the U.S., and the sale of oil in the U.S. creates a direct effect in the U.S."[8] The court found that the commercial activities exception of the FSIA applied under the facts of this case and therefore denied the KRG's motion to dismiss under the FSIA.

Third, the court found that admiralty jurisdiction did not exist, noting that the sale and conversion of oil can occur anywhere and does not traditionally occur only on the water. Thus, the motion to dismiss on the basis that the court lacked admiralty jurisdiction was granted.

Fourth, and finally, in assessing the act of state doctrine, the court recognized that this doctrine provides that "the courts of one country will not sit in judgment of the acts of another, done within its own territory."[9] However, in the present case, the government of Iraq itself sought out the United States courts, and it only brought suit in the United States after attempting without success to resolve the case in Iraqi courts. The court denied KRG's motion to dismiss on the basis of the act of state doctrine.

B. Court confirms the award of an International Court of Arbitration panel in a dispute among the participants in a joint venture involving the construction, ownership, supply and operations of crude oil refining facilities.

The case of *PDV Sweeny, Inc. v. ConocoPhillips Co.*,[10] presented a petition to vacate, and a cross-petition to confirm and enforce, an arbitration award issued by an International Court of Arbitration panel (Panel). The underlying facts involved a number of entities and "a complex web of agreements governing the supply and management of the oil refining operation"[11] at issue in the arbitration.

> ConocoPhillips, PDVSA [(Petróleos de Venezuela, S.A.)] and their respective subsidiaries commenced a joint venture to design, construct, own, supply, and operate refining facilities within the broader confines of a large refining complex owned by ConocoPhillips in Texas . . . PDVSA and its affiliates supplied crude oil from Venezuela which was then processed by ConocoPhillips . . . .[12]

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[5] *Id.* at *2 (quoting Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986)).
[6] *Id.* at *7.
[7] 28 U.S.C. § 1604 (2012).
[8] *Ministry of Oil of the Republic of Iraq*, 2015 WL 93900, at *10.
[9] *Id.* at *12 (quoting Spectrum Stores v. Citgo Petroleum Corp., 632 F.3d 938, 954 (5th Cir. 2011).
[10] No. 14-cv-5183, 2015 WL 5144023, at *1 (S.D.N.Y. Dec. 21, 2015).
[11] *Id.*
[12] *Id.*

Through the venture, PDVSA benefited from the greater refining and operational expertise of ConocoPhillips, and ConocoPhillips "was able to secure a long-term, low cost source of crude oil from Venezuela, which it was then able to convert into high-value end products."[13]

Among the many contracts that were a part of the venture and its operations, the agreement most directly at issue in the arbitration was a Transfer Agreement, governed by New York law, which restricted the manner in which the parties could transfer their interests in the joint venture. The Transfer Agreement included a Call Option which could be triggered if a PDVSA subsidiary failed to meet its obligation to supply crude oil under the parties' supply contract, or failed to make payments due under a supplemental contract, and the failure(s) remained uncured for ninety days. If the Call Option was exercised, the exercising party was allowed to acquire all of the joint venture interest of the other party. However, the exercise of the Call Option did not automatically trigger a dissolution of the crude oil supply agreements. Rather, PDVSA and its affiliates would still be required to supply Venezuelan crude oil to ConocoPhillips even if they no longer owned an interest in the joint venture.

When the PDVSA parties curtailed their supply of crude oil in January 2009, allegedly due to cutbacks in the production and export of crude oil from Venezuela, ConocoPhillips ultimately exercised the Call Option. To acquire the PDVSA share of the joint venture under the exercised option, ConocoPhillips was required to pay "eighty percent of the PDVSA parties' capital contributions to the joint venture minus all capital distributions from the joint venture to the PDVSA parties."[14] Since the PDVSA parties had received capital distributions totaling more than $1.1 billion and had made capital contributions of only some $270 million, the option price formula resulted in a purchase price of zero dollars.[15] Since the crude oil supply agreements remained in place, PDVSA and its affiliates resumed shipments of oil in October 2009.

The PDVSA parties commenced arbitration under the ICC Rules of Arbitration in February 2010. Among multiple issues raised, the PDVSA parties "challenged the validity of the Call Option, alleging that it acted as an unenforceable penalty clause under New York contract law . . . because it resulted in a purchase price of zero dollars for their share of the joint venture,"[16] which was estimated to have a value between $352 million and $540 million.[17] They asserted that the purpose of the Call Option was to compel their performance rather than to provide ConocoPhillips with adequate damages. The arbitration Panel issued its award, finding "that the Call Option was valid and enforceable under New York law and could not constitute an impermissible contractual penalty."[18] In the view of the Panel, the Call Option was a valid contract provision for the termination of the joint venture, and was not a liquidated damages or penalty clause.

In the present federal district court proceedings, the PDVSA parties asked the court to vacate the portion of the award described above on the grounds that it violated the public policy of New York and the United States. ConocoPhillips, in turn, asked the court to confirm and enforce the award. The court first considered the two international conventions relating to the enforcement of arbitration awards of the type at issue in this

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[13] *Id.*

[14] *Id.* at *3.

[15] ConocoPhillips was also required to assume outstanding debt obligations of the PDVSA parties in the amount of approximately $195 million. *PDV Sweeny, Inc.*, 2015 WL 5144023, at *3.

[16] *Id.*

[17] *Id.*

[18] *Id.*

case and concluded that it had jurisdiction over the matters presented. The court then analyzed the complex body of law that determines the legal standards to be applied to the requested relief.

The court found that the PDVSA parties fundamentally asserted "that the Panel grossly misapplied well-established New York contract law regarding the enforceability of contract provisions operating as a penalty."[19] The Panel agreed with ConocoPhillips that a contract clause can only be considered to be an unenforceable penalty if it is also a liquidated damages clause. Since the Panel determined that the Call Option was a termination provision rather than a liquidated damages provision, it could not be an unenforceable penalty. The court noted that "[n]either party has introduced any legal authority that conclusively answers the question put before the Panel concerning whether the Call Option acted as a penalty."[20] However, applying the prescribed standard of review for the decision of the Panel, it concluded that the PDVSA parties failed to meet "their 'burden of demonstrating the existence of a clearly governing legal principle and the arbitrator's manifest disregard of such a principle.'"[21] The court denied the PDVSA parties' motion to vacate.

Finally, the court addressed the cross-petition of ConocoPhillips seeking confirmation and enforcement of the award, which was governed by the same two international conventions as the petition of the PDVSA parties. Applying the appropriate standard of review, the court found that:

> [t]he Panel's alleged misapplication of New York contract law concerning unenforceable penalties does not violate the state or nation's "most basic notions of morality of justice." . . . "[E]rroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of the [Inter-American] Convention."[22]

Finding that the PDVSA parties failed to meet their burden of demonstrating that summary affirmance was not appropriate, the court confirmed, recognized and enforced the Panel's award.

C. Court finds that Shell's responses to inquiries from the U.S. Department of Justice regarding possible violations of the Foreign Corrupt Practices Act by one of Shell's contractors were absolutely privileged.

The Texas Court of Appeals' decision in *Writt v. Shell Oil Co.*,[23] was discussed in the 2013 edition of this annual report. The issue in this case was whether the defendants had "an 'absolute privilege,' or 'immunity,' to make [alleged] defamatory statements about [Writt] to the United States Department of Justice ('DOJ') . . . ."[24] In his employment with Shell, Writt

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[19] *Id.* at *8.
[20] *PDV Sweeny, Inc.*, 2015 WL 5144023, at *9.
[21] *Id.* at *9 (quoting *In re* Arbitration Between Atherton & Online Video Network, Inc., 274 F. Supp. 2d 592, 595 (S.D.N.Y. 2003)).
[22] *PDV Sweeny, Inc.*, 2015 WL 5144023, at *12.
[23] 409 S.W.3d 59 (Tex. Ct. App. 2013). At the time this report was submitted for publication, a petition for review was pending before the Texas Supreme Court. *See Case: 13-0552*, TEXAS JUDICIAL BRANCH, http://www.search.txcourts.gov/Case.aspx?cn=13-0552 (last visited Mar. 13, 2016).
[24] *Writt*, 409 S.W.3d at 61.

> [W]as charged with the responsibility of approving payments to contractors on certain Shell projects in foreign countries, including Nigeria. During the course of his work, Writt learned that certain Shell contractors were under investigation "by various governmental agencies" for making and receiving illegal payments and one of Shell's vendors had pleaded guilty to violating the Foreign Corrupt Practices Act ("FCPA").[25]

Writt alleged that the defendants voluntarily submitted a report to the DOJ, in response to an informal inquiry that "falsely stated that he had been involved in illegal conduct in a Shell Nigerian project by recommending that Shell reimburse contractor payments he knew to be bribes and [by] failing to report illegal contractor conduct of which he was aware."[26]

The trial court granted the defendants' motion for summary judgment and determined that the defendants had an absolute privilege and immunity with regard to the alleged defamatory statements at issue in this lawsuit. Writt appealed.

In a lengthy split decision of the three-judge panel, the majority of the Texas Court of Appeals panel reversed the trial court's decision and ruled that the statements of the defendants were not absolutely privileged, but were instead only conditionally privileged.[27]

In further appellate proceedings, the Texas Supreme Court reversed the judgment of the court of appeals, concluding that "Shell's statements were made preliminarily to a proposed judicial proceeding and were absolutely privileged."[28] The court first noted that Texas law recognizes two classes of privileges applicable to defamation suits—absolute privilege and conditional or qualified privilege. While "[a]n absolute privilege is more properly thought of as an immunity . . . [,]"[29] the conditional or qualified privilege "is lost if abused, such as when the statement is made with malice and with knowledge of its falsity."[30] Important to the facts at issue in this case, the court found "[t]he fact that a formal proceeding does not eventually occur will not cause a communication to lose its absolutely privileged status; however, it remains that the possibility of a proceeding must have been a serious consideration at the time the communication was made."[31]

The court also emphasized that Shell's actions occurred in an atmosphere of growing enforcement actions by the DOJ. FCPA enforcement actions more than doubled during the year preceding the DOJ's action in 2007 informing Shell of its investigation. FCPA enforcement actions more than doubled again from 2007 through 2010 when the DOJ and Shell entered into a Deferred Prosecution Agreement.[32] Moreover, the court noted that both federal prosecutors and the U.S. Sentencing Guidelines "place a high premium on self-reporting, along with cooperation and remedial efforts, in determining

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[25] *Id.* at 62.
[26] *Id.* at 63.
[27] *Id.* at 72-73. The court noted that "[t]he distinction between the absolute privilege and the conditional, or qualified, privilege is that 'an absolute privilege confers immunity regardless of motive whereas a conditional privilege may be lost if the actions of the defendant are motivated by malice.'" *Id.* at 66 (quoting Hurlbut v. Gulf Atl. Life Ins. Co., 749 S.W.2d 762, 768 (Tex. 1987)).
[28] Shell Oil Co. v. Writt, 464 S.W.3d 650, 651 (Tex. 2015).
[29] *Id.* at 654 (citing *Hurlbut*, 749 S.W.2d at 768).
[30] *Id.* at 655.
[31] *Id.*
[32] *Id.* at 659.

the appropriate resolution of FCPA matters."[33] The court concluded:

> In sum, the summary judgment evidence is conclusive that when Shell provided its internal investigation report to the DOJ, Shell was a target of the DOJ's investigation and the information in the report related to the DOJ's inquiry. The evidence is also conclusive that when it provided the report, Shell acted with serious contemplation of the possibility that it might be prosecuted.[34]

Finding that Shell's conduct in providing its internal report to the DOJ was an absolutely privileged communication, the court reversed the judgment of the court of appeals and reinstated the judgment of the trial court in favor of Shell.

It bears noting that six former United States Attorneys General (Michael B. Mukasey; Benjamin R. Civiletti; Edwin Meese, III; Richard L. Thornburgh; William P. Barr; and Alberto R. Gonzales) submitted an amicus curiae letter in support of Shell. The United States Chamber of Commerce, the National Association of Manufacturers, and the American Petroleum Institute submitted an *amicus* brief in support of Shell.[35]

D. Series of lawsuits involving international companies and operations tested the limits of finding jurisdiction in the U.S. courts.

In *International Energy Ventures Management, L.L.C. v. United Energy Group, Limited*,[36] the plaintiff (IEVM) appealed the district court's dismissal of this lawsuit against the defendant (UEG) for lack of personal jurisdiction. The underlying facts in the case involved the announcement in July 2010 that "British Petroleum ('BP') . . . wished to sell its Pakistani subsidiaries that owned oil and gas fields in Pakistan."[37] IEVM made a presentation regarding BP's Pakistani assets to UEG, a Chinese oil and gas company located in Beijing. Under a compensation agreement between UEG and IEVM, "IEVM was to assist UEG in its technical evaluation and in sourcing financing and act as consultants on behalf of UEG for the acquisition of the BP Pakistan Assets."[38] IEVM later learned that BP sold the Pakistan assets to UEG.

When UEG repeatedly declined to pay the compensation that IEVM contended it was due under the compensation agreement, IEVM sued UEG for breach of contract, promissory estoppel, quantum meruit, and fraud. "[F]ollowing the removal of this case to federal court . . . UEG moved to dismiss for lack of personal jurisdiction."[39] The district court granted that motion. IEVM appealed.

In order to determine whether IEVM had shown that the court had specific jurisdiction over UEG, the court examined:

> [T]he pre-litigation contacts that UEG purposefully established with the state of Texas. UEG sent a letter of interest, negotiated with, and sent a bid to BP's Houston office, the hub of the BP deal, in an attempt to secure the

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[33] 464 S.W.3d at 659 (quoting U.S. DEP'T OF JUSTICE & U.S. SEC. AND EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 54 (Nov. 2012), *available at* https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf).

[34] *Id.*

[35] *Id.* at 559-60 & n.1.

[36] 800 F.3d 143 (5th Cir. 2015).

[37] *Id.* at 147.

[38] *Id.*

[39] *Id.*

> BP Pakistan Assets. UEG retained Mueller, a Texas resident, as one of its two principal contacts on the BP deal. UEG contracted with Texas-based IEVM to perform consulting work on the BP deal and sent payment to IEVM in Texas. UEG contracted with the Houston offices of Dewey & LeBoeuf (attorneys), Degolyer & McNaughton (consultants), and Ernst & Young (accountants) to advise it on the BP deal. UEG's Chief Financial Officer travelled to Houston to sign the deal and to attend a dinner celebration.[40]

The court concluded that IEVM met its prima facie burden of showing specific jurisdiction. The court reversed the district court's dismissal of UEG from the lawsuit because the court had personal jurisdiction over UEG.[41]

In *Brenham Oil & Gas, Inc. v. TGS-NOPEC Geophysical Company*,[42] Brenham sued TGS and ENI, S.p.A. alleging that Brenham's efforts to reach an oil production agreement with the Republic of Togo failed due to the tortious interference of TGS. TGS was "a company that gathers and markets seismic data for the hydrocarbon industry. ENI, an Italian oil company, was accused of aiding and encouraging TGS's tortious conduct."[43] The trial granted ENI's special appearance and dismissed ENI from the lawsuit based on the lack of personal jurisdiction over ENI. Brenham appealed.

In a lengthy opinion that describes the facts in great detail, the Texas Court of Appeals summarized the facts alleged by Brenham to support general jurisdiction in Texas:

> Brenham Oil notes evidence of a trip by ENI executives to an industry conference in Houston where they met with representatives of several oil companies, as well as two trips by ENI's CEO to Texas for business meetings and speaking engagements. Brenham further observes that on 39 occasions between 2009 and 2012, other ENI employees visited Texas on business trips for the company, as evidenced by numerous letters of invitation from Texas subsidiary ENI U.S. Operating Co. to the American consulate in Milan. The stated purpose of these visits generally was to work with or advise ENTs Texas subsidiaries. Finally, Brenham points to evidence that ENI assumed an active role in negotiating a lease of Houston office space on behalf of ENI U.S. Operating Co. ENI employees traveled to Houston to survey the property and offer support in making the new offices match the "ENI standard."[44]

In pointing to the above activities of ENI on behalf of its subsidiaries as a basis for general jurisdiction, Brenham did not deny that the subsidiaries were separate corporate entities. The court concluded that "ENI's contacts with Texas were not shown to be sufficiently continuous and systematic as to render [ENI] 'essentially at home' in Texas[,]" and that Brenham failed to show that ENI is subject to general jurisdiction in Texas.[45]

The court also found that "[b]ecause Brenham Oil's claims against ENI do not

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[40] *Id.* at 153.
[41] 800 F.3d at 154.
[42] 472 S.W.3d 744 (Tex. Ct. App. 2015).
[43] *Id.* at 750.
[44] *Id.* at 759.
[45] *Id.* at 763.

arise from the alleged forum contacts, the trial court did not err . . ."[46] in dismissing Brenham's claims based on the additional finding of a lack of specific jurisdiction.

II. Other Select Energy & Natural Resources Lawsuits

A. District court adopts bankruptcy court's proposed findings and conclusions in support of granting the downstream crude oil purchasers' motion for summary judgment against lien claims and other assertions of the oil producers.

In *In re SemCrude, L.P.*,[47] the court was presented with a dispute between a group of oil producers (Producers) that had sold oil to the debtor in bankruptcy (SemCrude, L.P.) and two downstream purchasers, J. Aaron & Company and BP Oil Supply Company (Purchasers). The Purchasers filed adversary proceedings in SemCrude's Chapter 11 bankruptcy case seeking declaratory relief with respect to both the Purchasers' rights in certain disputed oil production and the Purchasers' obligations, if any, to the Producers. Before the federal district court in this case were the bankruptcy court's proposed findings of fact and conclusions of law (FFCL). The bankruptcy court recommended the granting of summary judgment in favor of the Purchasers on all counts in their adversary complaints. The Producers filed objections to the proposed FFCL, and the Purchasers responded, such that the proposed FFCL were before the court in this cause for the entry of a final judgment.

The factual backdrop for the claims involved the July 22, 2008, filing by SemCrude and related entities of voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code. The SemCrude debtors provided midstream services in the oil and gas industry, "primarily aggregating oil and gas from producers and reselling the product to downstream purchasers."[48] J. Aron & Company was "a commodities trading company that not only purchased physical oil from the Debtors, but also traded financial derivatives with them."[49] For purposes of the disputes presented in this case, the court found that BP Oil Supply Company's "relationship with the Debtors was functionally equivalent to that of J. Aron's."[50]

At the time the SemCrude debtors filed bankruptcy, "they had not yet paid the Producers for oil they purchased on credit in June and July of 2008."[51] Thousands of oil producers filed claims in the SemCrude bankruptcy proceedings with respect to the oil they delivered, but were not paid for, during the fifty-one days prior to the bankruptcy filing. The Producers also asserted claims against the Purchasers who had received the oil delivered to SemCrude by the Producers during the fifty-one-day period for which no payment had ever been made to the Producers. The Purchasers filed adversary proceedings seeking, among other relief, a declaratory judgment that the Purchasers' proposed tender of some $122 million (proposed to be the *final net amount* they owed the SemCrude debtors under their agreements) "fully satisfied and released the Purchasers from any claims of the Debtors and the Producers in the disputed oil."[52]

On June 28, 2013, the bankruptcy court issued its proposed FFCL and recommended the granting of summary judgment in favor of the Purchasers. The Producers objected to many of the findings proposed by the bankruptcy court. In this

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[46] *Id.*
[47] No. 14-cv-41 (SLR), 2015 WL 4594516 (D. Del. 2015).
[48] *Id.* at *2.
[49] *Id.*
[50] *Id.* at *3.
[51] *Id.*
[52] *In re SemCrude*, 2015 WL 4594516, at *4.

phase of the litigation, the federal district court reviewed the proposed findings and the Producers' objections. Among the many issues addressed by the court, several of the more interesting findings included the following:

First, with regard to the Purchasers' objection to the bankruptcy court's proposed finding "that the Purchasers took the disputed oil free and clear of all liens as buyers for value ('BFV') under [section] 9-317 of the Uniform Commercial Code ('U.C.C')[,]"[53] the district court first considered the proposed finding that the Producers' purported lien rights were unperfected. The court noted that "certain U.C.C. provisions specific to Kansas and Texas provide [Producers] with automatically perfected liens in the oil they delivered to the Debtors."[54] However, the court concluded that the varying perfection laws among the states did not make a difference because under Delaware law (the state of formation of the debtors), "the jurisdiction in which a debtor is located governs the issue of perfection."[55] From that finding, the court concluded that the Producers could not take advantage of the automatic perfection provisions of certain other states.

Second, the Producers challenged the bankruptcy court's recommendation that the court find, as to the BFV defense, that the Purchasers did not take the oil with actual knowledge of the Producers' liens. The Producers alleged that the following circumstantial evidence created disputed issues of fact as to this defense:

> (a) the Purchasers knew that the Debtors purchased oil in Kansas, Texas, and Oklahoma; (b) the Purchasers knew the identities of some of the specific Producers; (c) the Purchasers knew that the laws of certain producer states automatically encumbered the proceeds of oil sales; and (d) the Purchasers knew that Debtors did not pay for the oil [but instead purchased the oil on credit].[56]

The court found that the Producers' contention that the Purchasers had actual knowledge of their liens "rests solely upon general knowledge of the industry: knowledge of the parties, knowledge of those parties' locations, and knowledge of the applicable laws."[57] The court found that this was insufficient to establish the Purchasers' *actual knowledge* of a lien under section 1-202(b) of the U.C.C.

Third, with respect to the bankruptcy court's proposed finding that the Purchasers also acquired the Producers' oil free and clear of any liens as buyers in the ordinary course of business (BIOC) under section 9-320(a) of the U.C.C., the Producers asserted that the crude oil purchase contracts of J. Aron were with the parent entity SemGroup, rather than with SemCrude. The Producers asserted that a parent or holding company does not buy or sell oil in the ordinary course of business, so that the proposed finding of the court was in error. The district court stated that it "rejects this formalistic approach. . . . [C]ontrary to the Producers' suggestion, the 'person' who sells the goods in the ordinary course of business is not necessarily limited to the unitary legal entities that are parties to the transaction."[58] It added that SemGroup owned 99.5% of the equity in SemCrude and ultimately received the value of the crude oil sales at issue in this suit. Consequently, in spite of the formal legal distinction between the two entities, the U.C.C.'s definition of "person" for purposes of the BIOC defense was found to be broad enough to encompass the SemGroup-SemCrude relationship.

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[53] *Id.* at *8.
[54] *Id.*
[55] *Id.*
[56] *Id.* at *10.
[57] *In re SemCrude*, 2015 WL 4594516, at *10.
[58] *Id.* at *11.

B. Texas Supreme Court determines that the requirement of "reasonable certainty of proof" applies even where lost profits are not sought as damages and are instead used to determine the market value of property for which recovery is sought.

The Texas Court of Appeals' decision in the long-pending proceedings in *Carlton Energy Group, LLC v. Phillips*[59] was summarized in the 2012 edition of this annual report. Under the facts in this case, CBM Energy (CBM) entered into a contract with the government of Bulgaria in October 2000 that permitted CBM to explore for natural gas on a large tract of land in Bulgaria. In order to obtain financing to fulfill its obligations under the Bulgarian concession, CBM entered into an agreement with Carlton on April 25, 2003, under which Carlton was to provide phased payments totaling $8 million in exchange for a large interest in the project. In an effort to obtain additional funding in the summer of 2004 to support its payment obligations, Carlton submitted a proposed agreement to Phillips under which Phillips would agree to pay $8.5 million in exchange for a 10% interest in the project. Ultimately, Phillips did not provide any funding to Carlton, and Phillips later asserted that, contrary to Carlton's contentions, it never entered into a contract with Carlton. In particular, Phillips alleged that it signed the proposed letter agreement and returned it to Carlton for it to sign and accept. Phillips asserted that Carlton never returned to him a counterpart of the contract signed by Carlton.

Carlton later learned that in the fall of 2004, during the period when Carlton was providing Phillips with technical data concerning the project during their negotiations, "Phillips and his representatives, without Carlton's knowledge, were in direct contact with CBM about the Bulgaria Project."[60] Carlton alleged that Phillips was taking action to supplant Carlton's position with CBM in relation to the project. In February 2005, EurEnergy, a company connected to Phillips, made a proposal to CBM and then entered into a joint development agreement under which EurEnergy provided funding to CBM for the project. As part of that contract, CBM agreed to declare Carlton in default of its obligations under the CBM/Carlton contract, and Carlton did so. "CBM and EurEnergy's relationship subsequently soured, and litigation between CBM and EurEnergy ensued."[61] Bulgaria thereafter terminated the concession it had granted to CBM.

Based on the complex factual history described in the court's opinion, Carlton sued Phillips, EurEnergy, and several other Phillips-related entities for tortious interference with the CBM/Carlton agreement and for breach of contract and related claims. After a lengthy trial, the jury found that Phillips did in fact enter into a contract with Carlton and breached that contract. The jury awarded actual damages in the amount of $66.5 million. The jury further found that Phillips and EurEnergy intentionally interfered with the CBM/Carlton agreement, and that Carlton suffered $66.5 million in actual damages on that claim. The jury also awarded $8.5 million in punitive damages against Phillips and awarded the same amount against EurEnergy. The trial court, *sua sponte*, suggested a remittitur in the amount of $31.16 million, finding that the award of $66.5 million in actual damages was not supported by factually-sufficient evidence. The court, in its judgment on the jury verdict, awarded Carlton the reduced amount of $31.16 million in actual damages. The judgment assessed punitive damages in the amount of $8.5 million against Phillips, with the same award against EurEnergy.[62] The defendants

[59] 369 S.W.3d 433, 439-40 (Tex. Ct. App. 2012).
[60] *Id.* at 440.
[61] *Id.*
[62] *Id.* at 440-41.

appealed.

In reversing the judgment of the trial court in part, the court of appeals first concluded that Carlton submitted ample evidence to support the jury's conclusions with respect to the tortious interference claim. The court of appeals found that the trial court erred in requiring a remittitur from $66.5 million to $31.16 million. So it "rendered judgment on the verdict, awarding Carlton the $66.5 million actual damages found by the jury,"[63] together with exemplary damages.

The Texas Supreme Court in *Phillips v. Carlton Energy Group, LLC*,[64] affirmed in part and reversed in part the judgment of the court of appeals. In reaching that outcome, some of the more significant rulings of the court included the following:

First, Phillips emphasized on appeal the lack of evidence that Carlton ever signed and returned to Phillips' the modified version of the contract that Phillips returned to Carlton as Phillips' counter-offer. Phillips contended that Carlton's failure to sign and return the revised version of the proposed agreement meant there was no binding contract, contrary to the finding of the jury. The court noted that in the weeks following Phillips' counter-offer to Carlton, both parties behaved in certain respects as if they had an agreement, although the court recognized that certain aspects of the parties' conduct also suggested that they had not entered into a contract. Moreover, the court cited its prior holding that signature and delivery are not essential elements for the formation of a contract:

> Texas law recognizes that a contract need not be signed to be "executed" unless the parties explicitly require signatures as a condition of mutual assent. If a written draft of an agreement is prepared, submitted to both parties, and each of them expresses his unconditional assent thereto, there is a written contract.[65]

The court found the evidence supported the jury's finding that a contract was formed.

Second, the court discussed the rule in Texas that lost profits can be recovered as consequential damages only when the amount is proved with reasonable certainty.[66] However, it found that the court had never spoken to the issue of whether the "requirement of reasonable certainty of proof should apply when lost profits are not sought as damages themselves but are used to determine the market value of property for which recovery is sought . . . ."[67]

Finding that the purpose of the rule is to prevent recovery based on speculation, the court concluded that it would make sense to apply the rule in these circumstances. It observed that the "law is wisely skeptical of claims of lost profits from untested ventures or in unpredictable circumstances, which in reality are little more than wishful thinking."[68] However, it added that the law should "be no more skeptical of claimed market losses than the market itself is."[69]

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[63]Phillips v. Carlton Energy Gr., LLC, No. 12-0255, 2015 WL 2148951, at *7 (Tex. 2015).

[64]*Id.* at *1.

[65]*Id.* at *8 (quoting Mid–Continent Cas. Co. v. Global Enercom Mgmt., Inc., 323 S.W.3d 151, 157 (Tex. 2010)).

[66]*Phillips*, 2015 WL 2148951, at *9 (Tex. 2015).

[67]*Id.* at *10.

[68]*Id.*

[69]*Id.* The court drew an analogy to lottery tickets: "The prospect of winning millions in the lottery is too small to support any award of potential proceeds for, say, theft of a ticket; still the ticket itself has some value—the price it commands on the market." *Id.*

The judgment of the court of appeals was affirmed in part and reversed in part, and the case was remanded for further proceedings, including a determination of damages in a manner consistent with the court's opinion.

C. Court dismisses appeal, finding that the defendant's sale of the underlying oil and gas leases during the pendency of its appeal of a declaratory judgment ruling concerning alleged "free gas" rights of the plaintiff-landowner class rendered the appeal moot.

The events surrounding the appellate proceedings in *Schell v. OXY USA Inc.*[70] presented the not-uncommon situation of a litigant selling assets that are at issue in a lawsuit during the pendency of the litigation. The less-common aspect of the facts in this case, which led to a complex series of rulings by the Tenth Circuit, was that the only substantive judgment on appeal was a declaration as to the future rights and obligations of OXY relating to the assigned oil and gas leases, with no judgment for damages or other relief as to past actions of the defendant.

In this case, OXY appealed from the grant of summary judgment in favor of the plaintiff-landowner class "on the question of whether their oil and gas leases required OXY to make 'free gas' useable for domestic purposes."[71] OXY also appealed the district court's certification of the plaintiff class, the denial of OXY's motion to decertify the class, and the district court's order quashing the deposition of an absent class member. The landowner class moved to dismiss the appeal as moot. OXY opposed dismissal based on mootness, and argued that if the court should find mootness, the court should vacate the district court's declaratory judgment in favor of the plaintiff class.

The underlying lawsuit was filed in 2007 by four oil and gas leaseholders on behalf of a proposed class seeking, among other relief, a declaratory judgment based on the alleged failure of OXY to supply free useable gas under the applicable oil and gas leases. The district court "certified a class of 'all surface owners of Kansas land burdened by oil and gas leases held or operated by OXY USA, Inc. which contain a free gas clause.'"[72] The plaintiffs ultimately sought only declaratory relief, and not damages for past time periods, when it became apparent that OXY had continued to provide free gas during prior periods so that the plaintiffs had no damage claims.[73] The district court granted the plaintiffs' motion for summary judgment and denied OXY's motion for summary judgment. Specifically, the district court granted the landowner plaintiffs "declaratory relief requiring OXY to provide free useable gas under the contract . . . ."[74]

OXY appealed the declaratory judgment of the district court. However, after filing the appeal, but before the appeal briefs were due, OXY sold all of its interests in the Kansas leases to Merit Hugoton, L.P. (Merit). In light of that sale, the plaintiffs moved the court to dismiss the appeal as moot.

The court allowed the appeal to proceed with briefing and oral argument. One week after oral argument, Merit filed a motion to intervene as an appellant. That motion was denied,[75] leaving the case presented for decision by the Tenth Circuit. The court

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[70] 808 F.3d 443 (10th Cir. 2015).
[71] *Id.* at 446.
[72] *Id.* at 447-48.
[73] *Id.* at 449-50 & n.3.
[74] *Id.* at 448.
[75] The court noted at various points in its opinion that the parties had declined to enter into the record any documents related to OXY's sale to Merit that might enable the court to know how a judgment against OXY might or might not be binding on Merit. Nor had either Merit or OXY petitioned for Merit to be substituted for OXY. The court found that

began the ruling portion of its opinion "conclud[ing] that this appeal is moot. OXY has sold all of its interests in the leases; therefore, its conduct cannot be affected by a declaratory judgment concerning these same oil and gas leases. Accordingly, we grant the motion of the plaintiff class to dismiss this appeal.[76]

In reaching the above holding and other related rulings, some of the more notable issues and findings included the following:

First, the court noted that the doctrine of mootness, in the declaratory-judgment context, "looks to whether the requested relief will actually alter the future conduct of the named parties."[77] Citing a prior Tenth Circuit opinion, the court found that "[t]he crucial question is whether granting a *present* determination of the issues offered will have some effect in the real world."[78]

Second, applying the above mootness principles to the facts of this case, the court found that:

> [T]he declaratory judgment at issue in this litigation—"that OXY is required to provide useable gas pursuant to the terms of the Free Gas Covenant without interruption," Aplt.App. at 795—cannot affect OXY's behavior because it is no longer bound by the leases and no longer operates the wells in question. OXY is completely unaffected by our interpretation of contractual provisions (i.e., the free gas clauses) in contracts that no longer bind OXY.[79]

Third, the court stated that OXY's only argument against mootness was that OXY continued to have an interest in the outcome of this lawsuit "due to the potential preclusive effects of the declaratory judgment."[80] The court stated that it regarded such concerns over "the effects of this judgment in hypothetical unfiled future litigation—to be not a legally cognizable interest that will defeat mootness."[81]

Fourth, the court went on to observe that "[e]ven if OXY had breached the contracts in the past, our ruling today on the meaning of the free gas clauses cannot change its present behavior (because it no longer operates the wells) and cannot change its past behavior."[82]

Fifth, having determined that the appeal would be dismissed, the court next determined if it would grant OXY's request that if the court were to dismiss the appeal over OXY's objections based on mootness, the court should then also vacate the district court's declaratory judgment in favor of the plaintiff class. The court noted that "when a case becomes moot on appeal, the ordinary course is to vacate the judgment below and remand with directions to dismiss."[83] However, when the appeal becomes moot as a result of "a voluntary act of one of the parties, we generally act to prevent a party from

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there was no evidence in the record that a judgment against OXY would bind Merit. *Schell*, 808 F.3d at 463 n.4.

[76]*Id.* at 448.

[77]*Id.* at 449.

[78]*Id.* (quoting Rio Grande Silvery Minnow v. Bureau of Reclamation, 601 F.3d 1096, 1110 (10th Cir. 2010).

[79]*Schell*, 808 F.3d at 449.

[80]*Id.*

[81]*Id.* at 450.

[82]*Id.* at 451.

[83]*Id.* (quoting *Silvery Minnow*, 601 F.3d at 1129).

taking advantage of mootness that the party caused"[84] by refusing to vacate the district court's judgment. While those are the general practices, "[e]quitable principles keep us from applying this standard in a rigid fashion."[85]

Sixth, in applying the principles recognized in its opinion, the court found that, after considering the equities in this case where OXY's voluntary action caused the appeal to be moot, vacating the district court's judgment would not be appropriate:

> OXY protests that it did not "enter[ ] into this $1.4 billion sale of regional assets for the purpose of mooting one appeal," . . . We cannot say that the fact that OXY may have undertaken a sale for other reasons requires us to "allow that party to eliminate its loss without an appeal and to deprive the winning party of the judicial protection it has fairly won."[86]

Accordingly, the Tenth Circuit dismissed the appeal without disturbing the district court's declaratory judgment.[87]

D. Court addresses attempt by party to use pretrial discovery procedures as a means of obtaining commercial data that was sought as part of the ultimate relief requested in the lawsuit.

In *Ring Energy, Inc. v. Hullum*,[88] the court was presented with a discovery dispute involving the Hullum defendants' attempt to use pretrial discovery procedures to obtain access to geophysical exploration data that was also sought by the defendants as part of the ultimate relief requested by them in the lawsuit. The plaintiff Ring Energy and the Hullum defendants had entered into a merger agreement under which the defendants agreed to assign certain oil and gas leases to Ring Energy in exchange for cash and stock in Ring Energy. Ring Energy subsequently brought suit alleging that the defendants failed to meet their obligation to assign the oil and gas leases. The defendants denied those allegations and asserted counterclaims for breach of contract, specific performance, and other related claims. Part of the basis for the counterclaims was the assertion that the merger agreement required Ring Energy to provide the defendants with seismic reports and other information related to the leases, and that the information had not been provided.

The defendants sought to obtain the seismic reports both through discovery directed to Ring Energy and through a non-party subpoena duces tecum directed to "the professional geologist commissioned by Ring to obtain seismic data and create the seismic reports."[89] Ring Energy opposed both attempts to obtain the geophysical testing information through discovery. In response, the defendants argued that the information was relevant to various claims and defenses that would be presented at the trial of the action, and that Ring Energy would have an unfair advantage in various ways if it alone had access to the reports during the pendency of the lawsuit.

With regard Ring Energy's argument that to allow the defendants to obtain copies

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[84]*Schell*, 808 F.3d at 452.
[85]*Id.* at 453.
[86]*Id.* at 456-57 (quoting Mfrs. Hanover Trust Co. v. Yanakas, 11 F.3d 381, 383 (2d Cir. 1993)).
[87]The court does state in note 10 of its opinion that its decision not to vacate the district court's judgment "should not be read as an affirmance of the underlying decisions on the merits." *Schell*, 808 F.3d at n.10.
[88]No. 15-cv-00109-JHP-TLW, 2015 WL 4413366 (N.D. Okla. July 17, 2015).
[89]*Id.* at *1.

of the geophysical information through discovery would essentially grant the defendants part of the ultimate relief sought through their specific performance counterclaim, the court observed that:

> It is difficult to find cases in which a party seeks, as part of the ultimate relief, the disclosure of information and then seeks that same information through discovery. Cases in which this situation has arisen include those lawsuits arising out of Freedom of Information Act (FOIA) requests. In this context, the United States Supreme Court has addressed whether discovery requests which, if answered, would provide all of the relief the requesting party could obtain if that party were to prevail on the merits are appropriate.[90]

The court noted that the Supreme Court has concluded, in the context of FOIA litigation, that such discovery requests should *not* be allowed.[91] However the court in the present lawsuit distinguished those decisions on the ground that providing the Hullum defendants with the seismic reports would not provide them with all of the relief they would obtain if successful in this suit on the claim for specific performance, provided that an appropriate protective order is entered. The court also concluded that the seismic reports were "necessary in order for defendants to establish a number of their claims."[92]

While the court found that Ring Energy had shown "good cause for limiting the use of the seismic reports in order to prevent defendants from prevailing prematurely on much of their specific performance claim,"[93] it concluded that the seismic reports could be obtained through discovery subject to stated limitations. The court directed that the defendants could not use the reports for any purposes other than the lawsuit, and it prohibited the use of the reports to negotiate renewals or extensions of oil and gas leases. It noted that this limitation might prevent the defendants from mitigating their damages if they ultimately prevail in the lawsuit, leading to a potential increase in the monetary damages recovered from Ring Energy in that instance. However, the court found that Ring Energy had chosen to take that risk, given its objections to the defendants being allowed to fully use the information during the pendency of the litigation.[94]

E. As a matter of first impression, the Tenth Circuit holds that, for purposes of diversity jurisdiction in the federal courts, the citizenship of a master limited partnership consists of unitholders' citizenship.

The case of *Grynberg v. Kinder Morgan Energy Partners, L.P.*,[95] involved a lawsuit in which the plaintiffs (Grynbergs) petitioned the federal district court to vacate an arbitration award entered against them and in favor of Kinder Morgan Energy Partners, L.P. (KMEP) and Kinder Morgan CO2 Company, L.P. The Grynbergs sued in federal court on the basis of diversity jurisdiction. At the time the lawsuit was filed, the Grynbergs were Colorado citizens. KMEP was a Delaware master limited partnership. The district court dismissed the Grynbergs' lawsuit for lack of jurisdiction "by

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[90] *Id.* at *7.
[91] *Id.* (citing Cheney v. U.S. Dist. Court for Dist. of Columbia, 542 U.S. 367, 388, (2004)). *See also* Tax Analysts v. I.R.S., 410 F.3d 715, 722 (D.C. Cir. 2005) (quoting Military Audit Project v. Casey, 656 F.2d 724, 734 (D.C. Cir. 1981)).
[92] 2015 WL 4413366, at *8 & n.7.
[93] *Id.* at *8.
[94] *Id.*
[95] 805 F.3d 901 (10th Cir. 2015).

conclud[ing] that under *Carden v. Arkoma Associates*, KMEP's citizenship was the citizenship of all its unitholders, and because KMEP had at least one Colorado unitholder, its citizenship was not completely diverse from the Grynbergs'."[96] The Grynbergs appealed.

As a matter of first impression, the Tenth Circuit affirmed the district court's dismissal of the lawsuit and held that the citizenship of a master limited partnership consists of its unitholders' citizenship.[97] The court reached this conclusion finding that: (a) the long-standing rule for determining citizenship of unincorporated entities (i.e., that citizenship is typically determined by the entity's members' citizenship) applies to master limited partnerships; (b) the narrow exception to that rule, which applies to corporations, does not apply here; and (c) the Grynbergs' policy arguments in favor of expanding the exception to master limited partnerships are better addressed to the Congress than the courts.[98]

[96] *Id.* at 903 (citation omitted).
[97] *Id.* at 905.
[98] *Id.* at 905-06.

Chapter 13 • FOREST RESOURCES
2015 Annual Report[1]

I. DEVELOPMENTS IN FEDERAL LITIGATION

A. National Forest Roadless Area Management

Fifteen years after promulgation, the 2001 Roadless Area Conservation Rule (Clinton rule)[2] continues to provide job security for environmental lawyers.

In 2013, Alaska, with the nation's two largest national forests, lost its challenge to the Clinton rule after a district court ruling that Alaska's challenge was untimely.[3] On November 7, 2014, the Court of Appeals for the District of Columbia reversed the district court's order granting the United States' motion to dismiss, which effectively revives the claims brought by the State of Alaska against the Clinton rule.[4] In *Organized Village of Kake v. U.S. Department of Agriculture*,[5] a divided Ninth Circuit panel upheld the U.S. Forest Service's decision to temporarily exempt the Tongass National Forest from the Clinton rule under the Administrative Procedure Act (APA), but remanded the case to the federal district court to consider plaintiffs' National Environmental Policy Act (NEPA) claims. Plaintiffs subsequently filed a petition for rehearing en banc,[6] and the Ninth Circuit reversed itself,[7] finding that the U.S. Forest Service violated the APA in exempting the Tongass National Forest from the Clinton rule. The court vacated the Tongass Exemption and reinstated application of the Clinton rule to the Tongass National Forest in Alaska. The State of Alaska has filed a petition for writ of certiorari with the U.S. Supreme Court.[8]

In Colorado, the Department of Agriculture is undertaking a rulemaking to reinstate the North Fork Coal Mining Area exception to the Colorado Roadless Rule.[9] This rulemaking is the result of a successful lawsuit challenging the Bureau of Land Management's (BLM) and U.S. Forest Service's decisions to allow exploration and modification of existing coal leases within the North Fork Coal Mining Area. A

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[2]36 C.F.R. §§ 294.10-294.14 (2001). Idaho and Colorado are not subject to the Clinton rule because they have both promulgated state-specific roadless rules. *See* Idaho Roadless Area Management, 36 C.F.R. §§ 294.20-294.29 (2013); Colorado Roadless Area Management, 36 C.F.R. §§ 294.40-294.49 (2013).

[3]Alaska v. U.S. Dep't of Agric., 932 F. Supp. 2d 30 (D.D.C. 2013) (order granting motion to dismiss).

[4]Alaska v. U.S. Dep't of Agric., 772 F.3d 899, 900 (D.C. Cir. 2014).

[5]746 F.3d 970, 980 (9th Cir. 2014).

[6]*See* Organized Vill. of Kake v. U.S. Dep't of Agric., 765 F.3d 1117, 1118 (9th Cir. 2014).

[7]Organized Vill. of Kake v. U.S. Dep't of Agric., 795 F.3d 956, 967 (9th Cir. 2015).

[8]Alaska v. Organized Vill. of Kake, Alaska, No. 15-467 (U.S. filed Oct. 14, 2015).

[9]Roadless Area Conservation; National Forest System Lands in Colorado, 80 Fed. Reg. 72,665 (Nov. 20, 2015).

Supplemental Environmental Impact Statement has been prepared to complement the 2012 Environmental Impact Statement completed for the Colorado Roadless Rule.

B. Federal Court Cases

In *W.E. Partners II, LLC v. United States*,[10] W.E. Partners II, LLC, a company formed to construct a biomass facility in North Carolina, filed suit in the U.S. Court of Federal Claims, claiming that the government failed to fulfill its mandatory obligation under the Recovery Act to award a reimbursement grant for the construction of its biomass facility. The court granted summary judgment in favor of the government, holding that the Department of Treasury's decision to reimburse the biomass facility only for costs allocable to production of electrical energy was lawful.[11] The court deferred to the agency's interpretation of section 1603 of the Recovery Act and corresponding agency guidance.[12]

In *Swanson Group Manufacturing LLC v. Jewell*,[13] timber interests sued the Secretaries of the Interior and Agriculture for violating the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act (O & C Act) by failing to sell the allowable quantity of timber on federal lands in Oregon. In addition, plaintiffs claimed that the agencies failed to comply with the requirement for notice and comment under the APA when establishing the Owl Estimation Methodology, which is used to ensure timber sales comply with the Endangered Species Act.[14] The district court found in favor of plaintiffs on both the O & C Act and Endangered Species Act claims.[15] On appeal, the D.C. Circuit held that plaintiffs were unable to establish Article III standing because plaintiffs failed to allege a concrete and particularized injury in their declarations.[16] Accordingly, the court vacated the district court's decision and remanded the case for dismissal.[17]

In *Cascadia Wildlands v. Bureau of Indian Affairs*,[18] the Ninth Circuit affirmed the district court's grant of summary judgment in favor of the Bureau of Indian Affairs (BIA). Plaintiffs claimed that the BIA violated NEPA and the Coquille Restoration Act in its approval of the Coquille Indian Tribe's Middle Forks Kokwel timber sale. Plaintiffs claimed that the sale violated NEPA because the BIA failed to take proper account for impacts from the Alder/Rasler logging project, a logging project on adjacent land that had already been approved but was not completed.[19] The Ninth Circuit disagreed, holding that the BIA considered the cumulative effect of both projects in accordance with NEPA.[20] Plaintiffs also alleged that the timber sale violated the Coquille Restoration Act because it was inconsistent with the U.S. Fish and Wildlife Service's recovery plan for the Endangered Species Act-listed northern spotted owl. The Ninth Circuit disagreed, holding that the Coquille Restoration Act did not require compliance with the Fish and Wildlife Service's recovery plan.[21]

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[10] 119 Fed. Cl. 684, 687 (2015).
[11] *Id.* at 687.
[12] *Id.* at 694.
[13] 790 F.3d 235 (D.C. Cir. 2015).
[14] *Id.* at 239.
[15] *Id.*
[16] *Id.* at 242.
[17] *Id.* at 238, 246.
[18] 801 F.3d 1105 (9th Cir. 2015).
[19] *Id.* at 1110.
[20] *Id.* at 1113-14.
[21] *Id.* at 1114.

In *Cottonwood Environmental Law Center v. U.S. Forest Service*,[22] the Ninth Circuit affirmed the district court's grant of summary judgment in favor of an environmental organization, concluding that the U.S. Forest Service violated section 7 of the Endangered Species Act when it failed to reinitiate consultation after the Fish and Wildlife Service revised the critical habitat designation for the Canada lynx to include National Forest System land.[23] The court denied injunctive relief to the environmental organization because it failed to demonstrate that the Canada lynx would suffer irreparable injury.[24] The panel recognized that the presumption of irreparable harm in *Thomas v. Peterson*[25] was no longer good law following two U.S. Supreme Court cases addressing injunctive relief, *Winter v. Natural Resources Defense Council, Inc*.[26] and *Monsanto Co. v. Geertson Seed Farms*.[27]

In *Pit River Tribe v. Bureau of Land Management*,[28] the Ninth Circuit reversed the district court's grant of summary judgment in favor of the United States. Plaintiffs brought suit against a handful of federal agencies and the Calpine Corporation alleging that the continuation of twenty-six geothermal leases authorized by the BLM in the Medicine Lake Highlands area of the Klamath and Modoc National Forests violated NEPA, the National Historic Preservation Act (NHPA), the National Forest Management Act (NFMA), and the agencies' fiduciary obligations to Native American Tribes.[29] The district court concluded that plaintiffs did not have prudential standing to bring their claims because their claims did not fall with the zone of interest of the lease-continuation provision of the Geothermal Steam Act.[30] The Ninth Circuit disagreed, finding that plaintiffs' allegations included claims related to the Geothermal Steam Act's lease-extension provision.[31] The court remanded the case for further analysis of the merits of plaintiffs' claims.[32]

Last year we reported on a decision by the Court of Appeals for the Ninth Circuit to reopen the Moonlight Fire Litigation to address allegations of unethical conduct engaged in by the California Department of Forestry and Fire Protection (CAL FIRE) associated with cost recoupment litigation arising from a wildfire in 2007 that burned approximately 65,000 acres in Plumas County, California, (the Moonlight Fire) and a $55 million settlement reached with Sierra Pacific Industries (Sierra Pacific).[33] In our last report, the U.S. District Court for the Eastern District of California had, sua sponte, requested that the Ninth Circuit Court of Appeals Judge Alex Kozinski assign a judge outside of the Eastern District of California to the matter, but Judge Kozinski declined and reassigned the case to Senior Judge William B. Shubb in the Eastern District of

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[22] 789 F.3d 1075 (9th Cir. 2015).
[23] *Id.* at 1084-85.
[24] *Id.* at 1091.
[25] *Id.* at 1089; 753 F.2d 754, 764 (9th Cir. 1985).
[26] 555 U.S. 7 (2008).
[27] 561 U.S. 139 (2010).
[28] 793 F.3d 1147 (9th Cir. 2015).
[29] *Id.* at 1153.
[30] *Id.* at 1154-55; *see also* 30 U.S.C. § 1005(a) (2015) (Geothermal Steam Act lease provision).
[31] *Pit River Tribe*, 793 F.3d at 1158; *see also* 30 U.S.C. § 1005(g) (2015) (Geothermal Steam Act lease extension provision).
[32] *Id.* at 1159.
[33] United States v. Sierra Pac. Indus., No. 2:09-cv-02445-KJM-EFB (E.D. Cal. Oct. 15, 2014).

California.[34] After limited briefing, on April 17, 2015, Judge Shubb issued a decision denying Sierra Pacific's motion to set aside the judgment and a motion for a temporary stay of the settlement agreement.[35] In this decision, the court held that the government's failure to turn over important documents did not rise to the level of fraud on the court, defendants made a calculated decision to settle at the time of the judgment, and "[d]efendants have failed to identify even a single instance of fraud on the court, certainly none on the part of any attorney for the government"; "[s]tripped of all its bluster, defendants' motion is wholly devoid of any substance."[36] Sierra Pacific has appealed the decision, and five state attorneys general have filed an amicus brief urging the Ninth Circuit to reverse the decision.[37] As part of its appeal and request for reversal, Sierra Pacific has also requested recusal of Judge Shubb if the case is reversed, based on concerns regarding improper conduct by Judge Shubb due to apparent posts on Twitter and YouTube concerning the case, although state attorneys argue that the author of the postings is subject to dispute.[38]

II. DEVELOPMENTS IN STATE COURTS

In *State of Wyoming v. Black Hills Power, Inc.*,[39] the Wyoming Supreme Court adopted the free public services doctrine[40] in response to three certified questions from the U.S. District Court for the District of Wyoming regarding the state's ability to recover expenses incurred from suppressing a wildfire resulting from the negligence of a third party.[41] This case arose from a landowner's suit against Black Hills Power, Inc. (Black Hills), alleging that its negligent operation, inspection, and maintenance of its

[34]United States v. Sierra Pac. Indus., No. 2:09-cv-02445-KJM-EFB (E.D. Cal. Oct. 23, 2014) (order reassigning case).
[35]United States v. Sierra Pac. Indus., 100 F. Supp. 3d 948 (E.D. Cal. 2015).
[36]*Id.* at 981.
[37] United States v. Sierra Pac. Indus., No. 2:09-cv-02445-WBS-AC (E.D. Cal. Apr. 20, 2015), No. 15-15799 (9th Cir. Apr. 21, 2015); Brief for Attorneys General for the States of Arizona, Nebraska, Nevada, Utah, and Wisconsin as Amicus Curiae Supporting Appellants and Reversal, United States v. Sierra Pac. Indus., No. 15-15799 (9th Cir. Nov. 13, 2015).
[38]*See* Appellants' Opening Brief, United States v. Sierra Pac. Indus., *appeal docketed*, No. 15-15799 (9th Cir. Nov. 6, 2015); Appellants' Motion for Judicial Notice or, in the Alternative, Motion to Supplement the Record on Appeal, United States v. Sierra Pac. Indus., No. 15-15799 (9th Cir. Nov. 6, 2015); United States' Opposition to Appellants' Motion for Judicial Notice and Request to Strike References and Arguments from Appellants' Briefs, United States v. Sierra Pac. Indus., No. 15-15799 (9th Cir. Nov. 19, 2015).
[39]354 P.3d 83 (Wyo. 2015).
[40]The free public services doctrine is a general common law rule which provides that "absent specific statutory authorization, a governmental entity cannot recover the costs of providing public services from a tortfeasor whose conduct caused the need for such services." *Id.* at 85-86.
[41]The federal court certified the following three questions to the Wyoming Supreme Court: (1) whether the state could recover fire suppression and/or emergency services costs from a negligent third party that created the need for the services; (2) if not, whether the state could recover such expenses on portions of lands that were state lands; and (3) if the state could recover expenses from damages on state lands, would the state's recovery be limited in any way, such as to a pro rata share of costs based on the state's percentage of total acres affected by the fire. *Id.* at 84.

transmission line ignited "the Oil Creek Fire, [which] allegedly consumed more than 61,000 acres" of land.[42] The State of Wyoming intervened and sought recovery of damages to approximately 9,857 acres of state land and approximately $5,213,000 in fire suppression expenses.[43] Black Hills moved to dismiss the state's claims on the basis that costs of a government entity are not recognized by common law absent a specific statutory authorization (i.e., the free public services doctrine).[44] In response, the State of Wyoming argued that even if the state recognized the free public services doctrine, the exception to the general rule would apply, allowing recovery of government expenses incurred to protect its own property.[45] In response to the three certified questions from the federal court, the Wyoming Supreme Court: (1) adopted the free public services doctrine and found that there was no statutory provision allowing for recovery in this instance;[46] (2) adopted the exception to the general rule allowing recovery of the costs of services where portions of the lands protected by the fire suppression were state lands;[47] and (3) found that although as a matter of law the state's recovery is not limited in any way, there were questions of fact requiring further resolution by the federal court.[48]

In *State of Washington, Department of Natural Resources v. Public Utility District No. 1 of Klickitat County*,[49] the Washington Court of Appeals upheld a trial court's decision that a municipal corporation such as a public utility district is a "person" (or alternatively a "corporation") within the meaning of the state fire cost recovery statute authorizing the Washington Department of Natural Resources (DNR) to pursue a cost recovery claim.[50] The case arose out of a forest fire near Lyle, Washington, resulting in damage to 2,100 acres after a tree fell on a power line owned and operating by the Public Utility District No. 1 of Klickitat County (PUD) resulting in more than $1.6 million in fire suppression costs.[51] DNR commenced an action against the PUD after its investigation concluded that the fire was caused by PUD's negligence in failing to remove the tree near its electrical lines.[52] The PUD filed a motion to dismiss, arguing that municipal corporations are not identified entities in the statute and a monetary judgment against another taxpayer-funded entity is against Washington public policy.[53] Since the statute did not include a definition of the term "person," the court conducted a review of the statute's legislative history and a plain meaning analysis, and ultimately found "strong support for a permissively broad reading of 'person'" and that the reference to "any person, firm, or corporation" plainly includes municipal corporations.[54]

III. DEVELOPMENTS IN FEDERAL LEGISLATION, DIRECTIVES, AND POLICY

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[42] *Id.* at 85.
[43] *Id.*
[44] *Black Hills Power*, 354 P.3d at 85.
[45] *Id.*
[46] *Id.* at 85-88 (citing City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co., 719 F.2d 322 (9th Cir. 1983); Dist. of Columbia v. Air Fla., Inc., 750 F.2d 1077 (D.C. Cir. 1984)).
[47] *Black Hills Power*, 354 P.3d at 88.
[48] *Id.* at 88-89 (indicating that the questions, briefs, and arguments posed several unknowns regarding whether the state had expended funds because of its obligations under an agreement with Weston County or because it was incurring the expenses to protect its property).
[49] 349 P.3d 916 (Wash. Ct. App. 2015).
[50] *Id.* at 918.
[51] *Id.*
[52] *Id.*
[53] *Id.* (referring to WASH. REV. CODE § 76.04.495 (2015)).
[54] *Klickicat Cnty.*, 349 P.3d at 919-22.

In last year's edition, we reported that the Agricultural Act of 2014 (P.L. 113-79 or the Farm Bill), signed into law by President Obama on February 7, 2014, included a notable provision that amended the Clean Water Act (CWA) to exclude certain silviculture activities from National Pollutant Discharge Elimination System (NPDES) permitting requirements.[55] However, despite a decision from the U.S. Supreme Court in *Decker v. Northwest Environmental Defense Center*,[56] reversing a 2011 Ninth Circuit decision, the Ninth Circuit revived the specific issue as to whether stormwater discharges collected in a system of ditches, culverts, and channels are point sources to which a CWA NPDES permit requirement would apply.[57] As a result of this litigation, the U.S. Environmental Protection Agency (EPA) has entered into an agreement, which has been approved by the Ninth Circuit, to consider and issue proposed and final rulemaking deciding whether CWA section 402(p)(6) requires that stormwater discharges from forest roads be regulated.[58] In accordance with the agreement and the court's order, EPA published a Notice of Opportunity to Provide Information on Existing Programs That Protect Water Quality From Forest Road Discharges on November 10, 2015.[59]

The Forest Service continues to implement its 2012 Planning Rule[60] that sets forth detailed process and content requirements for the development, amendment, and revision of land and resource management plans (also known as "forest plans"). During 2015, the Forest Service issued the final version of its Forest Service Manual and Handbook "Directives" to guide implementation of the 2012 Planning Rule.[61] During 2015, the agency also continued with revising several "pilot" forest plans for various national forests.[62] The Forest Service is also proceeding with an amendment of the forest plan for the Tongass National Forest under 2012 Planning Rule provisions.[63]

Last year, we reported that the U.S. Forest Service issued its proposed Groundwater Management Directive for public comment.[64] The proposed directive

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[55]Agricultural Act of 2014, Pub. L. 113-79, 128 Stat. 649 (2014). *See also* KATIE HOOVER, CONG. RESEARCH SERV., FORESTRY PROVISIONS IN THE 2014 FARM BILL at 7(P.L. 113-79) (MAR. 2014), *available at* http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R43431.pdf.

[56]133 S. Ct. 1326 (2013).

[57]Nw. Envtl. Def. Ctr. v. Decker, 728 F.3d 1085 (9th Cir. 2013).

[58]*In re* Envtl. Def. Ctr., No. 14-80184 (9th Cir. Sept. 14, 2015) (joint motion for entry of order); Juan Carlos Rodriguez, *EPA Agrees to Review Runoff Regulations in 9th Circ.*, Law360 (Sept. 16, 2015, 4:25 PM), http://www.law360.com/articles/703471/epa-agrees-to-review-runoff-regulations-in-9th-circ (subscription).

[59]80 Fed. Reg. 69,653 (Nov. 10, 2015); *see also* Notice of an Extension to Provide Information on Existing Programs That Protect Water Quality From Forest Road Discharges, 80 Fed. Reg. 78,728 (Dec. 17, 2015) (extending the comment period for an additional 32 days from January 11, 2016, to February 12, 2016).

[60]National Forest System Land Management Planning Directives, 78 Fed. Reg. 13,316 (Feb. 27, 2013).

[61]National Forest System, Land Management Planning Directives, 80 Fed. Reg. 6683 (Feb. 6, 2015).

[62]*See, e.g.*, Plan Revisions for the Inyo, Sequoia and Sierra National Forests; California and Nevada, 79 Fed. Reg. 51,536 (Aug. 29, 2014).

[63]Environmental Impact Statements; Notice of Availability, 80 Fed. Reg. 72,719 (Nov. 20, 2015) (EIS No. 20150328, Draft, USDA, AK, Tongass Land and Resource Management Plan Amendment).

[64]Proposed Directive on Groundwater Resource Management, Forest Service Manual 2560, 79 Fed. Reg. 25,815 (May 6, 2014).

would have required Forest Service and special use permit holders of groundwater on U.S. Forest Service lands to implement water conservation measures; analyze the impact that existing and proposed uses may have on groundwater resources; and monitor, report, and mitigate large groundwater withdrawals and injections.[65] However, in June 2015, the U.S. Forest Service issued a notice withdrawing the proposed directive.[66] The notice stated that response to the proposed directive from conservation organizations and tribes was generally favorable, but that states and a number of other organizations raised concerns that the proposal would exceed the U.S. Forest Service's legal authority and infringe on state water allocation authority.[67] The notice stated that the U.S. Forest Service will have further discussions with states and other "key publics" to develop new proposed directives regarding the evaluation and monitoring of effects to groundwater on National Forest System lands.[68]

[65] *Id.* at 25,816.
[66] Proposed Directive on Groundwater Resource Management, Forest Service Manual 2560, 80 Fed. Reg. 35,299 (June 19, 2015) (notice of withdrawal of proposed directive).
[67] *Id.* at 35,299.
[68] *Id.*

Chapter 14 • HYDRO POWER
2015 Annual Report[1]

I. JUDICIAL DEVELOPMENTS

A. D.C. Circuit Vacates and Remands FERC's Attempt to Narrow Application of Municipal Preference

On November 20, 2015, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) rejected the Federal Energy Regulatory Commission's (FERC) holding that Federal Power Act (FPA) section 7(a)[2] limits the municipal preference in original licensing for hydroelectric projects to municipalities located nearby or in the vicinity of the project site.[3] The underlying FERC orders ended the FERC's consistent practice—since the passage of the FPA more than ninety years ago—of applying the preference to any state or municipal applicant for a preliminary permit or original license without regard to the proximity of the applicant to the proposed project. The D.C. Circuit granted Western Minnesota Municipal Power Agency's (WMMPA) petition for review, vacated the FERC's orders, and remanded the matter to the FERC for further proceedings.

The case arose when FFP Qualified Hydro 14, LLC (FFP) and WMMPA each filed a preliminary permit application to study the feasibility of the Saylorville Dam Water Power Project on the Des Moines River in Iowa.[4] WMMPA claimed municipal preference under section 7(a) of the FPA; FFP was a non-municipal applicant.[5] The FERC deemed the applications to be filed on the same day and time under its regulations,[6] and it issued notice of a random drawing to determine which application would be granted priority. WMMPA protested the random drawing as unnecessary, arguing that because it was a municipal applicant, it should be granted municipal preference. Nonetheless, the FERC held the drawing and granted FFP first priority.[7]

On December 19, 2013, the FERC issued a preliminary permit for the Saylorville Project to FFP and denied WMMPA's competing permit application. The FERC found that neither application contained plans that were better adapted to the comprehensive development of the waterway.[8] It then determined that FPA section 7(a), which requires the FERC to grant preference to state and municipal applicants if their applications are equally well adapted, is silent as to the scope of the municipal preference. The FERC concluded that the "best reading of the statute is that municipalities should be accorded preference only with respect to the development of water resources that are located in their vicinity."[9] The FERC reasoned that a municipality should receive preference to develop "nearby hydropower sites for the benefit of its citizens," but it is not in the public interest to grant municipal preference for a project that is "far from the site of the

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[1]This report, which covers significant decisions in the area of hydropower during 2015, was authored by Michael R. Pincus, Sharon L. White, and Erin K. Bartlett, attorneys at Van Ness Feldman, LLP.
[2]16 U.S.C. § 800(a) (2015).
[3]W. Minn. Mun. Power Agency v. FERC, 806 F.3d 588 (D.C. Cir. 2015).
[4]*FFP Qualified Hydro 14, LLC*, 145 F.E.R.C. ¶ 61,255 at P 1 (2013).
[5]*Id.*
[6]18 C.F.R. § 385.2001(a)(2) (2015).
[7]145 F.E.R.C. ¶ 61,255 at PP 7-9.
[8]*Id.* at P 16.
[9]*Id.* at P 17.

municipality."[10] The FERC did not provide any geographic parameters to define a project within a municipality's "vicinity," but it noted that WMMPA sought to claim municipal preference for a project located almost 400 miles outside of its vicinity.[11]

In June 2014, the FERC denied rehearing requests sought by WMMPA, the American Public Power Association, and the Public Power Council.[12] The FERC held that it reasonably interpreted the scope of municipal preference in FPA section 7(a) to be limited to the development of water resources that are located in the vicinity of the municipality. The FERC maintained that the FPA is ambiguous regarding the scope of municipal preference under section 7(a) and that public policy favors a geographical limit on the preference and declined to clarify the meaning of "vicinity," finding that a "more precise definition would eliminate the flexibility which may be necessary in any particular situation."[13]

On appeal, the D.C. Circuit vacated the FERC's orders and remanded the case to the FERC, holding that section 7(a) unambiguously requires the FERC to give preference to states and municipalities, subject to the "equally well adapted" requirement. The D.C. Circuit further held the FERC's conclusion that the section provides no guidance with regard to the scope of the preference was a "manufactured ambiguity" put forth to support the FERC's policy that it could not discern how the public interest is served by applying the preference to a municipality located distant from the site.[14] The D.C. Circuit also rejected the FERC's inference from Congress' silence regarding proximity to the project site that Congress delegated to the FERC the authority to "pick and choose favored municipalities to advance the Commission's policy."[15] The D.C. Circuit also held that the examples the FERC cited of purportedly absurd or mischievous consequences that would result from distant municipalities having the preference failed to meet the high standard for invoking the absurdity doctrine; that is, a demonstration that the plain meaning of the statutory text defies rationality by rendering the statutory text nonsensical and superfluous.[16] Finally, the D.C. Circuit suggested that if the FERC is concerned that granting the preference to a distant municipality would have undesirable consequences, it may address that through the "equally well adapted" provision of section 7(a).[17]

B. State Court Litigation Delays FERC Action in Yadkin Project Relicensing

Relicensing of the Yadkin Project (Project), located in North Carolina, has been delayed by several state court challenges in 2015. On May 29, 2015, a North Carolina Administrative Law Judge (ALJ) ruled that the state water quality agency improperly denied a Clean Water Act (CWA) section 401 certification for the Project and directed the agency to issue a certification within thirty days.[18] The licensee of the Project has been attempting to obtain a 401 certification from the State since 2007. The State has twice issued and then revoked 401 certifications for the Project. In 2012, the State denied the applicant's third attempt to obtain a certification based on litigation filed by the State

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[10] *Id.*
[11] *Id.* at P 19.
[12] *FFP Qualified Hydro 14, LLC*, 147 F.E.R.C. ¶ 61,233 (2014).
[13] *Id.* at P 36.
[14] *W. Minn. Mun. Power Agency*, 806 F.3d at 592-93.
[15] *Id.* at 593.
[16] *Id.* at 596.
[17] *Id.*
[18] Alcoa Power Generating, Inc. v. Div. of Water Quality, N.C. Dep't of Env't and Nat. Res., No. 13 HER 18085, 2015 WL 4503859 (N.C. Office of Admin. Hearings May 29, 2015).

in which it alleged that the State, not the licensee, owns the river bed underlying the four dams comprising the Project.

The ALJ found that the State denied the application based on a property ownership dispute, rather than issuing a ruling on the merits of the application. She further concluded that the State based its decision on an improper factor beyond the scope of its authority under section 401 of the CWA and that ownership of the river bed is irrelevant to issuance of the 401 certification.[19] The State appealed the decision, and on September 25, 2015, a Superior Court judge affirmed the ALJ's opinion and directed the State to issue a 401 certification within thirty days.[20] The State issued its 401 certification on October 23, 2015.[21]

In a separate proceeding challenging the licensee's ownership of the river bed, on September 28, 2015, the U.S. District Court for the Eastern District of North Carolina ruled that the licensee owns segments of the Yadkin River on which the dams operate.[22] The court found that the licensee owns the lands based on the state's Marketable Title Act, which provides that any person who "shall have been vested with any estate in real property of record for thirty years or more, shall have a marketable record title."[23] The court found that since 1958, the licensee paid property taxes for the river bed, impounded water and flooded the surrounding areas, and operated and maintained four dams on the site. The court also held that the licensee owned the river bed based on adverse possession, finding that the licensee had "actual, open, hostile, exclusive, and continuous possession of the land" for the required period under state law.[24] The court also acknowledged the timing of the lawsuit, noting that the State filed suit only after the licensee closed its aluminum smelting plant in 2010, and not years earlier when it learned that the licensee claimed ownership of the underlying river bed. The State has appealed this decision, which is pending before the U.S. Court of Appeals for the Fourth Circuit.[25] The State has requested the FERC to not issue a new license for the Project until the conclusion of that litigation.[26]

II. ADMINISTRATIVE DEVELOPMENTS

A. Agencies Issue Revised Interim Final Rules for Trial-Type Hearings and Alternatives under Sections 4(e) and 18 of the FPA

On March 31, 2015, the Departments of Agriculture, the Interior, and Commerce (the Departments) issued revised interim rules for trial-type hearings and the submission

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[19] *Id.*

[20] The Superior Court opinion is unavailable. *See* Press Release, Alcoa, Court Upholds Ruling That State Agency Unlawfully Denied Water Quality Certificate for Alcoa Dams (Sept. 28, 2015).

[21] Press Release, N.C. Dep't of Envtl. Quality, State Water Quality Certification Issued to Alcoa Power Generating Inc. (Oct. 23, 2015).

[22] North Carolina *ex rel.* N.C. Dep't of Admin. v. Alcoa Power Generating, Inc., No. 5:13-CV-633-BO, 2015 WL 5703520 (E.D.N.C. Sept. 28, 2015).

[23] *Id.* at *3 (citing N.C. GEN. STAT. § 47B-2(a) (2015)).

[24] *Id.* at *5 (quoting Merrick v. Peterson, 548 S.E.2d 171, 176 (N.C. Ct. App. 2001)); *see also* N.C. GEN. STAT. § 1-35 (2015).

[25] North Carolina *ex rel.* N.C. Dep't of Admin. v. Alcoa Power Generating, Inc., No. 5:13-cv-633, 2015 WL 5703520 (E.D.N.C. Sept. 28, 2015), *appeal docketed*, No. 15-2225 (4th Cir. Oct. 14, 2015).

[26] Letter from I. Faison Hicks, Special Deputy Attorney Gen., N.C. Dep't of Justice, to Kimberly D. Bose, Sec'y, F.E.R.C. (Oct. 28, 2015).

of alternative conditions (Revised Rules)[27] under sections 4(e) and 18 of the FPA.[28] The trial-type hearings are conducted to resolve disputed issues of material fact with respect to mandatory conditions and prescriptions submitted by federal resource agencies for inclusion in a FERC hydropower license. The Revised Rules are substantially similar to those initially promulgated in 2005,[29] but make several revisions to address issues not resolved in the initial rules. For example, the Departments interpreted section 33 of the FPA[30] to require the agencies to give equal consideration to power and non-power factors when adopting a condition only when an alternative condition or prescription has been proposed.[31]

The Revised Rules also assign the burden of proof in a trial-type hearing to a party requesting a hearing, rather than the Departments as the proponent of its condition or prescription.[32] The Departments also refused to grant the right to a trial-type hearing when a Department submits new conditions or prescriptions at the modified stage, or when the Department's modified conditions or prescriptions include factual justifications that were not presented with its preliminary conditions or prescriptions and subject to challenge in a trial-type hearing.[33] However, the Departments clarified that a trial-type hearing and submission of alternatives are available where a Department has previously reserved its authority to include conditions or prescriptions in a FERC license at a later time, and invokes that authority during the license term.[34]

The Revised Rules became effective on April 30, 2015. The Departments solicited public comment on how the rules may be improved and indicated that they will consider promulgation of further revised rules based on the comments received.[35]

B. Confederated Salish and Kootenai Tribes of the Flathead Reservation Become First Native Indian Tribe to Own and Operate a Hydroelectric Project in the Nation

On September 5, 2015, the Confederated Salish and Kootenai Tribes of the Flathead Reservation (CSKT or Tribes) located in Polson, Montana, became the first Native Indian Tribe to own and operate a hydroelectric project in the United States. The Séliš Ksanka QÍispé Project, formerly known as the Kerr Hydroelectric Project, was constructed on the Flathead Reservation in the 1930s. When the Project was up for relicensing in the 1980s, CSKT applied and was granted co-licensee status over the Project with the Montana Power Company.[36] As part of the relicensing proceeding, the Tribes were given the option to become the sole licensee thirty years from the relicensing

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[27]Resource Agency Hearings and Alternatives Development Procedures in Hydropower Licenses, 80 Fed. Reg. 17,156 (Mar. 31, 2015) [hereinafter Hydropower Licenses] (to be codified at 7 C.F.R. pt. 1, 43 C.F.R. pt. 45, 50 C.F.R. pt. 221) (revised interim rules).

[28]16 U.S.C. §§ 797(e), 811.

[29]Resource Agency Procedures for Conditions and Prescriptions in Hydropower Licenses, 70 Fed. Reg. 69,804 (Nov. 17, 2005) (to be codified at 7 C.F.R. pt. 1, 45 C.F.R. pt. 45, 50 C.F.R. pt. 221) (interim final rules).

[30]16 U.S.C. § 823d.

[31]Industry commenters noted that this interpretation is contrary to the plain language of the statute, which requires equal consideration for all conditions and prescriptions, even if an alternative is not proposed. Hydropower Licenses, *supra* note 27, at 17,176-77.

[32]*Id.* at 17,170-71.

[33]*Id.* at 17,163-64.

[34]*Id.* at 17,159.

[35]*Id.* at 17,156-57.

[36]*Mont. Power Co.*, 32 F.E.R.C. ¶ 61,070 (1985).

date, upon the payment of a "conveyance price." In March 2014, an arbitration panel set the "conveyance price" at $18.3 million.[37] In April 2015, CSKT filed notice with the FERC that the Tribes would assume ownership of the Project.[38] CSKT also applied for, and was granted, its motion requesting that the FERC add the Tribes' wholly-owned energy corporation, Energy Keepers, Inc. (EKI), to the Project license—effective on the day CSKT became the sole owner and operator of the dam.[39]

Just before the Project was scheduled to convey to CSKT, several individuals and groups filed an emergency temporary restraining order and complaint in the U.S. District Court for the District of Columbia to challenge the FERC's decision to add EKI to the Project license and to prevent the conveyance.[40] The district court denied the restraining order and eventually the complaint was dropped.[41] To celebrate the historic and cultural significance of assuming ownership of the approximately 200-megawatt Project, the Tribes held a community-wide event on September 5, 2015, attended by FERC Chairman Norman Bay.[42]

C. The FERC Prepares for Significant Increase in Number of Relicensings

FERC Staff took a number of actions this year to prepare for a dramatic increase in applications for new and subsequent licenses for projects where licenses will expire in the near future. On April 1, 2015, the Director of the FERC's Division of Hydropower Licensing (Director) sent a Notice of License Expiration and Request for Information Regarding Process Selection letter to the licensees of about 100 hydropower projects with licenses that will begin the relicensing process between October 1, 2016, and September 30, 2018.[43] The Director requested the licensees let the FERC know by June 1, 2015, which relicensing process—the Integrated, Alternative, or Traditional Licensing Processes—they intend to use.[44] While it did not require a binding commitment, the Director's letter required licensees to consider relicensing process selection much earlier than normal—in some cases, more than three years in advance—to enable FERC staff to better manage a substantial increase in workload in the coming years, given the large number of licenses expiring. The Director's letter notes that between fiscal year (FY) 2010 and FY 2014, the FERC received an average of twelve Notices of Intent to relicense hydroelectric projects per year, but that between FY 2016 and FY 2030, the FERC expects the average to increase to thirty-four per year.[45]

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[37] Letter from Matthew A. Love, Counsel, CSKT, to Kimberly D. Bose, Sec'y, F.E.R.C. (Mar. 4, 2014).

[38] Confederated Salish and Kootenai Tribes, Energy Keepers, Incorporated; Notice of Application for Partial Transfer of License and Co-Licensee Status and Soliciting Comments, Motions To Intervene, and Protests, 80 Fed. Reg. 27,161 (May 12, 2015).

[39] *Confederated Salish & Kootenai Tribes*, 152 F.E.R.C. ¶ 62,140 (2015).

[40] Complaint, Keenan v. Bay, No. 15-cv-01440 (D.D.C. Sept. 2, 2015).

[41] Keenan v. Bay, No. 15-cv-01440 (D.D.C. Sept. 4, 2015) (order denying temporary restraining order); Plaintiff's Notice of Voluntary Dismissal, Keenan v. Bay, No. 15-cv-01440 (D.D.C. Oct. 13, 2015).

[42] Dillon Kato, *CSKT Officially Assumes Ownership of Kerr Dam, Announces New Name*, INDEPENDENT RECORD (Sept. 5, 2015, 6:30 PM), http://helenair.com/news/natural-resources/cskt-officially-assumes-ownership-of-kerr-dam-announces-new-name/article_a7f7ce91-57be-5a0c-97f4-41d00cf43aed.html.

[43] *See, e.g.*, Letter from Vince Yearick, Dir., F.E.R.C. Div. of Hydropower Licensing, to Hydropower Project Licensees (Apr. 1, 2015).

[44] *Id.* at 2.

[45] *Id.*

Chapter 15 • MARINE RESOURCES
2015 Annual Report[1]

The Marine Resources Committee deals with diverse disciplines focused on the marine environment. The geographic breadth of that focus—embracing thousands of miles of national coastline, as well as estuarine, outer continental shelf, and international waters—is matched by the range of issues that arise in the development, management, and protection of those resources. This includes the jurisdiction and management of United States harvesters and their U.S.-flagged vessels across the world's oceans. The 2015 review discusses the significant events in 2015 across the full spectrum of the committee's responsibilities.

I. FISHERIES

A. Judicial Developments

It should be noted at the outset that in the area of fisheries adjudications, lower court decisions can often be as meaningful to the practitioner as a Supreme Court case since the bulk of the cases brought by the National Marine Fisheries Service (NMFS) are either settled or decided by an administrative law judge. Due to the economic circumstances of most marine harvesters, most of these cases never see the inside of a courtroom, so the few that get to an independent judiciary, even at the district court level, take on added weight as precedent for future actions of NMFA and alleged violators. The first time a fisheries case came before the Supreme Court in recent memory, the decision actually turned on the definition of a word in a financial crimes statute, rather than a fisheries offense.[2]

Early in 2015 the *Glacier Fish Company, LLC v. Pritzker*[3] case was decided. At issue was whether under the "Trawl Rationalization Program," NMFS could use its own formula, rather than the Pacific Fisheries Management Council's, for computing a cost recovery program. The court first determined, following the Ninth Circuit's opinion in *Oregon Trollers Association v. Gutierrez*, that under the statute of limitations section of

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[1]This report was prepared by the Marine Resources Committee and edited by: Peter H. Flournoy, International Law Offices of San Diego; Jennifer Simon Lento, Nixon Peabody LLP; and Julia B. Wyman, Marine Affairs Institute at Roger Williams University School of Law/Rhode Island Sea Grant Legal Program. In addition to the editors, Contributors to the report include: Joan Bondareff, Blank Rome LLP; Dana Merkel, Blank Rome LLP; and Lynn Long, Department of the Interior. Nothing in this review should be taken to represent the views of the employers of the writers or their clients. This review includes significant developments in the area of Marine Resources.

[2]Yates v. United States, 135 S. Ct. 1074 (2015). While contributing little, if anything, to fisheries law, it did give the Justices some comic relief. A prosecutor had charged a fisherman who had allegedly destroyed evidence by throwing back undersized grouper fish under the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1519, which makes it a criminal offense to destroy any "tangible objects" in order to obstruct a federal investigation. The Agency statute regarding catching undersized grouper would have resulted in a civil penalty (although it is not clear from the opinion whether Yates was ever charged with the civil offense). The Supreme Court opined, "We agree with Yates and reject the Government's unrestrained reading. 'Tangible object' in § 1519, we conclude, is better read to cover only objects one can use to record or preserve information, not all objects in the physical world."

[3]No. C14-40MJP, 2015 U.S. Dist. LEXIS 1045 (W.D. Wash. Jan. 6, 2015).

the Magnuson Stevens Fishery Conservation and Management Act (MSA), a person had to challenge a regulation or an action taken pursuant to a regulation within thirty days, and that a challenger could attack both the action and the regulation under which the action was taken within thirty days of the announced action.[4] Next, the court had to determine whether, under *Universal Health Servs., Inc. v. Thompson* and *Johnson v. Director, Office of Workers' Comp Programs*,[5] the plaintiffs had waived their arguments because they had not been raised before NMFS in the administrative record and because they had withheld a number of documents from the administrative record before the court on the basis of privilege. Here, the court found that it made no difference, since it was already limited to a review of the record upon which the administrative decision was based, which meant it was limited to the documents and materials directly or indirectly considered by NMFS decision-makers.[6]

A more recent case, decided on December 23, 2015, is the *Conservation Council for Hawaii v. National Marine Fisheries Service*.[7] During the years of 2010-2012, the U.S. longline catch of big eye tuna was limited to 3,763 metric tons (mt), pursuant to an international conservation and management resolution of the Western and Central Pacific Fisheries Commission (WCPFC). This provision did not apply to U.S. Pacific Participating Territories (PTs) since these had caught less than 2,000 mt in 2004. The measure did have the caveat that the PTs could catch up to 2,000 mt "as long [as] they were 'undertaking responsible development of their domestic fisheries.'"[8] During several years, the U.S. quota was reached and NMFS shut the fishery before the end of the season. Then, in 2011, Congress authorized the PTs to transfer all or part of their 2,000 mt quotas to U.S. vessels home-ported in Hawaii and permitted longlining for big eye in return for monies paid into a government fisheries development fund. The legislation stated specifically that none of the catch was required to be unloaded in a PT, and, further, that fish caught pursuant to this use of the PTs' quota was to be reported to the WCPFC as coming from the respective PT's quota and not from the U.S. quota. Pursuant to this legislation in 2011 and 2012, respectively, Hawaiian longliners caught 628 mt and 771 mt of tuna attributed to American Samoa. In 2013, 501 mt were caught and attributed to another PT, the Commonwealth of the Northern Marianas.[9]

The plaintiffs sought, inter alia, a declaratory judgment that this "quota shifting" arrangement was violative of the MSA and the implementing legislation for the WCPFC, since the U.S. had agreed to catch limits established by the WCPFC and this "quota shifting" violated that agreement and was, therefore, unlawful and a subterfuge to get around that limit which constrained the Hawaiian vessels' catch. The "quota shifting" arrangement was pursuant to a rule promulgated by NMFS, so plaintiffs also challenged it under the Administrative Procedures Act, 16 U.S.C. § 1855(f), as being arbitrary and capricious.[10]

The court distinguished *Natural Resources Defense Council v. Environmental Protection Agency*,[11] which held that post-ratification decisions by parties to the Montreal

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[4]Or. Trollers Ass'n v. Gutierrez, 452 F.3d 1104, 1113 (9th Cir. 2006); 16 U.S.C. §1855(f).

[5]Universal Health Servs., Inc. v. Thompson, 363 F.3d 1013, 1019 (9th Cir. 2004); Johnson v. Director, Office of Workers' Comp. Programs, 183 F.3d 1169, 1171 (9th Cir. 1999).

[6]Glacier Fish Co., 2015 U.S. Dist. LEXIS 1045, at *11-12.

[7]No. 14-00528 LEK-RLP, 2015 WL 9459899 (D. Haw. Dec. 23, 2015).

[8]*Id.* at *3 (internal citations omitted).

[9]*Id.* at *4-5.

[10]*Id.* at *23.

[11]464 F.3d 1 (D.C. Cir. 2006)

Protocol on Substances that Deplete the Ozone Layer were not enforceable in United States courts. Instead, it found that the international Conservation and Management Measures (CMMs) of the WCPFC could be enforced domestically by limiting the question to whether NMFS had promulgated regulations which violated the CCMs. This is to be distinguished from a domestic court actually being able to enforce a CCM itself. The court went on to find that plaintiffs' were advocating a position that PTs were no longer recognized as separate entities for purposes of catch allocations and that such a position was inconsistent with the Convention and the Commission's policies.[12]

Other cases of note are *United States v. Saunders* and *United States v. Daniels*, both of which reaffirmed earlier rulings that the Lacey Act specifically exempts from its application fisheries of the United States, which are subject to a Fisheries Management Plan under the MSA.[13] In the continuing battle to outlaw sharkfin soup and shark finning (the practice of harvesting only the fins from sharks and returning them to the ocean to die), the court in *Chinatown Neighborhood Association v. Harris*,[14] found no conflict between the shark finning provisions of the MSA, which prohibit this activity, and the California shark fin law, which went a step further and banned the possession of shark fins, overruling the plaintiffs attempt to show that the federal statute and regulations had preempted the field of regulating shark finning.

B. Legislative Developments

A major piece of legislation—which is meant to strengthen the U.S. fight against Illegal Unregulated and Unreported (IUU) fishing—was finally passed by Congress and signed into law which is meant to strengthen the U.S. fight against IUU fishing. The bill, as passed, also amended the Tuna Conventions Act of 1950 (TCA), which is the enabling legislation for the Inter-American Tropical Tuna Commission (IATTC).[15] Twelve years ago the United States signed an updated treaty—the Antigua Convention—that clarified and extended the reach of the IATTC's jurisdiction; however, it had been prevented from presenting its ratification of the treaty until implementing legislation was passed. Unfortunately, in amending the TCA, the Administration deleted a provision, which had been intended to "level the playing field" for U.S. vessel owners when facing foreign fleet competition. The U.S. is one of only a handful of nations that actually implements and enforces regulations which give effect to international conservation and management measures for highly migratory species. The provision left out of the amended TCA was one that permitted the Secretary of Commerce to put in abeyance regulations if other countries were not enforcing their regulations on their fleets based on the same international conservation and management resolution and adversely impacting the fishery. Despite omitting a provision that truly would have "leveled the playing field," NMFS trumpeted the legislation's passage as doing just that.[16]

C. Administrative Developments

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[12] *Conservation Council for Haw.*, 2015 WL 9459899, at *20.

[13] United States v. Saunders, No. 4:14-CR-8-F-1, 2015 WL 4507420 (E.D.N.C. July 23, 2015); United States v. Daniels, No. 4:14-CR-11-F-1, 2015 WL 4509995 (E.D.N.C. July 24, 2015).

[14] Chinatown Neighborhood Ass'n v. Harris, 794 F.3d 1136 (9th Cir. 2015).

[15] H.R. 774, 114th Cong. (2015) (enacted); *see also* Tuna Conventions Act of 1950, 16 U.S.C. §§ 951-962 (2012).

[16] Press Release, Nat'l Oceanic and Atmospheric Admin., New Law Empowers U.S. to Combat Illegal Fishing and Seafood Fraud and Promote the Sustainable Management of International Fisheries (Nov. 6, 2015).

NMFS seems to publish several new rules or regulations concerning some aspect of fisheries management in the Federal Register every day. Among the more important ones was one requiring Vessel Monitoring Systems (VMS) on all vessels fishing for tuna and tuna-like species under the jurisdiction of the IATTC.[17] This matches the previously promulgated regulation that all vessels fishing for tuna or tuna like species under the jurisdiction of the WCPFC were required to have VMS.

II. MARINE MAMMALS AND THE MARINE MAMMAL PROTECTION ACT

A. Judicial Developments

1. *Conservation Council for Hawaii v. National Marine Fisheries Service*

The Navy sought authorization for the incidental take of marine mammals in the Hawaii-Southern California Training and Testing (HSTT) area of the Pacific Ocean, which NMFS granted under the Marine Mammal Protection Act (MMPA) for the period of December 2013 to December 2018.[18] The court noted that Congress amended the MMPA to exempt military readiness activities, and thus, the Navy's activities "may be permitted if the taking will have a 'negligible impact' on an affected species or stock and will not have 'an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses.'"[19] However, the court stated that NMFS's determination that the activities would have a "negligible impact" was so insufficiently supported, it was arbitrary and capricious.[20] First, the court ruled that NMFS must examine the impact of the authorized take, not the anticipated take, as required by the MMPA.[21] Then the court found that NMFS failed to analyze the effects of authorized takes on many of the affected species and stocks.[22] Finally, the court held that NFMS's biological opinion did not satisfy the requirements of the ESA and its Final Environmental Impact Statement failed to comply with NEPA.[23]

2. *Alaska Wilderness League v. Jewell*

The U.S. Fish and Wildlife Service (FWS) promulgated an Incidental Take Regulation (ITR) which set out the permissible methods for the incidental taking of small numbers of Pacific walruses in the Chukchi Sea in connection with oil and gas exploration activities.[24] Plaintiffs asserted the ITR violated the MMPA because it failed to set forth the means of effecting the least practicable adverse impact on walruses, and "fail[ed] to make a negligible impact finding based on 'total' take."[25] The court found

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[17]International Fisheries; Pacific Tuna Fisheries; Establishment of Tuna Vessel Monitoring System in the Eastern Pacific Ocean, 80 Fed. Reg. 60,533 (Oct. 7, 2015) (direct final rule).
[18]F. Supp. 3d 1210, 1214-15 (D. Haw. 2015).
[19]*Id.* at 1216-17.
[20]*Id.* at 1219-20.
[21]*Id.* at 1221-22.
[22]*Id.* at 1222-24.
[23]*Conservation Council for Haw.*, 97 F. Supp. 3d at 1231-34.
[24]The southern sea otter is a threatened species under the ESA and protected under the MMPA. No. 3:15-cv-00067-SLG, 2015 U.S. Dist. LEXIS 86773, at *8 (D. Alaska July 2, 2015) (referring to 50 C.F.R. § 18.118(a)(4)(v)).
[25]*Id.* at *14.

that the MMPA does not require the FWS "to enact every mitigation measure in the incidental take regulation itself."[26] The court then followed the Ninth Circuit's holding that MMPA section 101(a)(5)(A) does not require FWS to qualify or estimate the total take.[27]

3. *Black v. Pritzker*

Plaintiffs, six captains and owners of tuna fishing vessels, were issued notices of violation, including a violation of the MMPA for making sets on a whale, which was upheld in the administrative proceeding.[28] On appeal to the district court, plaintiffs disputed the National Oceanic and Atmospheric Administration's (NOAA) interpretation of incidental take under the MMPA.[29] Using the *Chevron* analysis, the court found that NOAA's interpretation was reasonable.[30] Thus, the court upheld the administrative law judge's findings that plaintiffs violated the MMPA by intentionally making set on live whales as supported by substantial evidence.[31]

4. *California Sea Urchin Commission v. Bean*

In 2012, the U.S. Fish and Wildlife Service (FWS) terminated the southern sea otter translocation program off the coast of California.[32] FWS began the translocation program in 1987 due to the otter's vulnerability to extinction from oil spills, environmental contamination, disease, shooting, and entanglement in fishing gear.[33] Under the program, the creation of which was authorized by Congress, FWS would relocate southern sea otters found in waters south of Santa Barbara and north of the Mexico border, the "management zone," to California's Nicolas Island.[34] But due to unexpectedly high levels of deaths, disappearances of translocated otters, and slow growth of the new colony, FWS halted translocation efforts in 1991 and suspended the capture and removal of sea otters from the management zone in 1993.[35] Commercial fishing groups filed suit, but the court held they lacked standing.[36] The court held that any alleged injuries that might result from reduced shellfish stocks caused by the sea otters' consumption of shellfish in the former management zone will not be redressed by their lawsuit.[37] Even if the groups did have standing, the court found the groups' claims lacked merit because FWS had the discretion to both commence and cease implementation of the program under the ESA.[38]

5. *Georgia Aquarium, Inc. v. Pritzker*

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[26] *Id.* at *19.
[27] *Id.* at *22 (referring to 16 U.S.C. § 1371(a)(5)(A)).
[28] No. 14-782 (CKK), 2015 U.S. Dist. LEXIS 104694, at *16 (D.D.C. Aug. 10, 2015).
[29] *Id.* at *50-51 (referring to 50 C.F.R. § 229.2).
[30] *Id.* at *51-55; *see also* Chevron v. Nat. Res. Defense Council, Inc., 467 U.S. 837 (1984).
[31] *Black*, 2015 U.S. Dist. LEXIS 104694, at *93-98.
[32] No. CV 14-8499-JFW (CWx), 2015 U.S. Dist. LEXIS 136453, at *8-9 (C.D. Cal. Sept. 18, 2015).
[33] *Id.* at *4-5.
[34] *Id.* at *7.
[35] *Id.* at *7-9.
[36] *Id.* at *16.
[37] *Cal. Sea Urchin Comm'n*, 2015 U.S. Dist. LEXIS 136453, at *16-18.
[38] *Id.* at *31.

The Georgia Aquarium applied for a permit under the MMPA to import eighteen beluga whales from Russia for use in a United States breeding cooperative and for public display.[39] After a notice and comment period, NMFS denied the permit for failure to satisfy the MMPA's issuance criteria.[40] NMFS based its denial on the fact that the Sakhalin-Amur stock of the whales is likely declining and is experiencing adverse impacts in addition to Russian live-capture operations.[41] Further, some of the beluga whales destined for import were potentially young enough to still be nursing and dependent upon their mothers.[42] The Aquarium challenged NMFS's decision to deny the permit.[43] The court held that NMFS was correct in following the statutory mandate of the MMPA because the MMPA requires permit applicants demonstrate that imports of marine mammals be consistent with the purpose of the MMPA and not diminish stocks below their optimum sustainable population.[44]

B. Legislative Developments

Senator Mike Crapo (R-ID) introduced a bill to amend the MMPA to require the Secretary of the Interior to issue a permit allowing the importation of polar bear parts (except internal organs) taken from a polar bear that was legally hunted for sport in Canada.[45] Several bills with a similar provision were also introduced in 2015.[46]

Representative Adam Schiff (D-CA) introduced a bill that would, in part, amend the MMPA to prohibit the taking, importation, and exportation of Orcas and Orca products for public display.[47]

Senator Bill Nelson (D-FL) introduced a bill "[t]o establish a moratorium on oil and gas-related seismic activities off the coastline of the State of Florida" until the Administrator of NOAA determines that the reasonably foreseeable impacts of such activities are minimal to individuals or populations of marine mammals, sea turtles, or fish.[48]

Representative Jaime Herrera Beutler (R-WA) introduced a bill to amend the MMPA to authorize NOAA to issue one-year permits to certain listed states and tribes for the lethal taking of sea lions that are part of a healthy population that is not listed as an endangered species or threatened species under the ESA in order to protect endangered and threatened species of salmon and other non-listed fish species.[49]

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[39]No. 1:13-CV-3241-AT, 2015 U.S. Dist. LEXIS 133566, at *4 (N.D. Ga. Sept. 28, 2015).
[40]*Id.* at *5-6.
[41]*Id.* at *65-67.
[42]*Id.* at *138-46.
[43]*Id.* at *8.
[44]*Ga. Aquarium, Inc.*, 2015 U.S. Dist. LEXIS 133566, at *21 (citing to MMPA regulations, 50 C.F.R. § 216.34(a)(4) and (7)).
[45]S. 561, 114th Cong. (2015).
[46]*See generally* S.B. 405, 114th Cong. § 103 (2015); S.B. 659, 114th Cong. § 4 (2015); S.B. 2406, 114th Cong. § 302 (2015); H.R. 326, 114th Cong. (2015); H.R. 327, 114th Cong. (2015); H.R. 2406, 114th Cong. §§ 301-02 (2015).
[47]H.R. 4019, 114th Cong. §§ 1-2 (2015).
[48]S.B. 1171, 114th Cong. § 2(b) (2015). Similar language was also introduced by Representative Patrick Murphy (D-FL) in H.R. 2276, 114th Cong. (2015), and Representative Bill Posey (R-FL) in H.R. 2279, 114th Cong. (2015).
[49]H.R. 564, 114th Cong. (2015).

C. Administrative Developments

NFMS proposed a rule to revise its regulations to implement the import provisions of the MMPA to establish conditions for evaluating a harvesting nation's regulatory program for reducing marine mammal incidental mortality and serious injury in fisheries that export fish and fish products to the United States.[50]

NMFS released a final rule issuing the regulations under the MMPA to govern the unintentional taking of marine mammals incidental to training and testing activities conducted in the Northwest Training and Testing (NWTT) Study Area from November 2015 through November 2020.[51]

NOAA issued a proposed rule to expand the boundaries and scope of the Hawaiian Islands Humpback Whale National Marine Sanctuary in order to transition the sanctuary from a single-species management approach to an ecosystem-based management approach.[52]

NMFS proposed a rule to amend the regulations implementing the Atlantic Large Whale Take Reduction Plan.[53]

III. POLAR BEARS, SEA TURTLES, SALMON, AND THE ENDANGERED SPECIES ACT

A. Judicial Developments

1. *Center for Biological Diversity v. Export-Import Bank of the United States*

The Endangered Species Act (ESA) requires that each federal agency insure that funded actions not jeopardize the continued existence of any endangered or threatened species or its habitat.[54] FWS and NFMS originally promulgated a joint regulation to extend this to actions taken in foreign nations, but revised the regulation in 1986 "to require consultation only for actions taken in the United States or upon the high seas."[55] This case challenges the "Ex-Im Bank's decision to provide nearly $4.8 billion [USD] in financing for the development and construction of two liquefied natural gas ('LNG') projects" in Queensland, Australia.[56] The projects would involve installing a 300-mile pipeline to transport the LNG to shore, where it would then be shipped to "destinations abroad through the Great Barrier Reef and high seas, [which is] habitat for dugongs, sea turtles, and several ESA-listed whales."[57] In considering the Ex-Im Bank's motion to

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[50]Fish and Fish Product Import Provisions of the Marine Mammal Protection Act, 80 Fed. Reg. 48,171 (Aug. 11, 2015) (to be codified at 15 C.F.R. pt. 902 and 50 C.F.R. pt. 216).

[51]Takes of Marine Mammals Incidental to Specified Activities; U.S. Navy Training and Testing Activities in the Northwest Training and Testing Study Area, 80 Fed. Reg. 73,555 (Nov. 24, 2015) (to be codified at 50 C.F.R. pt. 218).

[52]Proposed Expansion, Regulatory Revision and New Management Plan for the Hawaiian Islands Humpback Whale National Marine Sanctuary, 80 Fed. Reg. 16,223 (Mar. 26, 2015) (to be codified at 15 C.F.R. pt. 922).

[53]Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations, 80 Fed. Reg. 14,345 (Mar. 19, 2015) (to be codified at 50 C.F.R. pt. 229).

[54]No. C 12-6325 SBA, 2015 U.S. Dist. LEXIS 21481, at *11 (9th Cir. Feb. 20, 2015) (citing to ESA, 16 U.S.C. § 1536(a)(2)).

[55]*Id.* at *12 (citing 43 Fed. Reg. 870,874 (1978) and 51 Fed. Reg. 19,926, 19,929-30 (1986)).

[56]*Id.* at *4.

[57]*Id.* at *5.

dismiss, the court found that "agency action" under the ESA is broadly interpreted, so that even though the projects will occur in Australia and its territorial seas, post-construction shipping activities will occur upon the high seas such that it is plausible Ex-Im Bank violated the ESA.[58]

2. *Protect Our Lakes v. United States Army Corps of Engineers*

The U.S. Army Corps of Engineers (Corps) granted a Clean Water Act (CWA) Permit for a construction project of a wind farm, "authorizing it to permanently and temporarily fill certain wetlands and streams during construction."[59] The project impacted wildlife habitats, including the Atlantic salmon.[60] The court reviewed the final administrative action issuing the permit to consider whether the Corps violated, among other things, the ESA, when the Corps completed an analysis of the potential take of Atlantic salmon done without complete information and without issuing an incidental take statement.[61] The court found that the ESA requires the best scientific data available, but it does not require agencies to have complete information before acting, and therefore, found that the Corps' reliance on FWS's letter of concurrence neither arbitrary nor capricious where plaintiffs did not point to new information that challenged FWS's conclusions.[62] Furthermore, the court determined that the ESA requires an incidental take statement only when incidental take may occur.[63] The record did not indicate that take of Atlantic salmon was a possibility; the court granted summary judgment to defendants on the ESA claims.[64]

3. *Klamath-Siskiyou Wildlands Center v. NOAA*

Plaintiffs alleged that FWS and NMFS improperly issued fifty-year incidental take permits to take two "threatened" species, including the Southern Oregon/Northern California Coast coho salmon.[65] The court considered whether NMFS made an arbitrary and capricious finding in its biological opinion (BiOp) when it failed to account for the coho salmon's three-year lifespan in the "no jeopardy" analysis.[66] Because NMFS did not adequately analyze the short-term impacts of logging on the coho salmon and did not take into consideration the short lifespan of the coho salmon, the court invalidated the BiOp as well as the accompanying incidental take statement.[67]

4. *McKenzie Flyfishers v. McIntosh*

Plaintiffs sought to compel the Oregon Department of Fish and Wildlife (ODFW) to comply with the ESA in operating the McKenzie Hatchery, which is funded by the Corps.[68] At the hatchery, ODFW spawns, raises, and releases spring Chinook salmon

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[58] *Id.* at *20.
[59] No. 1:13-cv-402-JDL, 2015 U.S. Dist. LEXIS 21295, *2 (D. Me. Feb. 20, 2015).
[60] *Id.* at *3.
[61] *Id.* at *8, *11.
[62] *Id.* at *9-11.
[63] *Id.* at *12-13 (citing to 50 C.F.R. § 402.14(g)(7)).
[64] *Protect Our Lakes*, 2015 U.S. Dist. LEXIS 21295, at *13.
[65] 99 F. Supp. 3d 1033, 1037 (N.D. Cal. 2015) (the other species at issue was the northern spotted owl).
[66] *Id.* at 1037-38.
[67] *Id.* at 1057-59.
[68] No. 6:13-cv-02125-TC, 2015 U.S. Dist. LEXIS 31030, *2 (D. Or. Mar. 13, 2015).

smolts into the McKenzie River basin, and plaintiffs argued the release adversely affects the productivity and recovery of wild spring Chinook salmon by competing with the wild salmon for food, habitat, and spawning space, which results in a take of the wild salmon.[69] The court found that defendants' actions were protected from ESA section 9 liability because defendants are in "express compliance" with the RPA and the BiOp and incorporated incidental take statement and because NMFS had not yet approved the 2014 Hatchery and Genetics Management Plan.[70]

5. *N.C. Fisheries Association v. Pritzker*

Plaintiff nonprofit corporations filed suit alleging that the recreational hook and line fishery poses a known threat to sea-turtle conservation, a violation of the ESA, and defendants have failed to take action, ignoring scientific data that shows the "significant numbers of illegal takes of protected sea turtles."[71] The court found that plaintiffs lacked standing for failing to allege either an economic or environmental injury sufficient to establish standing.[72] Further, the court held plaintiffs could not establish representational standing.[73] Even had plaintiffs had standing, the court determined that plaintiffs failed to state a claim upon which relief could be granted because they failed to allege that the federal defendants played any role in the activity.[74]

6. *Oceana, Inc. v. Pritzker*

Oceana challenged "a Biological Opinion [(BiOp)] issued by [NMFS], in which NMFS ha[d] determined that the combined operation of seven fisheries is not likely to jeopardize the continued existence of the Northwest Atlantic Distinct Population Segment of loggerhead sea turtles."[75] While the court declined to vacate the BiOp, it did remand the matter to NMFS to address the concerns around climate change.[76] In particular, the court found that the BiOp failed to sufficiently explain "the link between the substantial evidence of significant short-term climate change effects, which the BiOp acknowledges, and the agency's ultimate conclusion that any short-term impacts on loggerheads will be negligible."[77] The court also determined that NMFS needed to provide a further explanation of the sufficiency of its monitoring mechanisms.[78]

B. Administrative Developments

NMFS issued a proposed rule to revise the listing status of the humpback whale (*Megaptera novaeangliae*) under the ESA to divide the globally listed endangered

[69] *Id.* at *3.
[70] *Id.* at *18.
[71] No. 4:14-CV-138-D, 2015 U.S. Dist. LEXIS 95425, at *3, *5-6 (E.D.N.C. July 22, 2015).
[72] *Id.* at *15-17.
[73] *Id.* at *19-20.
[74] *Id.* at *23-26.
[75] No. 12-0041 (PLF), 2015 U.S. Dist. LEXIS 115039, at *1 (D.D.C. Aug. 31, 2015).
[76] *Id.* at *53.
[77] *Id.* at *46.
[78] *Id.* at *49-53.

species into fourteen distinct population segments (DPSs), remove the current species-level listing, and in its place list two DPSs as endangered and two DPSs as threatened.[79]

NMFS re-proposed a rule to designate critical habitat for the Arctic subspecies (*Phoca hispida hispida*) of the ringed seal (*Phoca hispida*) under the ESA.[80]

IV. DEEP SEABED MINING, CONTINENTAL SHELF DELINEATION, THE ARCTIC, AND OTHER ISSUES UNDER THE 1982 UNCLOS

A. Deep Seabed Mining

During the twenty-first session of the International Seabed Authority (ISA), it was noted that five new contracts had been approved for deep seabed exploration work in areas of the seabed beyond national jurisdiction over the past year.[81] Two of the contracts were for exploration for polymetallic nodules by Marawa Research & Exploration Limited and Ocean Mineral Singapore Private Limited Company, and both were for reserved areas in the Clarion-Clipperton Fracture Zone of the Pacific Ocean. Another two of the contracts were for exploration for polymetallic sulfides by IFREMER in an area on the mid-Atlantic Ridge and by the Federal Institute for Geosciences and Natural Resources of Germany in the Central Indian Ridge and South-east Indian Ridge. The final contract was for exploration for cobalt-rich ferromanganese crusts by the Ministry of Natural Resources and Environment of the Russian Federation in an area on the Magellan Mountains in the Pacific Ocean.

During the twenty-first session, the ISA adopted procedures and criteria for extension of contracts as a number of contracts will be expiring during the next few years.[82] The ISA also continues to develop exploitation regulations; a plan and timeline for the regulations are expected in July 2016. A complete exploitation code, including guidelines and recommendations, is expected to evolve over time as more information becomes available.[83]

Deep seabed mining prospects also continue within a number of countries' Exclusive Economic Zones (EEZs). Nautilus Minerals' Solara 1 Project is moving toward production in the Papua New Guinea EEZ and is expected to begin in early 2018.[84] Discussions continue in a number of countries regarding deep sea mining possibilities within their respective EEZs.

B. Continental Shelf Delineation

The Commission on the Limits of the Continental Shelf, a commission established under the authority of the United Nations Convention on the Law of the Sea, considered a

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[79]Endangered and Threatened Species; Identification of 14 Distinct Population Segments of the Humpback Whale (*Megaptera novaeangliae*) and Proposed Revision of Species-Wide Listing, 80 Fed. Reg. 22,303 (Apr. 21, 2015) (to be codified at 50 C.F.R. pts. 223 and 224).

[80]Endangered and Threatened Species; Designation of Critical Habitat for the Arctic Ringed Seal, 79 Fed. Reg. 73,010 (Dec. 9, 2014) (to be codified at 50 C.F.R. pt. 226).

[81]Press Release, International Seabed Authority, SB/21/17, International Seabed Authority Concludes 21st Annual Session (July 24, 2015).

[82]*Id.*

[83]*Id.*

[84]Press Release, Nautilus Minerals Inc., Steel Cutting Marks Start of Physical Construction of Nautilus' Production Support Vessel (Sept. 28, 2015).

number of submissions in the past year by member nations seeking recognition of claims over extended areas of the continental shelf. The Commission continued its review of several submissions, including those by Uruguay; the Cook Islands, with respect to the Manihiki Plateau; Argentina; Pakistan; Norway, with respect to Bouvetøya and Dronning Maud Land; South Africa; the Federated States of Micronesia, Papua New Guinea, and Solomon Islands, with respect to the Ontong Java Plateau; France and South Africa, with respect to the Crozet Archipelago and Prince Edward Islands; and Mauritius, with respect to Rodrigues Island.[85]

The Commission issued recommendations regarding Pakistan's submission, which establish the outer edge of the continental margin to guide the delineation of the outer limits of Pakistan's continental shelf.[86] Review of the submissions from Argentina and the Cook Islands was completed, but the Commission has not yet issued recommendations.[87]

Two new claims were submitted in the past year. Denmark submitted a claim addressing the Northern Continental Shelf of Greenland.[88] Spain submitted a claim addressing the area west of the Canary Islands.[89] In addition, two partial revised submissions were submitted in the past year. The Russian Federation submitted a partial revised submission addressing the Arctic Ocean.[90] Brazil submitted a partial revised submission addressing the Brazilian Southern Region.[91]

As the United States is not an official member of the Commission, it can only observe and comment on other nations' submissions. However, at a hearing on November 17, 2015, before the House Committee on Foreign Affairs, Admiral Robert J. Papp, Jr.,

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[85]Press Release, Commission on the Limits of the Continental Shelf, Commission on Limits of Continental Shelf Concludes Thirty-Seventh Session, U.N. Press Release SEA/2014 (Mar. 23, 2015).

[86]Commission on the Limits of the Continental Shelf, Summary of Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Submission Made by the Islamic Republic of Pakistan on 30 April 2009 (March 13, 2015).

[87]Press Release, Commission on the Limits of the Continental Shelf, Commission on Continental Shelf Limits Concludes Thirty-Eighth Session, U.N. Press Release SEA/2021 (Sept 16, 2015).

[88]Comm'n on the Limits of the Cont'l Shelf (CLCS), U.N., *Outer Limits of the Continental Shelf: Submission by the Kingdom of Denmark*, U.N. OCEAN AFFAIRS & LAW OF THE SEA, http://www.un.org/Depts/los/clcs_new/submissions_files/submission_dnk_76_2014.htm (last updated Nov. 2, 2015) (Denmark submitted to the Comm'n on Dec. 15, 2014).

[89]Comm'n on the Limits of the Cont'l Shelf (CLCS), U.N., *Outer Limits of the Continental Shelf: Submission by the Kingdom of Spain*, U.N. OCEAN AFFAIRS & LAW OF THE SEA, http://www.un.org/Depts/los/clcs_new/submissions_files/submission_esp_77_2014.htm (last updated Aug. 10, 2015) (Spain submitted to the Comm'n on Dec. 17, 2014).

[90]Comm'n on the Limits of the Cont'l Shelf (CLCS), U.N., *Outer Limits of the Continental Shelf: Partial Revised Submission by the Russian Federation*, U.N. OCEAN AFFAIRS & LAW OF THE SEA, http://www.un.org/Depts/los/clcs_new/submissions_files/submission_rus_rev1.htm (last updated Dec. 1, 2015) (Russia submitted revision to Comm'n on Aug. 3, 2015).

[91]Comm'n on the Limits of the Cont'l Shelf (CLCS), U.N., *Outer Limits of the Continental Shelf: Partial Revised Submission by Brazil*, U.N. OCEAN AFFAIRS & LAW OF THE SEA, http://www.un.org/Depts/los/clcs_new/submissions_files/submission_bra_rev.htm (last updated Apr. 13, 2015) (Brazil submitted revision to Comm'n on Apr. 10, 2015).

Special U.S. Representative for the Arctic, testified that "[t]he United States, like the other Arctic States, has made significant progress in determining its [Extended Continental Shelf] ECS."[92] Papp said that all of the necessary data has been collected, nine successful cruises were completed over twelve years, and four of these were joint with Canada. He also stressed that:

> Becoming a Party to the Law of the Sea Convention would help the United States maximize international recognition and legal certainty regarding the outer limits of the U.S. continental shelf, including off the coast of Alaska, where our ECS is likely to extend out to more than 600 nautical miles.[93]

C. Arctic Developments

The United States took over as Chair of the Arctic Council in 2015 and will remain Chair until 2017. The Council is a high-level intergovernmental forum intended to promote cooperation and coordination between eight Arctic nations. The United States' chairmanship theme is "One Arctic: Shared Opportunities, Challenges, and Responsibilities."[94] The U.S. chairmanship program has three focus areas: (1) improving economic and living conditions for Arctic communities; (2) Arctic Ocean safety, security, and stewardship; and (3) addressing the impacts of climate change.[95]

At the November 2015 Arctic hearing, Admiral Papp also reported that the Arctic Council is prioritizing emergency response among the Arctic States; is working to prevent suicide, especially among youth, in the Arctic region, including Alaska; and is moving to fully implement the Framework for Action on Enhanced Black Carbon and Methane Emissions.[96] Finally, the Coast Guard stressed at the same hearing that it has only two polar icebreakers—compared to forty for Russia—but that President Obama has announced the Administration's intention to "accelerate the acquisition of a replacement heavy polar icebreaker and begin planning for construction of additional icebreakers."[97] However, it is not clear with the budget constraints placed on the Department of Homeland Security (home to the Coast Guard), among other government agencies, where the funding would come from.

Oil exploration and development activities in the Arctic have decreased over the past year. Shell announced that it will cease further exploration activity in offshore

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[92]*Charting the Arctic: Security, Economic, and Resource Opportunities: Before the Subcomm. on Europe, Eurasia, and Emerging Threats and the Subcomm. on Western Hemisphere of the H. Comm. On Foreign Affairs*, 114th Cong. 19 (2015) (statement of Admiral Robert Papp, Jr., Special Rep. for the Arctic, U.S. Dep't of State) [hereinafter *Charting the Arctic Hearing*].

[93]*Id.* at 20.

[94]*See* ARCTIC COUNCIL, ONE ARCTIC, U.S. CHAIRMANSHIP 2015-2017, *available at* http://www.arctic-council.org/images/PDF_attachments/US_Chairmanship/Chairmanship_Brochure_2_page_public.pdf.

[95]*U.S. Chairmanship*, ARCTIC COUNCIL, http://www.arctic-council.org/index.php/en/about-us/arctic-council/u-s-chairmanship (last visited Feb. 7, 2016).

[96]*Charting the Arctic Hearing*, *supra* note 92, at 13-16.

[97]*Charting the Arctic Hearing*, *supra* note 92, at 27 (statement of Vice Admiral Charles D. Michel, Vice Commandant, U.S. Coast Guard).

Alaska for the foreseeable future.[98] Shell noted that the decision was made based on poor well results, high costs associated with the project, and the challenging and unpredictable federal regulatory environment in offshore Alaska. The U.S. Department of Interior also announced that it was cancelling the two potential Arctic offshore lease sales scheduled under its oil and gas leasing program. The press release stated that "[i]n light of Shell's announcement, the amount of acreage already under lease and current market conditions, it does not make sense to prepare for lease sales in the Arctic in the next year and a half."[99]

During its 68th session, the International Maritime Organization's Marine Environmental Committee adopted the environmental provisions of the International Code for Ships Operating in Polar Waters (Polar Code), along with draft amendments to the International Convention for the Prevention of Pollution from Ships (MARPOL), which will make the Polar Code mandatory.[100] The Polar Code and MARPOL amendments are expected to enter into force January 1, 2017.

D. 1982 Law of the Sea Convention

Secretary of State John Kerry continues to advocate for the United States to ratify the United Nations Law of the Sea Convention (UNCLOS). However, little progress has been made since he was unable to secure the two-thirds vote needed for ratification in 2013 prior to leaving the Senate. The U.S. Envoy to the Arctic, retired Coast Guard Commandant, Robert Papp has also stressed in hearings before the Congress how important ratifying UNCLOS would be to the accomplishment of U.S. claims to an extended continental shelf in the Arctic.[101]

V. COASTAL ZONE MANAGEMENT ACT AND MARINE ZONING

A. Judicial Developments

In *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, the Supreme Court of South Carolina addressed whether a proposed bulkhead and revetment comply with the requirements of the Coastal Zone Management Act.[102] The case addressed a residential development planned by the plaintiff and a proposed bulkhead and concrete block revetment that would extend 2,783 feet along the Stono River near where it empties into the Atlantic Ocean. The defendant, South Carolina Department of Health and Environmental Control, issued a permit that allowed construction of the bulkhead and revetment, but only for a 270-foot section adjacent to a county park. An administrative law court later granted a permit for the entire bulkhead and revetment, concluding that the structure would not violate any applicable statutes or regulations, including the Coastal Zone Management Act (CZMA).

The Supreme Court of South Carolina ruled that the administrative law court erred in finding that the proposed bulkhead and revetment comply with the CZMA. The court found that the administrative law court made no findings of public benefit that would result from the bulkhead or revetment. Rather, the court found that the

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[98] Press Release, Shell Global, Shell Updates on Alaska Exploration (Sept. 28, 2015).
[99] Press Release, U.S. Dep't of Interior, Interior Department Cancels Arctic Offshore Lease Sales (Oct. 16, 2015) (internal quotations omitted).
[100] Press Release, Int'l Maritime Org., Polar Code Adopted (May 18, 2015).
[101] *Charting the Arctic Hearing*, *supra* note 92, at 19-20 (statement of Admiral Robert Papp, Jr., Special Rep. for the Arctic, U.S. Dep't of State).
[102] 766 S.E.2d 707 (S.C. 2014).

construction would benefit a private developer, not the public. The court further stated that the administrative law court wrongly found that erosion has no positive benefit for anyone. The court reversed and remanded for further consideration.

B. Marine Spatial Planning Developments

Marine spatial planning for areas of the U.S. Exclusive Economic Zone (EEZ) has slowed, partly due to Congressional opposition and concern that it could add a layer of regulation to existing federal regulations. However, some states continue to work on plans for their own waters. This year, the first foundations were placed in the water to support a wind farm offshore of Block Island, Rhode Island. The location of the farm, developed by Deepwater Wind, was made possible by Rhode Island's previous development of an Ocean Special Area Management Plan (SAMP), which established a renewable energy zone around Block Island.[103]

[103]Offshore Wind Energy, STATE OF RHODE ISLAND: OFFICE OF ENERGY RESOURCES, http://www.energy.ri.gov/renewable/offshore/ (last visited Feb. 7, 2016).

Chapter 16 • MINING AND MINERAL EXTRACTION
2015 Annual Report[1]

I. CASE LAW DEVELOPMENTS

A. Clean Water Act Section 404

In evaluating section 404 Clean Water Act (CWA)[2] permits, the United States Army Corps of Engineers (USACE) specifies an area "for the discharge of dredged or fill material" by evaluating the environmental effects on the disposal site pursuant to section 404(b)(1) of CWA guidelines.[3]

In *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*, the district court initially held that plaintiff's claims were barred by laches, but in the alternative, still addressed plaintiff's substantive claims.[4] The plaintiff challenged USACE's section 404 nationwide permit (NWP) 21 that provides a streamlined permitting process for dredge and fill activities related to surface coal mining. USACE was found to have satisfactorily completed the cumulative effects analysis, to have relied on the 2007 analysis, and to have properly considered compensatory mitigation. The district court also held that "compensatory mitigation has a sufficient factual basis."[5]

Plaintiff appealed and the Eleventh Circuit reversed.[6] The Eleventh Circuit held that the district court had improperly ruled that laches barred plaintiff's suit because the delay in filing suit was minimal and "the bare and insubstantial allegations of prejudice" did not outweigh the potential environmental benefits.[7] As to the substantive claims, on the eve of oral argument before the Eleventh Circuit, USACE realized that it had miscalculated the impacts of projects under NWP 21. USACE therefore conceded that the district court should be reversed and the matter remanded to USACE to properly consider impacts under NWP 21.[8]

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[1]Editors and Authors: Joseph L. Jenkins, Lewis Glasser Casey & Rollins, Charleston, West Virginia; and Michael R. McCarthy, Parsons Behle & Latimer, Salt Lake City, Utah. Mr. McCarthy gives special thanks to the Rocky Mountain Mineral Law Foundation (Rocky) for material contributed by him that was adapted from Rocky's Mineral Law Newsletter.

[2]33 U.S.C. § 1344 (2012).

[3]*Id.* § 1344(b); Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 C.F.R. pt. 230 (2014).

[4]23 F. Supp. 3d 1373, 1380, 1387 (N.D. Ala. 2014) (explaining permittees would suffer unfair prejudice from plaintiff's unexcused delay of nine to ten months between permit reauthorizations and filing suit).

[5]*Id.* at 1388; *but see* Kentucky Riverkeeper, Inc. v. Rowlette, 714 F.3d 402, 413 (6th Cir. 2013) (invalidating NWP 21 because USACE failed to properly address past actions in its cumulative impacts analysis; lack of documentation mitigation will minimize cumulative impacts).

[6]Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engr's, 781 F.3d 1271 (11th Cir. 2015).

[7]*Id.* at 1283, 1286.

[8]*Id.* at 1275.

B. Clean Water Act's Permit Shield

1. Applicability to General Permits

In *Sierra Club v. ICG Hazard, LLC*,[9] the plaintiffs sued under the CWA, arguing that the defendant discharged selenium exceeding Kentucky's water quality standards in violation of the CWA and the Surface Mining Control and Reclamation Act (SMCRA). The mine's National Pollutant Discharge Elimination System (NPDES) general permit did not contain an effluent limitation for selenium. The district court held that because the general permit did not set selenium discharge limits, the defendant could discharge selenium as long as it made the required disclosures, and determined that the CWA's permit shield protected the defendant from CWA liability. As for SMCRA, the district court held that enforcing water quality standards using SMCRA would impermissibly supersede the CWA permit shield protection that the defendant was entitled to under the CWA.[10] On appeal, the plaintiff argued that the general permit did not expressly or implicitly approve of selenium discharges in violation of state standards, and that even if the CWA permit shield did apply, the discharges violated SMCRA because such a determination would not conflict with the CWA.[11]

Following Fourth Circuit case law,[12] the Sixth Circuit rejected the plaintiff's argument that the permit shield may only apply if the pollutants at issue are explicitly listed in the general permit. Instead, the court applied the deference test of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[13] and held that the statute was ambiguous because the scope of the permit shield exception was not clear. The court found the Environmental Protection Agency's (EPA) statutory interpretation—allowing some pollutants to be discharged even though not specifically listed in the general permit—reasonable and held that the defendant satisfied the CWA permit shield, which prevented CWA liability for the selenium discharge. In particular, the court noted that because the permitting authority "knew at the time it issued the general permit that the mines in the area could produce selenium, . . . selenium discharges were within [the permitting authority]'s reasonable contemplation."[14]

The Sixth Circuit also rejected the plaintiff's argument that the selenium discharge violated the terms of the defendant's SMCRA mining permit. The court noted in another case that SMCRA states "[n]othing in this [Act] shall be construed as superseding, amending, modifying, or repealing" the CWA or rules or regulations promulgated thereunder.[15] Relying on *In re Surface Mining Regulation Litigation*, the court interpreted this language to mean that "Congress intended regulation under the CWA and regulation under [SMCRA] to be complementary." The court reasoned that "[w]here regulation under the CWA is silent, regulation under [SMCRA] is permissible, but where there is regulatory overlap, [SMCRA] expressly directs that the CWA and its regulatory framework control, so as to afford consistent standards nationwide."[16] Accordingly, rather than a "regulatory gap" in which SMCRA would apply, the CWA

[9]781 F.3d 281 (6th Cir. 2015).
[10]*Id.* at 282-83.
[11]*Id.* at 283, 290-91.
[12]Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carrol Cnty., 268 F.3d 255, 258, 268-69 (4th Cir. 2001).
[13]467 U.S. 837, 842-43 (1984).
[14]*Sierra Club*, 781 F.3d at 286-90.
[15]*In re* Surface Mining Regulation Litigation, 627 F.2d 1346, 1366 (D.C. Cir. 1980).
[16]*Sierra Club*, 781 F.3d at 291.

controlled because it addressed the situation through the permit shield—protection from liability due to the general NPDES permit.[17]

2. West Virginia Attempts to Fix Its Unique Permit Shield

As noted in last year's chapter, West Virginia incorporates into its mining NPDES permits a condition that discharges shall not cause a violation of water quality standards.[18] Due to this provision, West Virginia courts have consistently held that a discharge of a pollutant that violates water quality standards violates the terms of the permit, even if the pollutant was contemplated and the agency chose not to impose limits for the pollutant. Since the violation of the terms of a permit disqualifies the permittee from asserting the permit shield, this condition in West Virginia NPDES permits effectively nullified the CWA permit shield.[19]

In order to make the permit shield available again to mining permittees, the rule was changed to eliminate the condition that effectively nullified the permit shield.[20] Unfortunately for the defendant in *Ohio Valley Environmental Coalition v. Fola Coal Co.*, the court held that the rule change was inapplicable.[21] The court explained: 1) that the rule change was ineffective until it was approved by the EPA; and 2) that even if the EPA eventually approved the change, the rule change alone was insufficient to modify the conditions of a permit, and, therefore, the permit would have to be modified in accordance with the appropriate procedures in order to incorporate the rule change.[22]

C. Section 402 NPDES Permits, Conductivity, and Surface Mining in Appalachia

Also explained in last year's chapter, there is a group of cases continuing to get larger every year that involves citizen suits brought against mining operators due to increased conductivity, which is used to evaluate violations of the biological narrative water quality standards under the CWA.[23] The court found that the "overwhelming scientific evidence" indicates that:

> (1) controlling for other potential confounding factors, high conductivity in streams causes or at least materially contributes to a significant adverse impact to the chemical and biological components of aquatic ecosystems—proof of which can be shown through low [bioassessment]

[17] *Id.* at 290-91.
[18] W. VA. CODE R. § 47-30-5.1.f (2013); *see also* Joseph L. Jenkins, et al., *Mining and Mineral Extraction*, ABA ENV'T, ENERGY & RES. L., THE YEAR IN REVIEW 2014 at 171 (2015).
[19] *See, e.g.*, Ohio Valley Envtl. Coal. v. Marfork Coal Co., 966 F. Supp. 2d 667, 671, 677 (S.D. W. Va. 2013); Ohio Valley Envtl. Coal. v. Elk Run Coal Co., 2014 U.S. Dist. LEXIS 509, at *25-28 (S.D. W. Va. Jan. 3, 2014).
[20] W. VA. CODE R. § 47-30-5.1.f (2015).
[21] No. 2:13-215188, 2015 U.S. Dist. LEXIS 69457, at *32 (S.D. W. Va. May 29, 2015).
[22] *Id.* at *42-44.
[23] Ohio Valley Envtl. Coal. v. Elk Run Coal Co., 24 F. Supp. 3d 532, 536 (S.D. W. Va. 2014); Ohio Valley Envtl. Coal. v. Fola Coal Co., No. 2:13-5006, 2014 U.S. Dist. LEXIS 138708, at *1 (S.D. W. Va. Sept. 30, 2014); *see also Mining and Mineral Extraction*, *supra* note 18, at 172 (2015).

scores—and (2) surface mining causes—or at least materially contributes to—high conductivity in adjacent streams.[24]

However, conductivity is not considered a pollutant. Conductivity measures ionic pollution. The ions are pollutants known to cause violations of narrative water quality standards because of their impact upon aquatic life. A common set of ions dominates alkaline mine drainage where high conductivity is observed. "Thus, while conductivity may not generally be considered a pollutant, in this unique and well-studied region, it is a reasonable proxy for specific ionic pollutants known to cause violations of West Virginia's narrative water quality standards."[25]

Continuing this line of cases, the U.S. District Court for the Southern District of West Virginia found that discharges of high levels of ionic pollution, as measured by conductivity, violated the narrative water quality standards incorporated into the NPDES permits.[26] Accordingly, the court found plaintiffs had shown defendant had committed at least one violation of its permit.

In the second phase of *Fola II*, a trial was held to determine the appropriate injunctive and/or civil penalty relief for the defendant's violation of its NPDES permit.[27] The plaintiffs decided not to seek civil penalties, and the court decided injunctive relief was appropriate to address defendant's violations of its NPDES permit. The parties submitted different proposals to address the violations that differed substantially in cost.[28] Instead of deciding then which proposal the court should incorporate into its injunctive relief, the court appointed a special master to assist in determining the appropriate remedy.[29]

D. Mining on Public Lands

1. Mine Claim Validity

In *Freeman v. United States Department of the Interior*,[30] the plaintiff challenged the Interior Board of Land Appeals' (IBLA) affirmance of the Bureau of Land Management's (BLM) mine claim validity determination that the plaintiff had not established the discovery of a valuable mineral deposit. The plaintiff owned 161 nickel placer and association placer claims, and he applied for a mineral patent on 151 of the claims in September 1992, before Congress imposed the patent moratorium effective October 1, 1994.[31] The moratorium prevented the BLM's review and processing of plaintiff's patent application. The BLM, however, commenced a validity determination, and the administrative law judge ruled "that the plaintiff had 'failed to establish . . . a

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[24]*Elk Run*, 24 F. Supp. 3d at 562-63. *Contra* Sierra Club v. Patriot Mining Co., No. 13-0256, 2014 W. Va. LEXIS 591, at *22 (May 30, 2014) (explaining that there is inadequate agreement in the scientific community to trigger a reasonable potential analysis for conductivity).
[25]*Fola*, 2014 U.S. Dist. LEXIS 138708, at *33.
[26]Ohio Valley Envtl. Coal. v. Fola Coal Co., 82 F. Supp. 3d 673, 699 (S.D. W. Va. 2015).
[27]Ohio Valley Envtl. Coal. v. Fola Coal Co., No. 2:13-5006, 2015 U.S. Dist. LEXIS 139507, at *1, n.1, *7 (S.D. W. Va. Oct. 14, 2015).
[28]*Id.* at *11-13 (plaintiffs' proposal was estimated to cost $136 million versus defendant's proposal at $164,000).
[29]*Id.* at *13-14.
[30]83 F. Supp. 3d 173 (D.D.C. 2015).
[31]*Id.* at 179.

discovery of a valuable mineral deposit.'"[32] The IBLA affirmed. The plaintiff then sued the Department of the Interior, the BLM, and the IBLA under the Administrative Procedures Act (APA) challenging the determination that plaintiff had not made a discovery of a valid mineral deposit.[33]

To satisfy the validity requirement, "the discovered deposits must be of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine."[34] Using its Mineral Commodity Price Policy (MCP), the BLM applied a six-year average for the price of nickel when determining the value of the mineral deposit at two different points in time: October 1994 (the date of the patent moratorium) and October 2000 (the date plaintiff's plan of operations was denied). The issue was critical because the MCP price for October 1994 was $3 per pound, and for October 2000, it was $2.93 per pound. But at the time of the contest proceedings before the administrative law judge, the nickel price was $21.00 per pound. After taking testimony and other evidence, the administrative law judge held that the plaintiff had not submitted evidence justifying the use of a price higher than the MPC.[35] The IBLA affirmed, finding that the evidence did not support a price over $4.00 per pound. The court affirmed, holding that "the IBLA did not substitute the MCP in place of the prudent-person standard, but instead determined that the expected price of nickel resulting from the MCP was consistent with the price a prudent person would use in evaluating whether to proceed with the development of a claim."[36]

2. Conflicting Mining Claims

In *Clayton Valley Minerals, LLC*,[37] the IBLA heard an appeal by Clayton Valley Minerals, LLC (CVM) challenging the BLM's decision to deny its potassium prospecting permit application for northwestern Nevada. A different entity, Western Lithium Corporation (WLC), already held unpatented mining claims on the same land. The BLM determined that both CVM and WLC intended to mine the same target and therefore, there was a potential for conflicts. The BLM also prepared a Mineral Evaluation Report (MER) in which it concluded that "there was no reasonable expectation of finding a valuable deposit of potassium" in the conflict lands because "while clay deposits underlie the lands . . . and potassium may be associated with clay deposits, potassium was considered an incidental component."[38] Based on portions of the MER, the BLM denied CVM's exploration application, concluding that it was highly likely that CVM's proposed operations would materially interfere with WLC's.[39]

Despite the BLM's discretion to deny prospecting permits and its right to rely on its technical experts, the IBLA concluded that the BLM incorrectly found CVM's proposed operations were highly likely to materially interfere with WLC's operations. The IBLA noted that it was not certain whether CVM would find a potassium deposit,

[32] *Id.* at 176.
[33] *Id.*
[34] *Id.* at 182 (quoting United States v. Coleman, 390 U.S. 599, 602 (1968); citing Cameron v. United States, 252 U.S. 450, 459 (1920)).
[35] *Freeman*, 83 F. Supp. 3d at 184.
[36] *Id.* at 185. The plaintiff filed an appeal, which is being heard by the Court of Appeals for the D.C. Circuit, with briefing due to be complete before the end of 2015.
[37] 186 Interior Dec. 1, 1-2 (IBLA 2015).
[38] *Id.* at 7-9.
[39] *Id.* at 9.

and even if it did, the BLM could issue the prospecting permit with provisions that would allow the BLM to deny a preference right lease based on conflict.[40]

The IBLA also questioned the BLM's conclusion that CVM's operations would occur on the same lands as WLC's operations. The IBLA noted that CVM's four drill holes would not be at the same locations as WLC's; that they would be accessed by CVM's roads, not WLC's; and that all of WLC's holes had been drilled. The BLM's assertions of material interference were held as merely conclusory.[41] On CVM's claim that the BLM improperly denied its prospecting application because the BLM concluded that potassium was not found in sufficient qualities or quantities to constitute a commercially viable deposit, the IBLA stated that any such finding would be erroneous at the prospecting permit stage.[42]

II. REGULATORY DEVELOPMENTS

A. The EPA Declines to Regulate Coal Ash as Hazardous Waste

On December 19, 2014, the EPA issued a final rule for the regulation of coal combustion residuals (coal ash) as solid waste pursuant to subtitle D of the Resource Conservation and Recovery Act (RCRA).[43] The rule was issued in accordance with the consent decree approved in *Appalachian Voices v. McCarthy*.[44] The rule was officially published in the Federal Register on April 17, 2015.[45] It became effective October 19, 2015.[46] Petitions seeking judicial review of the rule have been filed.

B. Stream Protection Rule

In 2014, the district court sustained an environmental group's challenge to the Office of Surface Mining Reclamation and Enforcement's (OSMRE) 2008 revision to the stream buffer zone rule that had been in effect since 1983.[47] This resulted in the 2008 rule being vacated and the 1983 rule being reinstated.

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[40] *Id.* at 19-20.
[41] *Id.* at 21-23.
[42] 186 Interior Dec. at 27.
[43] Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities (Dec. 19, 2014) (to be codified at 40 C.F.R. pts. 257, 261) (Prepublication Version of Final Rule).
[44] Consent Decree, No. 1:12-cv-00523-RBW (D.D.C. Jan. 29, 2014).
[45] Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities, 80 Fed. Reg. 21,302 (Apr. 17, 2015) (to be codified at 40 C.F.R. pts. 257, 261).
[46] Technical Amendments to the Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities—Correction of the Effective Date, 80 Fed. Reg. 37,988 (July 2, 2015) (to be codified at 40 C.F.R. pt. 257).
[47] Nat'l Parks Conservation Ass'n v. Jewell, 62 F. Supp. 3d 7 (D.D.C. 2014); *see also* 30 C.F.R. §§ 816.57, 817.57 (2008); Surface Coal Mining and Reclamation Operations Permanent Regulatory Program; Stream Buffer Zones and Fish, Wildlife, and Related Environmental Values, 48 Fed. Reg. 30,312 (June 30, 1983) (to be codified at 30 C.F.R. pts. 816 and 817).

In response, the OSMRE went back to the drawing board and proposed a new rule now titled the "Stream Protection Rule."[48] The name change is telling because the OSMRE's proposed rule goes beyond just a stream buffer. The rule maintains the 100-foot buffer around perennial and intermittent streams, but it goes on to provide many more regulatory revisions, too numerous to mention in this brief summary, including defining "material damage to the hydrologic balance outside the permit area" and increasing baseline data collection and monitoring.[49] The OSMRE believes the expansive rule will "better protect streams, fish, wildlife, and related environmental values from the adverse impacts of surface coal mining[.]"[50] Conversely, industry, and many in Congress, have complained that the rule is a significant burden on coal mining, particularly in Appalachia.

C. U.S. Department of the Interior's Efforts to Limit Mining on Federal Land

The U.S. Department of the Interior (DOI) has taken two significant steps toward limiting mining on federal land. First, the DOI's BLM published a notice of proposed withdrawal of approximately 10 million acres spanning six states.[51] The lands are being withdrawn specifically from location and entry under United States mining laws. The public and national forest lands were identified as sagebrush focal areas and their withdrawal is aimed at protecting the greater sage-grouse. The notice segregates the land for up to two years while the withdrawal application is processed.[52]

Second, the DOI Secretary issued an order calling on the BLM to prepare a programmatic environmental impact statement (PEIS) to comprehensively review the federal coal program.[53] The goal is to modernize and improve the federal coal program by examining leasing, fair return to the public, climate and socio-economic impacts, exports and energy needs.[54] Until the PEIS has been prepared by the BLM, no new leases for thermal coal will be issued, unless an exclusion applies.[55]

D. Investing in Coal Communities, Workers, and Technology: The POWER+ Plan

The President's 2016 budget includes the POWER+ Plan, which targets investments in coal communities that have been hit hard by the recent downturn in the industry.[56] The plan includes a variety of proposals aimed at job creation, economic diversification, protection of miners' health care and pension plans, and carbon capture and sequestration. It also proposes to make available for the reclamation and economic

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[48]Stream Protection Rule, 80 Fed. Reg. 44,436 (July 27, 2015) (to be codified at 30 C.F.R. pts. 700, 701, 773, 774, 777, 779, 780, 783, 784, 785, 800, 816, 817, 824, and 827).
[49]*Id.* at 44,438-39.
[50]*Id.* at 44,346.
[51]Notice of Proposed Withdrawal; Sagebrush Focal Areas; Idaho, Montana, Nevada, Oregon, Utah, and Wyoming and Notice of Intent to Prepare an Environmental Impact Statement, 80 Fed. Reg. 57,635, 57,635, 57,637 (Sept. 24, 2015).
[52]*Id.* at 57,635.
[53]Sally Jewell, Sec'y, Dep't of the Interior, Order No. 3338 (Jan. 15, 2016).
[54]*Id.* at 7-8.
[55]*Id.* at 8-10.
[56]OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, THE PRESIDENT' S BUDGET FISCAL YEAR 2016 INVESTING IN COAL COMMUNITIES, WORKERS, AND TECHNOLOGY: THE POWER+ PLAN (2015).

development of abandoned mine lands $1 billion from the Abandoned Mine Reclamation Fund.

Chapter 17 • NATIVE AMERICAN RESOURCES
2015 ANNUAL REPORT[1]

I. LEGAL HEADLINES CONCERNING INDIAN COUNTRY

A. Overall Themes

Several recurring themes emerged this year. This article will sample cases rather than provide an exhaustive list because future Congressional or Supreme Court action on these issues is likely.

1. Challenges to the Indian Child Welfare Act

Several lawsuits have challenged the validity of the Indian Child Welfare Act (ICWA).[2] Perhaps the most notable of these is *Carter v. Washburn*,[3] also known as the "Goldwater Litigation," as it was filed and funded by the Goldwater Institute. The Goldwater Litigation is a class-action lawsuit challenging ICWA on the theory that it is an unconstitutional race-based law.[4] On October 16, 2015, the United States filed a motion to dismiss.[5] Several tribes have also requested permission to intervene in the case.[6] The case was prompted in part by the Bureau of Indian Affairs' (BIA's) issuance of new ICWA guidelines (discussed later in this chapter).

Another challenge to the new ICWA guidelines is *National Council for Adoption v. Jewell.*[7] Similarly, the United States filed a motion to dismiss.[8] On October 20, 2015, the court denied the Plaintiffs' motion for summary judgment, holding in part that the guidelines did not constitute a final agency action for purposes of the federal Administrative Procedures Act and that the plaintiffs did not have standing to challenge the guidelines.[9]

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[1]This Chapter, which addresses the year's significant cases and developments in Native American Resources, was prepared by attorneys and staff of Hobbs, Straus, Dean & Walker, LLP, Oklahoma City, OK, and Washington, D.C.: Kayla D. Cannon, G. Blake Jackson, Michael D. McMahan, William R. Norman, Jr., and Austin R. Vance.

[2]25 U.S.C. §§ 1901-1963 (2015).

[3]Civil Rights Class Action Complaint for Declaratory and Injunctive Relief, Carter v. Washburn, No. 2:15-cv-01259-DKD (D. Ariz. filed July 6, 2015) [hereinafter Complaint]; *see also A.D. v. Washburn*, GOLDWATER INSTITUTE, http://goldwaterinstitute.org/en/work/topics/constitutional-rights/equal-protection/case/equal-protection-for-indian-children/ (last visited Apr. 6, 2016).

[4]Complaint, *supra* note 3, at 2; Plaintiffs' Motion for Class Certification; Oral Argument Requested, Carter v. Washburn, No. 2:15-cv-01259-NVW (D. Ariz. filed Aug. 21, 2015).

[5]Federal Defendants' Motion to Dismiss and Memorandum of Points and Authorities, No. 2:15-cv-01259-NVW (D. Ariz. filed Oct. 16, 2015).

[6]*See, e.g.*, Motion of the Gila River Indian Community to Intervene as Defendant, Carter v. Washburn, No. 2:15-cv-01259-NVW (D. Ariz. filed Oct. 16, 2015).

[7]Complaint and Prayer for Declaratory and Injunctive Relief, Nat'l Council for Adoption v. Jewell, No. 1:15-cv-00675-GBL-MSN (E.D. Va. filed May 27, 2015).

[8]Memorandum of Law in Support of Defendants' Motion to Dismiss for Lack of Subject-Matter Jurisdiction and for Judgment on the Pleadings, Nat'l Council for Adoption v. Jewell, No. 1:15-cv-00675-GBL-MSN (E.D. Va. filed Sept. 11, 2015).

[9]Memorandum Opinion and Order, Nat'l Council for Adoption v. Jewell, No. 1:15-cv-00675-GBL-MSN (E.D. Va. Oct. 20, 2015).

2. Fair Labor Standards Act and the National Labor Relations Board Jurisdiction

On December 3, 2015, the National Labor Relations Board (NLRB) issued a decision reaffirming the Board's position that it could assert jurisdiction over a tribal casino owned and operated by the Pauma Band of Luiseno Mission Indians.[10] This is the latest in a series of confusing decisions that emerged this year from courts and the NLRB. The cases stem from the Sixth Circuit's decision upholding NLRB jurisdiction over the tribe in *National Labor Relations Board v. Little River Band of Ottawa Indians Tribal Government*.[11] In a case related to *Little River Band*, the Sixth Circuit affirmed a decision in favor of the NLRB, holding it had jurisdiction over the Saginaw Chippewa Indian Tribe of Michigan.[12] Yet on June 4, 2015, the NLRB declined jurisdiction over the Chickasaw Nation by citing possible interference with treaty rights.[13]

Congress sought to remedy the NLRB jurisdictional issues by proposing several different bills. On November 17, 2015, the U.S. House of Representatives passed H.R. 511, the Tribal Labor Sovereignty Act of 2015,[14] over White House opposition.[15] This measure amends the definition of "employer" under section 2 of the National Labor Relations Act to exclude Indian tribes and tribal enterprises operating in Indian Country from NLRB jurisdiction.[16] Currently, the legislation awaits action in the Senate.[17]

3. Native Hawaiian Elections/Recognition

Earlier this fall, the Department of Interior (DOI) issued a proposed rule whereby the Native Hawaiian community, once organized as its own collective government, could re-establish a formal government-to-government relationship with the United States.[18] This proposal came after more than a year of public meetings that DOI hosted across Hawaii about the subject.[19] Although some remain opposed, DOI emphasized that the Native Hawaiian community—not the federal government—would decide whether it reorganized, the structure of the organized government, and whether the government

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[10]Casino Pauma & Unite Here Int'l Union, 363 N.L.R.B. No. 60 (Dec. 3, 2015).
[11]788 F.3d 537 (6th Cir. 2015) (*reh'g denied* June 9, 2015).
[12]Soaring Eagle Casino & Resort v. Nat'l Labor Relations Bd., 791 F.3d 648 (6th Cir. 2015) (*reh'g denied* Sept. 29, 2015).
[13]Chickasaw Nation, 362 N.L.R.B. No. 109 (June 4, 2015).
[14]H.R. 511, 114th Cong. (as passed by House, Nov. 17, 2015; as received in Senate, Nov. 18, 2015). *See also Lawmakers Defy White House on Tribal Labor Sovereignty Act*, INDIANZ.COM (Nov. 18, 2015), http://www.indianz.com/IndianGaming/2015/11/18/lawmakers-defy-white-house-on.asp.
[15]Press Release, Office of Mgmt. & Budget, Exec. Office of the President, Statement of Admin. Policy: H.R. 511 – Tribal Labor Sovereignty Act of 2015 (Nov. 17, 2015).
[16]H.R. 511, *supra* note 14.
[17]*Id. See also Lawmakers Defy White House*, *supra* note 14.
[18]Procedures for Reestablishing a Formal Government-to-Government Relationship With the Native Hawaiian Community [hereinafter Native Hawaiian Government Reestablishment], 80 Fed. Reg. 59,113 (Oct. 1, 2015) (to be codified at 43 C.F.R. pt. 50).
[19]Chris D'Angelo, *U.S. Government Outlines a Path for Native Hawaiian Recognition*, HUFFPOST POLITICS (Oct. 1, 2015), http://www.huffingtonpost.com/entry/native-hawaiian-government-recognition_560b28fce4b0768126ffc511.

would take on a relationship with the United States.[20] The comment period for the proposed rule expired December 30, 2015.[21]

This announcement came during the pendency of an election where Native Hawaiians will select delegates to represent them at a constitutional convention where an initial government structure could be selected.[22] The election was challenged in *Akina v. Hawaii*[23] as unconstitutional and illegal under various federal laws, but the U.S. District Court for the District of Hawaii denied the plaintiffs' request for injunctive relief, holding the proposed election was permissible because the election was a private, rather than public election.[24] Plaintiffs ultimately sought relief from the U.S. Supreme Court, and Justice Kennedy issued a temporary order to prevent ballot counting.[25] The litigation is still pending.[26]

4. Marijuana Legalization in Indian Country

Tribes have expressed interest in marijuana legalization for economic development, inspired by the financial impact in states that have legalized the substance both medically and recreationally.[27] Despite this recent trend, marijuana remains a Schedule I substance under the Controlled Substances Act (CSA).[28] In response to states legalizing marijuana, the Department of Justice (DOJ) issued a memorandum (Cole Memo) on August 29, 2013, outlining the procedures it would follow for enforcing the CSA on marijuana violations.[29] The Cole Memo isolated eight priority areas of federal enforcement; outside of those priority areas, however, the DOJ would not alter its reliance on states for criminal enforcement of marijuana violations, as long as the states provide and enforce adequate regulations for legalized marijuana.[30] On October 18, 2014, the DOJ clarified in a memorandum that the same procedures applied to tribal governments.[31]

These memoranda do not alter the categorization of marijuana under the CSA. Consequently, the DOJ memos are only enforced until the Department decides otherwise,

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[20]Native Hawaiian Government Reestablishment, 80 Fed. Reg. at 59,113-14; *see also id.*
[21]Native Hawaiian Government Reestablishment, 80 Fed. Reg. at 59,114.
[22]D'Angelo, *supra* note 19.
[23]No. 15-00322 JMS-BMK, 2015 WL 6560634 (D. Haw. Oct. 29, 2015).
[24]*Id*. at *23-24.
[25]No. 15A551, 2015 WL 7691943 (U.S. Nov. 27, 2015); *see also* Lyle Denniston, *Kennedy Temporarily Blocks Hawaii Vote Count*, SCOTUSBLOG (Nov. 27, 2015, 1:06 PM), http://www.scotusblog.com/2015/11/kennedy-temporarily-blocks-hawaii-vote-count/.
[26]Denniston, *supra* note 25.
[27]*See* Sarah Manning, *Santee Sioux Assert Tribal Sovereignty, Open First Marijuana Resort*, INDIAN COUNTRY TODAY MEDIA NETWORK (Oct. 6. 2015), http://indiancountrytodaymedianetwork.com/2015/10/06/santee-sioux-assert-tribal-sovereignty-open-first-marijuana-resort-161976.
[28]21 U.S.C. § 812 (2012).
[29]Memorandum from James Cole, Deputy Att'y Gen., to U.S. Attorneys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013).
[30]*Id.*
[31]Memorandum from Monty Wilkinson, Dir., to U.S. Attorneys, et al., Policy Statement Regarding Marijuana Issues in Indian Country (Oct. 28, 2014).

and the recent federal raid of the Menominee Indian Tribe of Wisconsin for marijuana is a cautionary tale for other tribes considering marijuana legalization.[32]

II. JUDICIAL DEVELOPMENTS

A. Cases Pending Before the U.S. Supreme Court

1. *United States v. Bryant*

In this case, the Ninth Circuit addressed whether prior uncounseled tribal court convictions for domestic abuse could be used for subsequent federal punishment under the provisions of the Violence Against Women Act.[33] Michael Bryant, Jr., an Indian defendant, was indicted on two counts of domestic assault as a habitual offender under 18 U.S.C. § 117(a).[34] As per the statutory requirement,[35] the government relied upon two prior tribal court convictions for domestic abuse where Bryant was uncounseled by an attorney and received a prison sentence. Bryant filed a motion to dismiss, arguing that the charges violated his Fifth and Sixth Amendment rights. The district court denied the motion, and Bryant entered a guilty plea that preserved his appellate rights. He was sentenced to a 46-month prison term on both counts, which run concurrently.[36]

The Ninth Circuit reversed this decision, holding that Bryant's prior tribal court domestic abuse convictions would violate the Sixth Amendment if they were obtained in state or federal court.[37] Although the Supreme Court has never addressed whether an uncounseled tribal court conviction could be used to support a subsequent federal prosecution, the panel was careful to note that it had previously addressed this issue in *United States v. Ant*.[38] The court then read *Ant* to stand for the general rule that, subject to limited exclusions, "a conviction obtained in a tribal court that did not afford a right to counsel equivalent to the Sixth Amendment right may not be used in a subsequent federal prosecution."[39] In so holding for Bryant, the panel did note that this decision conflicted with Eighth and Tenth Circuit decisions subsequent to *Ant*, but the panel was still bound by the Ninth Circuit precedent.[40]

2. *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*

In this case, John Doe—a 13-year-old member of the Mississippi Band of Choctaw Indians (Tribe)—worked as an unpaid intern at the Dollar General store on the

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[32] *See* Associated Press, *After Federal Raids, U.S. Tribes Cautioned About Marijuana*, CBSNEWS (Nov. 18, 2015, 7:48PM), http://www.cbsnews.com/news/after-federal-raids-u-s-tribes-cautioned-about-marijuana/.

[33] 769 F.3d 671, 672-73 (9th Cir. 2014), *cert. granted*, No. 15-420, 2015 WL 5822186 (Dec. 14, 2015); 18 U.S.C. § 117(a) (2012).

[34] *Bryant*, 769 F.3d at 673; § 117(a).

[35] The relevant portion of § 117(a) penalizes one "who has a final conviction on at least [two] separate prior convictions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction[,] . . . assault . . . against a spouse or an intimate partner." § 117(a)(1). *See Bryant*, 769 F.3d at 673.

[36] *Bryant*, 769 F.3d at 673-74.

[37] *Id.* at 677.

[38] *Id.* at 676; *see also* United States v. Ant, 882 F.2d 1380 (9th Cir. 1989).

[39] *Bryan*, 769 F.3d at 677.

[40] *Id.* at 678.

Tribe's Reservation as part of the Youth Opportunity Program (YOP).[41] Doe accused Dollar General's manager, Dale Townsend, of sexual molestation and brought a civil tort suit in Choctaw tribal court, claiming that Dollar General is vicariously liable for Townsend's actions and that the company negligently hired, trained, and supervised him.[42] Dollar General contested tribal jurisdiction, but both the Mississippi Choctaw Supreme Court and the U.S. District Court for the Southern District of Mississippi found that the Tribe had jurisdiction under the first exception established in *Montana v. United States,*[43] which provides that a Tribe may exercise civil regulatory jurisdiction over non-members on non-Indian fee lands[44] when the non-member's conduct "has a nexus to some consensual relationship between the non-member and the tribe or its members."[45]

The Fifth Circuit affirmed the lower court's holding based on *Montana*'s first exception. The majority held that an adequate consensual relationship existed where Townsend and Dollar General agreed to participate in the YOP, where Doe was "essentially an unpaid intern, performing limited work in exchange for job training and experience."[46] Moreover, an "obvious nexus" to this relationship existed sufficient for tribal jurisdiction: "[t]he conduct for which Doe seeks to hold [Dollar General] liable is [their] alleged placement in [their] . . . store located on tribal lands, of a manager who sexually assaulted Doe while he was working there."[47] By exercising jurisdiction over this suit, the majority explained that the Tribe merely sought to "protect[] its own children on its own land" by regulating their workplace safety.[48] The majority declined to read *Plains Commerce Bank v. Long Family Land & Cattle Co*. to "require an additional showing that one specific relationship, in itself, 'intrude[s] on the internal relations of the [T]ribe or threaten[s] self-rule.'"[49] The dissent argued that the relationship between Doe and Dollar General did not meet the threshold requirements for tribal jurisdiction because it did not implicate tribal self-government or internal tribal relations.[50]

3. *Menominee Tribe of Wisconsin v. United States*

In this case, the District of Columbia Circuit (D.C. Circuit) upheld a decision by the U.S. District Court for the District of Columbia that the Menominee Indian Tribe of Wisconsin's (Tribe) claim against the Department of Health and Human Services (HHS) for unpaid contract support under the Indian Self Determination and Education Assistance Act (ISDEA) was not subject to equitable tolling and therefore exceeded the statute of limitations.[51] The Tribe argued that its claim should be subject to equitable tolling because either (1) their claim should have been adjudicated as a class action, with the representative member being the Cherokee Nation, or (2) filing a claim with HHS

[41]746 F.3d 167, 169 (5th Cir. 2014), *cert. granted sub nom*. Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 135 S. Ct. 2833 (2015).
[42]*Dolgencorp, Inc.*, 746 F.2d at 169.
[43]Montana v. United States, 450 U.S. 544 (1981); *Dolgencorp, Inc.*, 746 F.3d at 169.
[44]*Dolgencorp, Inc.*, 746 F.3d at 170 n.1.
[45]*Id.*
[46]*Id.* at 173.
[47]*Id.*
[48]*Id.*
[49]*Dolgencorp, Inc.*, 746 F.3d at 175 (quoting Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 334-35 (2008)).
[50]*Id.* at 177-78.
[51]Menominee Indian Tribe of Wis. v. United States, 764 F.3d 51, 54 (D.C. Cir. 2014), *cert. granted in part*, 135 S. Ct. 2927 (2015).

was frivolous at the time, and thus the Menominee would not have filed a claim within the statute of limitations.[52]

The D.C. Circuit determined that the first claim was inadequate because the Tribe had "no justification" to believe its claim would be certified with the Cherokee Nation's class action as the Tribe did not exhaust administrative remedies.[53] As for the second argument, the Tribe's belief that filing its claim with HHS was frivolous had no bearing on the statute of limitations, because "[t]he only sure way to determine whether a suit can be maintained is to try it."[54] Consequently, the court found that neither claim satisfied the controlling standards for equitable tolling: "'(1) that [the party] has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in [the] way' and prevented timely filing."[55]

4. Smith v. Parker

On December 19, 2014, the Eighth Circuit reviewed *de novo* a grant for summary judgment by the U.S. District Court for the District of Nebraska to determine whether or not a Congressional 1882 Act that sold Omaha Indian Reservation land to raise money for the tribe had, in turn, diminished the Omaha Indian Reservation.[56] If the Omaha Indian Reservation had been diminished then the Tribe would not be able to enforce its alcohol tax on that land.[57] Ultimately, the Eighth Circuit affirmed the district court, finding that the 1882 Act had not diminished the land and concluding that the 1882 Act did not express intent to diminish the Omaha Indian Reservation.[58] Moreover, Federal Indian law dictates to "resolve any ambiguities in favor of the Indians."[59] On October 1, 2015, the Supreme Court of the United States granted a writ of certiorari to review the decision in *Smith v. Parker*.[60]

B. Appellate Opinions.

1. *Knight v. Thompson (Knight II)*

This case is a follow-up to a prior Eleventh Circuit decision concerning the religious freedom of male Native American inmates at the Alabama Department of Corrections (ADOC). The Eleventh Circuit previously held in *Knight I* that the ADOC policy of refusing to grant these inmates a religious exemption to wear long hair was the "least restrictive means" of furthering institutional security and health interests under the Religious Land Use and Institutionalized Persons Act (RLUIPA).[61] On appeal to the

[52]*Menominee Indian Tribe*, 764 F.3d at 54.
[53]*Id.* at 60.
[54]*Id.* at 61 (quoting Commc'n Vending Corp. of Arizona v. Fed. Commc'n Comm'n, 365 F.3d 1064, 1075 (2004)).
[55]*Id.* at 58 (quoting Holland v. Florida, 560 U.S. 631, 649 (2010)).
[56]Smith v. Parker, 774 F.3d 1166, 1167 (8th Cir. 2014), *cert. granted sub nom.* Nebraska v. Parker, 136 S. Ct. 27 (2015).
[57]*Id.*
[58]*Id.* at 1168-69.
[59]*Id.* (quoting South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 344 (1998)).
[60]Nebraska v. Parker, 136 S. Ct. 27 (2015).
[61]Knight v. Thompson (Knight I), 723 F.3d 1275, 1276-77 (11th Cir. 2013); *see also* 42 U.S.C. §§ 2000cc-2000cc-5 (2015).

Supreme Court, *Knight I* was vacated and remanded back to the Eleventh Circuit to be considered in light of the recently pronounced decision of *Holt v. Hobbs*.[62]

The Supreme Court held in *Holt* that the Arkansas Department of Corrections' policy prohibiting petitioner Gregory Holt, an Arkansas inmate and religious Muslim, from growing a ½-inch beard in accordance with his faith violated RLUIPA. Like the ADOC policy concerning long hair, this policy did not allow for a religious exemption.[63] Unlike the ADOC policy, however, this policy did allow a slight exemption to its prohibition for dermatological purposes.[64] On remand, the Eleventh Circuit upheld its prior decision—*Knight I*—and the claimants have again appealed to the U.S. Supreme Court.

2. *United States v. Brown*

Brown, along with three other defendants, was indicted under the Lacey Act for catching fish by gill net within the Leech Lake Reservation and then selling those fish to non-Indians. However, because all four defendants were members of the Chippewa Tribe (Tribe), the U.S. District Court for the District of Minnesota held that their fishing activities were protected by a treaty from 1837, dismissing the federal charges.[65]

The Eighth Circuit upheld the decision, reasoning that all of the parties at the treaty negotiations understood that the Tribe retained broad fishing rights without restrictions within their reservation; furthermore, although the defendants' behavior violated the Leech Lake Reservation Conservation Code, tribal law does not change the scope of the Tribe's treaty protections.[66] Moreover, there was no evidence that when Congress passed the Lacey Act it intended to abrogate the Chippewa Tribe's reserved treaty right to fish. Thus, the defendants could be prosecuted in Chippewa tribal court, but the federal indictments were properly dismissed because the Tribe's right to fish was expressly provided for in the 1837 Treaty.[67]

3. *United States v. Zepeda*

In this case, the Ninth Circuit modified and clarified existing tests used to determine whether a defendant is an "Indian" for purposes of the Indian Major Crimes Act (IMCA).[68] The court held that the defendant was an Indian because he "(1) has some quantum of Indian blood and (2) is a member of, or is affiliated with, a federally recognized tribe."[69] The court also noted that the charged defendant "must have been an Indian at the time of the charged conduct."[70]

4. *Seminole Tribe of Florida v. Stranburg*

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[62]Knight v. Thompson, 135 S. Ct. 1173 (2015); Holt v. Hobbs, 135 S. Ct. 853 (2015).
[63]Knight v. Thompson (Knight II), 796 F.3d 1289, 1291 (11th Cir. 2015) (citing *Holt*, 135 S. Ct. at 860).
[64]*Knight II*, 796 F.3d at 1291 (citing *Holt*, 135 S. Ct. at 860) (explaining that the Arkansas Department of Corrections policy allows a ¼-inch beard for inmates with "diagnosed dermatological problems").
[65] United States v. Brown, 777 F.3d 1025, 1027 (8th Cir. 2015).
[66]*Id.* at 1030-32.
[67]*Id.* at 1034.
[68]United States v. Zepeda, 792 F.3d 1103 (9th Cir. 2015).
[69]*Id.* at 1106-07.
[70]*Id.* at 1107.

In this case, the Eleventh Circuit considered the validity of two Florida state taxes as applied to two non-Indian business lessees located in two casinos owned by the Seminole Tribe of Florida.[71] The first of these taxes is levied upon commercial rent payments (the Rental Tax) and is a tax on the "privilege [of engaging] in the business of renting, leasing, letting, or granting a license for the use of any real property" in Florida.[72] The tax is assessed against the lessee and is collected and remitted by the landlord. If the landlord fails to perform these duties, he is then liable to pay the tax and incur penalties.[73]

The second of these taxes is imposed "on gross receipts from utility services that are delivered to a retail customer."[74] The utility provider has discretion to separately line item this "Utility Tax" on the customer's bill. If this discretion is exercised, the customer must remit the tax to the utility services provider as part of their monthly bill.[75] Florida law clarifies that the "tax is imposed upon every person for the privilege of conducting a utility or communications services business, and each provider of the taxable services remains fully and completely liable for the tax, even if the tax is separately stated as a line item or component of the total bill."[76]

The district court held that the imposition of both of these taxes was invalid. The Rental Tax was preempted by 25 U.S.C. § 465 (*i.e.*, the Indian Reorganization Act) and "impermissibly interfered" with tribal sovereignty under the balancing test established in *White Mountain Apache Tribe v. Bracker*.[77] Likewise, the legal incidence of the Utility Tax improperly fell upon the Tribe and was prohibited by federal law.[78]

The Eleventh Circuit upheld the lower court's holding as applied to the Rental Tax, reasoning that it constituted an impermissible "tax on a right in the land" under the Court's interpretation of section 465 in *Mescalero Apache Tribe v. Jones*.[79] Moreover, the Rental Tax was also held to violate tribal interests under *Bracker*, even though the panel applied the test *de novo*. In spite of this, the district court's conclusion was reversed as to the Utility Tax because the legal incidence fell upon the utility company rather than the consumer (or in this case, the Tribe). Key to this reversal was the non-existence of a mandatory requirement for the provider to pass the tax along to the consumer and the provider's non-liability for paying the tax unless paid by the consumer.[80]

C. District Court Opinions

1. *Navajo Nation v. San Juan County*

In this case, the U.S. District Court for the District of Utah addressed whether San Juan County School Board violated the "one person, one vote" principle under the Equal Protection Clause.[81] Navajo Nation filed for summary judgment, alleging that San Juan County (the County) committed a prima facie violation of the Equal Protection Clause

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[71]Seminole Tribe of Fla. v. Stranburg, 799 F.3d 1324, 1326 (11th Cir. 2015).
[72]*Id.* (quoting FLA. STAT. § 212.031(1)(a) (2015)).
[73]*Id.*
[74]*Id.* at 1326-27 (quoting FLA. STAT. § 203.01(1)(a)(1) (2012)).
[75]*Id.* at 1327.
[76]*Stranburg*, 799 F.3d at 1327 (quoting FLA. STAT. § 203.01(5) (2012)).
[77] *Id.* at 1329, 1335; White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).
[78]*Stranburg*, 799 F.3d at 1345.
[79]*Id.* at 1331-32; Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).
[80]*Stranburg*, 799 F.3d at 1335, 1345, 1347-50.
[81]Navajo Nation v. San Juan Cnty., No. 2:12-CV-00039, 2015 WL 8493980, at *1 (D. Utah Dec. 9, 2015).

because the San Juan County School Board election district populations were not equally distributed. The Supreme Court had previously declared that population apportionments deviating by less than 10% from what would be considered "equal" is constitutionally permissible. The deviations found by the County's practices ranged from 37.69% to 38.22%, well-beyond the safe harbor threshold.[82] Moreover, the County had conceded that this was a prima facie violation of the Equal Protection Clause. Having established this, the court then shifted the burden to the County to establish that the deviations were necessary to achieve "legitimate considerations incident to the effectuation of a rational state policy."[83] The County then proceeded to present a series of five justifications for its practices, including: (1) the County's geographic profile; (2) the County's survey section lines and polling place logistics; (3) the County's consistent belief and objective; (4) the County's impossibility to draw lines within the 10% limit; and (5) the racial differences in two districts account for the large deviation.[84] The court rejected each of these documents, and entered summary judgment for Navajo Nation by concluding that the County had failed to carry its burden for noncompliance with the Equal Protection Clause.[85]

2. *Pro Football, Inc. v. Blackhorse*

In this case, the U.S. District Court for the Eastern District of Virginia upheld the decision of the Trademark Trial and Appeal Board (TTAB) to cancel the "Redskins" trademark registration of Pro-Football, Inc. (PFI), as it violated the "may disparage" provision of the Lanham Act. The district court reviewed the case *de novo* and was presented with cross-motions from both parties for summary judgment. PFI claimed that the Lanham Act violated: (1) the First Amendment; (2) the notice requirement of the Fifth Amendment; and (3) the Due Process and Taking clause of the Fifth Amendment. PFI also claimed that under the Lanham Act, Blackhorse failed to show, based on preponderance of evidence, that a substantial composition of the Native Americans believed "Redskins" may disparage them, and additionally that latches would apply. The district court found for Blackhorse on every claim.[86]

With regard to the claims about the Lanham Act itself, the district court made the overarching recognition that the Lanham Act concerns itself with trademark registration, rather than the trademarks themselves, and thus many of the claims that PFI forwarded were inapplicable.[87] For example, pursuant to the *Walker* test, the court viewed the trademark registration process as a form of government speech not subject to First Amendment protection, unlike the trademark itself.[88] The court further found the Lanham Act passes the test for vagueness and gives adequate notice.[89] Finally, the court ruled the Due Process and Takings Clauses of the Fifth Amendment cannot apply because the government is not taking away the trademark from PFI but rather was merely not ensuring the trademark's protection.[90] The district court also labored over the fact that

[82] *Navajo Nation*, 2015 WL 8493980, at *3, 6, 10.
[83] *Id.* at *6 (quoting Reynolds v. Sims, 377 U.S. 533, 579 (1964)).
[84] *Id.* at *11-14.
[85] *Id.*
[86] Pro-Football, Inc. v. Blackhorse, No. 1-14-CV-01043-GBL-IDD, 2015 WL 4096277, at *1-2 (E.D. Va. July 8, 2015).
[87] *Id.* at *6.
[88] *Id.* at *11-13 (citing Walker v. Tex. Division, Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2243 (2015)).
[89] *Id.* at *18-21.
[90] *Id.* at *21-22.

Blackhorse had overwhelmingly established that a substantial composition of Native Americans would find that the "Redskins" trademark may disparage them.[91] Laches in this case, unlike in *PFI v. Harjo*, did not attach because Blackhorse had filed timely after turning eighteen (18) and there are societal implications that bar laches.[92] PFI appealed the decision to the United States Court of Appeals for the Fourth Circuit.

Since the district court's decision, the United States Court of Appeals for the Federal Circuit has decided that the Lanham Act did in fact violate the First Amendment in a separate, somewhat similar, case.[93]

3. *Brown v. Western Sky Financial, LLC*

Plaintiffs brought a putative class action lawsuit on behalf of North Carolina residents who borrowed money from Western Sky Financial, LLC, (Western Sky) an Indian-owned "payday loan" company located on the Cheyenne River Sioux Tribe's reservation. The suit alleged that Western Sky and other related entities issued loans that charged excessive interest, violating state and federal law. At issue in the case was whether the tribal court system had jurisdiction over these disputes based on forum selection and arbitration clauses in the loan documents.[94] The federal court analyzed the existing approaches various jurisdictions have taken when evaluating such claims: "(1) the forum selection clause has been found unenforceable; (2) the forum selection clause has been enforced; or (3) the [tribal court] has been provided an initial opportunity to determine the enforceability of the forum selection clause using the tribal exhaustion doctrine."[95] Finding the third approach to be persuasive, the court proclaimed that "the effect of the forum-selection clause turns on whether tribal court jurisdiction exists under federal law."[96] Thus, the court held that plaintiffs must first exhaust tribal court remedies before bringing suit in federal court because the Cheyenne River Sioux Tribe had a colorable claim of jurisdiction.[97]

D. State Court Opinions

In *First Bank and Trust v. Cheyenne and Arapaho*, First Bank and Trust Co. (First Bank) sought a declaratory judgment in the District Court of Custer County, Oklahoma, regarding the bank accounts of the Cheyenne and Arapaho Tribes of Oklahoma (Tribes), after a tribal dispute produced two competing tribal government factions. The district court denied the Tribes' sovereign immunity claim based upon the choice of law provision in the Bank's contract and further imposed administrative control over the Tribes' bank accounts. The Tribes appealed. The Oklahoma Court of Civil Appeals held that the district court did not have subject matter jurisdiction, despite the choice of law provision, because the underlying issue was the resolution of the tribal government dispute, which lies within the Tribes' exclusive jurisdiction. The Court of Civil Appeals also held that the district court could not exercise control over the Tribes' accounts

[91] *Pro-Football, Inc.*, 2015 WL 4096277 at *23-37.
[92] *Id.* at *37-38.
[93] *In re* Tam, No. 2014-1203, 2015 WL 9287035, at *28 (Fed. Cir. Dec. 22, 2015).
[94] Brown v. Western Sky Fin., LLC, 84 F. Supp. 3d 467, 470-72, 471 n.8 (M.D.N.C. 2015)
[95] *Id.* at 474.
[96] *Id.* at 478 (citation omitted).
[97] *Id.* at 480-82.

because that would equate to exercising jurisdiction by compelling the resolution of the tribal dispute.[98]

III. Legislative and Executive Developments

A. Legislative Developments

On December 4, 2015, President Obama signed the Fixing America's Surface Transportation (FAST) Act.[99] After years of short-term funding for transportation infrastructure, the five-year FAST Act authorization will provide $305 billion in highway and transit spending through 2020.[100] The FAST Act made several important changes to the Tribal Transportation Program. The most notable of those is the creation of the Department of Transportation (DOT) Tribal Self-Governance Program that would extend many of the self-governance provisions of Title V of the Indian Self-Determination and Education Assistance Act (ISDEAA) to DOT.[101] The FAST Act also provides modest funding increases for the Tribal Transportation Program (TTP) and the Tribal Transit program, as well as a number of technical changes to these programs.[102]

On December 10, 2015, by unanimous consent, the Senate approved S. 209, the Indian Tribal Energy Development and Self-Determination Act Amendments, a bill designed to encourage energy development in Indian Country.[103] A similar measure, H.R. 538, the Native American Energy Act, passed the House of Representatives,[104] but no action had been taken by the Senate at the end of 2015.[105]

B. Executive Actions

1. Right-of-Way Regulations

The Department of the Interior announced new regulations regarding grants for right-of-ways across Indian lands and BIA lands.[106] The new right-of-way regulations apply to (1) any person or entity that is not an owner of Indian land, and (2) individual Indian landowners that own fractional interests in land.[107] Unauthorized possession or use

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[98]First Bank & Trust Co. v. Cheyenne & Arapaho Tribes, No. 110,909, 2015 WL 1029945 (Okla. Civ. App. Feb. 23, 2015).

[99]*The Fixing America's Surface Transportation Act or "FAST Act"*, U.S. Dep't of Transp., https://www.transportation.gov/fastact (last updated Feb. 24, 2016).

[100]*See* Pub. L. No. 114-94, § 1101(a), 129 Stat. 1312 (2015).

[101]*Id.* § 1121.

[102]*More Transportation Funds Head to Indian Country in New Law*, INDIANZ.COM (Dec. 18, 2015), http://www.indianz.com/News/2015/019899.asp.

[103]*See* S.B. 209, 114th Cong. (2015). *See also Senate Approves Bill to Streamline Indian Energy Development*, INDIANZ.COM (Dec. 11, 2015), http://www.indianz.com/News/2015/019835.asp.

[104]*See* H.R. 538, 114th Cong. (2015). *See also Controversy Brews as House Takes up Native American Energy Act*, INDIANZ.COM (Oct. 6, 2015), http://www.indianz.com/News/2015/019148.asp.

[105]*Actions Overview: H.R. 538 – 114th Congress (2015-2016)*, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/house-bill/538/actions (last visited Apr. 6, 2016).

[106]Rights-of-Way on Indian Land, 80 Fed. Reg. 70,492, 72, 535 (Nov. 19, 2015) (to be codified at 25 C.F.R. pt. 169) (direct final rule).

[107]*Id.* at 72,536-37.

of Indian land is considered a trespass, and is subject to applicable law.[108] Authorized use of existing right-of-ways are limited to "the same scope of the use specified in the original grant."[109] Use or possession outside of "the same scope of use" requirement will require an amendment to the right-of-way grant; however, if ground disturbance would occur then a new right-of-way grant is required.[110]

The new regulations generally apply to right-of-way grants issued after December 21, 2015. However, the procedural provisions apply retroactively to include all right-of-way grants—unless the grant (or statute authorizing the grant) contains explicit provisions that conflict with the procedural provisions; in that limited case, the provisions of the grant will apply.[111]

2. ICWA Guidelines and Regulations

In early 2015, the Department of Interior (DOI) published new guidelines and regulations to ensure increased compliance with the Indian Child Welfare Act of 1967. On February 25, 2015, the BIA published its revised *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, the first update of its kind in over 35 years.[112] These guidelines, which were effective immediately on their publication date, provide state courts with guidance to ensure full implementation of ICWA and its overarching mission.[113] Shortly thereafter, on March 20, 2015, the BIA followed by releasing a Notice of Proposed Rulemaking for new ICWA regulations.[114] While the guidelines are advisory, the regulations seek to provide a binding interpretation of ICWA on state courts and agencies to ensure consistent implementation of the law nationwide.[115] Key areas of both of these measures include: (1) defining terms in ICWA; (2) clarifying when ICWA applies; (3) clarifying ICWA's notice requirements; (4) defining tribal court jurisdiction in ICWA proceedings; and (5) defining ICWA standards in state courts.[116]

3. Secretarial Election Procedures

On October 19, 2015, the Bureau of Indian Affairs (BIA) published a final rule amending its regulations governing Secretarial elections and the procedures for

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[108] *Id.* at 72,549.
[109] *Id.* at 72,544.
[110] *Id.*
[111] Rights-of-Way on Indian Land, 80 Fed. Reg. at 72,537.
[112] Press Release, U.S. Dep't of the Interior, Office of the Asst. Sec'y for Indian Affairs, Assistant Secretary Washburn Announces Revised Guidelines to Ensure that Native Children and Families Receive the Full Protection of the Indian Child Welfare Act (Feb. 24, 2015).
[113] *Id.*; *See* Guidelines for State Courts and Agencies in Indian Child Custody Proceedings [hereinafter State Guidelines], 80 Fed. Reg. 10,146 (proposed and effective Feb. 25, 2015).
[114] Press Release, U.S. Dep't of the Interior, Office of the Asst. Sec'y for Indian Affairs, Assistant Secretary Washburn Answers Call to Strengthen Implementation of Indian Child Welfare Act (Mar. 18, 2015).
[115] *See* Regulations for State Courts and Agencies in Indian Child Custody Proceedings [hereinafter State Regulations], 80 Fed. Reg. 14,880 (proposed Mar. 20, 2015) (to be codified at 25 C.F.R. pt. 23).
[116] *See* State Regulations, *supra* note 115, at 14,885-93; *see also* State Guidelines, *supra* note 113, at 10,150-58.

petitioning to request a Secretarial election.[117] The BIA stated that the clarifications relating to Secretarial elections encourage tribes reorganized under the Indian Reorganization Act (IRA) to amend their governing documents so that "future elections will be purely tribal elections, governed and run by the tribe rather than BIA."[118] Under the new rules, tribal policy—and not federal management—will form the backbone of election-related requirements in Indian Country.[119] Notably, the final rule also clarifies that only members of federally recognized tribes may petition for a Secretarial election to be held—a departure from prior federal policy.[120] The final rule became effective November 18, 2015. [121]

[117]Secretarial Election Procedures, 80 Fed. Reg. 63,094 (Oct. 19, 2015) (to be codified at 25 C.F.R. pts. 81, 82) (direct final rule).
[118]*Id.*
[119]*See id.*
[120]*Id.* at 63,095.
[121]*Id.* at 63,094.

Chapter 18 • NUCLEAR LAW
2015 Annual Report[1]

I. JUDICIAL DEVELOPMENTS

A. Price-Anderson Preemption—Cook v. Rockwell International Corp.[2]

The twenty-five-year saga that is the Rocky Flats "downwinder" litigation took a dramatic and unexpected turn on June 23, 2015, when the Tenth Circuit rendered a decision (*Cook II*) holding that a plaintiff who is unable to prevail on a claim for radiation-related injuries or property damage under the Price-Anderson Act (PAA) nonetheless can recover under a freestanding state law cause of action. This ruling creates a direct split with decisions by the Fifth and Ninth Circuits (and an indirect split with decisions by the Second, Third, Sixth, and Seventh Circuits). The Tenth Circuit's decision has the potential to spawn significant changes in how U.S. Department of Energy (DOE) contractors, commercial nuclear licensees, and all other licensees facing claims arising out of exposure radiation and releases of radioactive materials defend these claims.

This litigation involves a class action against Rockwell International and Dow Chemical brought on behalf of residents who own property near the Rocky Flats DOE site, asserting various property damage claims due to very low-level plutonium contamination of their properties. Over defendants' objections, District Judge John L. Kane (District of Colorado) issued an opinion[3] allowing the plaintiffs to proceed on a state law-based public nuisance claim separate from their PAA claim. After a lengthy trial, the jury rendered a verdict in January 2006 that, with prejudgment interest, resulted in the district court entering judgment[4] for nearly $1 billion. The first appeal was brought by defendants, who argued that the trial judge erred by not holding that federal regulations governing releases of radioactive materials define the standard of care for claims brought under the PAA. The panel on the first appeal agreed, and on September 3, 2010, issued an opinion (*Cook I*)[5] vacating the judgment and remanding for "further proceedings not inconsistent with this opinion."

Rather than attempting to satisfy the requirements for a compensable claim under the PAA, plaintiffs dismissed their PAA claim and sought reinstatement of the judgment based on the jury's verdict on the state law nuisance claim. The district court disagreed, holding that, "a failed PAA claim based on an alleged nuclear incident is simply a failed claim, not a state law claim in waiting."[6] Plaintiffs appealed.

The *Cook II* panel began its opinion by holding that defendants waived their argument that the PAA preempted independent state law claims. Not content with resting on its "waiver" ruling, the panel then proceeded with a lengthy exegesis on the substantive question of whether the PAA actually preempts independent state law claims. The panel held that it does not. It concluded that there is nothing in the PAA precluding a plaintiff from pursuing state law-based claims for damages from a nuclear hazard even if the plaintiff

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[2]Cook v. Rockwell Int'l Corp. (*Cook II*), 790 F.3d 1088 (10th Cir. 2015).

[3]Cook v. Rockwell Int'l Corp., 273 F. Supp. 2d 1175 (D. Colo. 2003).

[4]Cook v. Rockwell Int'l Corp., 564 F. Supp. 2d 1189 (D. Colo. 2008).

[5]Cook v. Rockwell Int'l Corp. (*Cook I*), 618 F.3d 1127, 1142 (10th Cir. 2010).

[6]Cook v. Rockwell Int'l Corp., 13 F. Supp. 3d 1153, 1155 (D. Colo. 2014).

cannot satisfy the statutory requirements for a claim under the PAA. This permits plaintiffs to recover for contamination of property or person by radioactive materials, or for doses below federal regulatory limits, without the need to prove actual property damage or personal injury. Because the claim proceeds outside of the PAA statutory scheme, defendants may not have the benefit of insurance coverage or aggregate limits on liability.[7]

Leaving no room for doubt as to its intentions on remand, the *Cook II* panel directed the district court to "proceed to judgment on the existing nuisance verdict promptly."[8] The defendants moved for rehearing or rehearing en banc, which was denied on July 20, 2015, exactly two weeks after it was filed, and without plaintiffs having filed an opposition. Defendants filed their petition for certiorari in the U.S. Supreme Court on December 17, 2015.

B. Fire Protection Exemptions—Brodsky v. U.S. Nuclear Regulatory Commission[9]

On February 26, 2015, the U.S. District Court for the Southern District of New York granted the Nuclear Regulatory Commission (NRC) summary judgment on a claim brought by Richard Brodsky, a former New York State Assemblyman, challenging NRC-granted exemptions. The case stems from a longstanding dispute over exemptions NRC granted to Entergy relating to the Indian Point Nuclear Power Plant Unit 3 fire safety program. To comply with NRC fire-protection regulations, Entergy chose a fire barrier called Hemyc to enclose the cables of a safety shutdown system. In 2006, NRC notified licensees that Hemyc could not withstand fire for the required one-hour burn time. As a result, Entergy sought exemptions to continue the use of Hemyc.

After NRC granted the exemption, Mr. Brodsky challenged the exemption before the Second Circuit. The Second Circuit originally dismissed Mr. Brodsky's challenge for lack of jurisdiction.[10] Mr. Brodsky refiled his challenge in district court, but the court granted NRC summary judgment.[11] Mr. Brodsky appealed and the Second Circuit affirmed the district court's judgment in all respects but one, finding that the record was insufficient to determine whether NRC violated the National Environmental Policy Act (NEPA) regulations that allow for public involvement on environmental assessments (EAs) where appropriate and practicable.[12] The Second Circuit remanded the case so the NRC could either "(1) supplement the administrative record to explain why allowing public input into the exemption request was inappropriate or impracticable, or (2) take such other action as it may deem appropriate to resolve this issue."[13]

On remand, the NRC chose the second option, re-noticed the original exemptions, and invited comment on the EA. After considering the comments, in 2013, NRC reissued the exemptions and found that NEPA did not require the EA to evaluate the impacts of a terrorist attack. After Mr. Brodsky returned to the district court to challenge the exemptions and EA, the court granted summary judgment for the NRC.[14] The district court concluded that "the record demonstrates that the NRC has satisfied its public participation obligations as set out by the Court of Appeals" and "reveals no reason to

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[7] *Cook II*, 790 F.3d at 1093, 1103.
[8] *Id.* at 1105.
[9] Brodsky v. U.S. Nuclear Regulatory Comm'n, No. 09 Civ. 10594 (LAP), 2015 WL 1623824 (S.D.N.Y. Feb. 26, 2015), *appeal filed*, No. 15-1330 (2d Cir. Apr. 24, 2015).
[10] Brodsky v. U.S. Nuclear Regulatory Comm'n, 578 F.3d 175 (2d Cir. 2009).
[11] Brodsky v. U.S. Nuclear Regulatory Comm'n, 783 F. Supp. 2d 448 (S.D.N.Y. 2011).
[12] Brodsky v. U.S. Nuclear Regulatory Comm'n, 704 F.3d 113, 124-25 (2d Cir. 2013); *see also* Brodsky v. U.S. Nuclear Regulatory Comm'n, 507 F. App'x 48 (2d. Cir. 2013).
[13] *Brodsky*, 704 F.3d at 115.
[14] *Brodsky*, 2015 WL 1623824, at *2.

disturb the prior rulings of this case."[15] With regard to the risk of terrorism, the court found that "[n]othing in the recent public comments adds credibility to [p]laintiffs' concern, and NEPA does not require further consideration of the environmental impacts of terrorism-related fires."[16] It further held that, even though it was not necessary, "the NRC addressed commenters' concerns about a potential terrorist attack, noting that it 'has analyzed plausible threat scenarios' and concluded 'from its independent safety evaluation'" that "a severe fire is not plausible and the existing fire protection features are adequate."[17]

In April 2015, Mr. Brodsky filed notice of appeal from the district court decision. The appeal is pending before the Second Circuit.[18]

II. ADMINISTRATIVE DEVELOPMENTS

A. Continued Storage Rule and Generic Environmental Impact Statement

In 2015, the NRC's rule addressing the environmental impacts of continued storage of spent nuclear fuel faced a number of challenges.[19] This rule was a product of the D.C. Circuit's *New York v. NRC I* decision that vacated the agency's earlier "Waste Confidence Decision."[20] Shortly after the revamped Continued Storage Rule and associated generic environmental impact statement (GEIS) were issued, several environmental groups challenged the rule and requested that the Commission suspend final reactor licensing decisions, claiming that the Atomic Energy Act (AEA) requires the NRC to address the safety of spent fuel disposal in a repository when it issues reactor licenses. In February 2015, the Commission rejected the petitions and held:

> At no time have we, Congress, or the courts articulated the view that the Atomic Energy Act requires a "finding" or "predictive safety findings" regarding the disposal of spent fuel in a repository as a prerequisite to issuing a nuclear reactor license. We see no reason to alter our long-standing interpretation of the Atomic Energy Act.[21]

Several environmental groups also challenged the Continued Storage Rule by claiming that NRC must supplement previously prepared site-specific environmental impact statements (EIS) in ongoing licensing proceedings to expressly incorporate by reference the GEIS. The rule, however, directs that the environmental impact determinations in the GEIS "shall be deemed incorporated" into the EIS associated with NRC license renewal and combined license applications.[22] On April 23, 2015, the Commission issued a decision rejecting the petitioners' argument. It reasoned that petitioners misread 10 C.F.R. § 51.23(b), whose language concerning "deemed incorporated" controls more general language in 10 C.F.R. part 51.[23] The order also

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[15] *Id.* at *1.
[16] *Id.* at *8.
[17] *Id.* (internal citations omitted).
[18] *Brodsky*, *supra* note 9.
[19] Environmental Impacts of Continued Storage of Spent Nuclear Fuel Beyond the Licensed Life for Operation of a Reactor, 10 C.F.R. § 51.23 (2015).
[20] New York v. U.S. Nuclear Regulatory Comm'n, 681 F.3d 471 (D.C. Cir. 2012).
[21] *In re* DTE Elec. Co., CLI-15-4 (Nuclear Regulatory Comm'n Feb. 26, 2015).
[22] Environmental Impacts of Continued Storage of Spent Nuclear Fuel Beyond the Licensed Life for Operation of a Reactor, 10 C.F.R. § 51.23(b) (2015).
[23] *In re* DTE Elec. Co., CLI-15-10 (Nuclear Regulatory Comm'n Apr. 23, 2015).

explained how NRC's approach to assessing the environmental impacts of continued storage satisfies the statutory purposes of an EIS by (1) ensuring that decision-makers have detailed information on significant environmental impacts (e.g., impacts of continued storage) and (2) guaranteeing that the relevant information also will be made available (through the rulemaking and NEPA processes) to the larger public that may play a role in the decision-making process.[24]

Separately, the Commission denied several motions to reopen the record in the various licensing proceedings to admit "placeholder" contentions to ensure that any federal litigation involving the Continued Storage Rule applied to the ongoing affected proceedings.[25] As the Commission explained in the *Callaway* license renewal proceedings, although such contentions are inadmissible, they are also "not necessary to ensure that [the] challenges to the Continued Storage Rule and GEIS receive a full and fair airing" and that petitioner's challenge to the Rule is appropriately before the U.S. Court of Appeals for the D.C. Circuit.[26]

B. Post-Fukushima Response Activities

In the wake of the earthquake, tsunami, and subsequent events at the Fukushima Dai-ichi plant that struck Japan on March 11, 2011, the NRC took steps to evaluate and reassess the safety of nuclear reactors in the United States. A task force, comprised of senior-level NRC staff, was assembled to determine what lessons could be learned and provide recommendations to the Commission. The Commission then prioritized these recommendations into three tiers.[27] In the past year, the NRC has addressed a number of Fukushima-related lessons learned.

First, in July 2015, the Commission approved the NRC staff's action plan for integrating mitigation strategies for beyond-design-basis events into its information request requiring reevaluation of flooding hazards.[28]

Second, on August 19, 2015, the Commission issued its final decision disapproving the NRC staff's recommendation to issue a Federal Register notice requesting public comments on the draft regulatory basis for a rulemaking to address containment protection and release reduction for Mark I and Mark II boiling water reactors.[29] This represents the Commission's final decision declining to require installation of engineered filters for BWRs with Mark I and II containment designs—a modification that the NRC staff's analysis showed would yield minimal (if any) discernable safety benefit.

Third, NRC Order EA-12-049 required reactor licensees to develop strategies to mitigate beyond-design-basis natural phenomena for multi-unit events and to protect

[24] *Id.* at 7.

[25] *See, e.g.*, *In re* Union Elec. Co., CLI-15-11 (Nuclear Regulatory Comm'n Apr. 23, 2015); *In re* DTE Elec. Co., CLI-15-12 (Nuclear Regulatory Comm'n Apr. 23, 2015); *In re* Duke Energy Carolinas LLC, CLI-15-15 (Nuclear Regulatory Comm'n June 9, 2015).

[26] *In re Union Elec. Co.*, CLI-15-11, at 5.

[27] Memorandum from R.W. Borchardt, Exec. Dir. for Operations, to the Comm'rs, SECY-11-0137 (Oct. 3, 2011).

[28] Memorandum from Annette L. Vietti-Cook, Sec'y of the Comm'n, to Mark A. Satorius, Exec. Dir. for Operations, SRM-COMSECY-15-0019 (July 28, 2015).

[29] Memorandum from Annette L. Vietti-Cook, Sec'y of the Comm'n, to Mark A. Satorius, Exec. Dir. for Operations, SRM-SECY-15-0085 (Aug. 19, 2015).

equipment identified under such strategies.[30] In November 2015, the NRC published a proposed rule that would codify this order and address other requirements concerning the mitigation of beyond-design-basis events.[31] Aside from implementing the requirements of EA-12-049, the proposed rule would also codify the requirements of Order EA-12-051, which required that plants ensure they can monitor spent fuel pool water levels remotely in the event of a disaster.[32] The public was provided with an opportunity to comment on the proposed rule until February 11, 2016.

Finally, on October 29, 2015, the NRC staff sought Commission approval of its plan to resolve the Tier 2 and 3 recommendations developed in response to the Fukushima disaster.[33] For most of the Tier 2 and 3 recommendations, the NRC staff believes the agency's existing requirements are adequate and no further action is necessary, but these items will not be closed out until the NRC staff has consulted with stakeholders. Regardless of stakeholder input, the NRC staff estimates that all of the recommendations will be closed out by the end of 2016, if not sooner.

C. New Plant Developments

The past year has been relatively active for new commercial nuclear power plants and the NRC. As discussed below, the NRC issued the operating license for Watts Bar Unit 2 and the combined license (COL) for Fermi Unit 3, and held the mandatory hearing for the COLs for South Texas Project (STP) Units 3 and 4.

The Tennessee Valley Authority (TVA) obtained a construction permit for Watts Bar Unit 2 in 1973. TVA later suspended construction, but then decided to resume it in 2007. TVA also updated its operating license application in 2009, which was subject to legal challenge at the NRC. During the past year, the intervenor group Southern Alliance for Clean Energy (SACE) filed a motion to reopen the record of the operating license proceeding and a new contention. The NRC Atomic Safety and Licensing Board denied the motion, concluding that SACE had not satisfied the requirements for reopening.[34] On September 24, 2015, the Commission rejected SACE's petition for review.[35] Subsequently, the NRC issued the full power Operating License for Watts Bar Unit 2 to TVA on October 22, 2015. Unit 2 is scheduled to begin commercial operation in 2016.

The applicants for STP Units 3 and 4 submitted a COL application to the NRC in 2007. The application has undergone extensive NRC review and was subject to legal challenge. As one example, on April 29, 2013, the NRC staff issued its evaluation concluding that one of the owners and applicants of STP Units 3 and 4, Nuclear Innovation North America LLC (NINA), and its wholly-owned subsidiaries are under foreign ownership, control, or domination (FOCD) and do not meet the requirements of section 103(d) of the Atomic Energy Act or the requirements of 10 C.F.R. § 50.38. That conclusion was challenged at an evidentiary hearing on a contention related to this topic, which resulted in a Board decision resolving the contention in favor of NINA and

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[30]Issuance of Order to Modify Licenses With Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events, 77 Fed. Reg. 16,091 (Mar. 19, 2012).

[31]Mitigation of Beyond-Design-Basis Events, 80 Fed. Reg. 70,610 (Nov. 13, 2015) (to be codified at 10 C.F.R. pts. 50 and 52).

[32]Order Modifying Licenses With Regard To Reliable Spent Fuel Pool Instrumentation, 77 Fed. Reg. 16,082 (Mar. 19, 2012).

[33]Memorandum from Victor M. McCree, Exec. Dir. for Operations, to Comm'rs SECY-15-0137 (Oct. 29, 2015).

[34]*In re* Tenn. Valley Auth., LBP-15-14 (Atomic Safety & Licensing Bd. Apr. 22, 2015).

[35]*In re* Tenn. Valley Auth., CLI-15-19 (Nuclear Regulatory Comm'n Sept. 24, 2015).

concluding that NINA has carried its burden on the contention by demonstrating that it is not subject to impermissible FOCD.[36] Following an appeal by the intervenors, on April 14, 2015, the Commission issued its conclusion that the intervenors had not raised a substantial question of fact or law that warrants review.[37] The Commission also held the mandatory hearing for the COLs on November 19, 2015, and should issue a decision on the COLs in 2016.

The applicant for Fermi Unit 3 submitted a COL application in 2008. The application has undergone extensive NRC review and was subject to legal challenge. As one example, on July 7, 2014, the Board requested Commission authorization to review sua sponte the NRC staff's environmental analysis of offsite transmission line impacts for Fermi Unit 3.[38] The Commission rejected the request in a decision issued January 13, 2015, based on the staff's comprehensive review of transmission corridor impacts, because parts of the ASLB's inquiry would be a challenge to the limited work authorization rule, and the Commission would look at this issue as part of the mandatory hearing.[39] The Commission subsequently held the mandatory hearing on February 4, 2015, and issued its decision on the COL on April 30, 2015.[40] The Commission concluded that the staff's review has been adequate to support the findings set forth in 10 C.F.R. §§ 52.97(a) and 51.107(a) for the Fermi COL. The NRC issued the COL on May 1, 2015.

D. De Facto License Amendment Claims

In 2015, the NRC addressed a pair of cases involving petitioners asserting hearing rights—typically reserved for licensing activities—in connection with oversight activities on grounds that they constitute de facto license amendments.

On March 9, 2015, the Commission denied Sierra Club's hearing request relating to confirmatory action letters (CALs) associated with restart activities at Fort Calhoun Station.[41] Sierra Club argued that the CAL process was a de facto license amendment because it involved commitments by the licensee that would require future licensing actions. In rejecting this argument, the Commission emphasized the distinction between NRC's hearing and oversight processes. As the Commission explained, "inspections and CALs, in and of themselves, are oversight activities normally conducted for the purpose of ensuring that licensees comply with existing NRC requirements and license conditions and, therefore, do not typically trigger the opportunity for a hearing."[42] According to the Commission, Sierra Club failed to point to anything in the CALs or otherwise expanding the licensee's operating authority or modifying the operating license. The Commission also found that "the prospect of a possible future license amendment does not trigger

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[36] *In re* Nuclear Innovation North America LLC, LBP-14-03 (Atomic Safety & Licensing Bd. Apr. 10, 2014).

[37] *In re* Nuclear Innovation North America LLC, CLI-15-07 (Nuclear Regulatory Comm'n April 14, 2015). On a related topic, in SRM-SECY-14-0089, the Commission approved a staff recommendation to revise the FOCD Standard Review Plan and to develop a regulatory guide to include graded Negation Action Plan criteria to mitigate the potential for FOCD. Memorandum from Annette L. Vietti-Cook, Sec'y of the Comm'n, to Mark A. Satorius, Exec. Dir. for Operations, SRM-SECY-14-0089 (May 4, 2015).

[38] *In re* Detroit Edison Co., LBP-14-9 (Atomic Safety & Licensing Bd. July 7, 2014).

[39] *In re* DTE Elec. Co., CLI-15-01 (Nuclear Regulatory Comm'n Jan. 1, 2015).

[40] *In re* DTE Elec. Co., CLI-15-13 (Nuclear Regulatory Comm'n Apr. 30, 2015).

[41] *In re* Omaha Pub. Power Dist., CLI-15-5, at 12 (Nuclear Regulatory Comm'n Mar. 9, 2015).

[42] *Id.* at 13.

hearing rights now" and that "hearing rights do not attach to licensee changes made under Section 50.59 because those changes do not require NRC approval but are instead subject to normal NRC oversight through the inspection process."[43]

Rather than initially address the petition itself, the Commission referred the Board to a portion of an analogous de facto license amendment hearing request by Friends of the Earth (FOE) relating Diablo Canyon seismic issues.[44] On September 28, 2015, the Board denied FOE's hearing request and rejected the claim that plant was operating outside its seismic risk licensing basis and NRC's failure to suspend PG&E's license amounted to a *de facto* amendment. As the Board explained, NRC's post-Fukushima review to reevaluate every nuclear power plant's seismic and flood design basis, under 10 C.F.R. § 50.54(f), was not a *de facto* amendment since that process was being used to "determine whether *future* changes to any of the plants' design bases might be warranted . . . [and] [did] not revise the design basis of the plant."[45] Nor did the licensee's update to its final safety analysis report under 10 C.F.R. § 50.71(e) to incorporate newly discovered seismic information amount to a licensing amendment since the licensee's compliance with that regulation fell within the NRC's oversight function.[46] As such, the Board found that relief petitioners may not "create a hearing opportunity merely by claiming that a facility is improperly operating outside its licensing basis," but rather needed to use the 10 C.F.R. § 2.206 process for requesting enforcement action to address such claims.[47]

[43] *Id.* at 9-10, 12.
[44] *In re* Pac. Gas & Elec. Co., CLI-15-14 (Nuclear Regulatory Comm'n May 21, 2015).
[45] *In re* Pac. Gas & Elec. Co., LBP-15-27, at 11 (Atomic Safety & Licensing Bd. Sept. 28, 2015).
[46] *Id.* at 18.
[47] *Id.* at 9.

As a preliminary qualification, the ongoing growth of legal activity and challenges in the oil and gas industry has led to a significant increase in the number of new legal developments. In view of space limitations, the state updates included in this report are not exhaustive.

I. ALASKA

A. Legislative Developments

The Alaska State Legislature approved S.B. 3001, allowing the buyout of the pipeline company TransCanada so the state-owned Alaska Gasline Development Corp. (AGDC) can acquire a 25% share of the Alaska LNG project alongside BP, ConocoPhillips, and ExxonMobil. S.B. 3001 appropriates $68.4 million to repay TransCanada for its expenses to date in preliminary engineering on its share of the project. The bill also authorizes AGDC to spend $75.6 million to pay what would have been TransCanada's share in completing preliminary engineering now underway.[2]

B. Judicial Developments

In *McIntyre v. BP Exploration. & Production., Inc.*, the court granted summary judgment against an individual who sued BP Exploration and Production, Inc. (BP) for, inter alia, breach of contract and misappropriation of trade secrets in connection with BP's solicitation of suggestions from the public for ways to stop the uncontrolled leaking of oil from the Macondo Oil Well. Plaintiff claimed that BP used his suggested method to cap the well and filed a U.S. Patent Application for the method, without offering plaintiff any compensation, credit, or acknowledgment. The court found that plaintiff and BP never formed a contract and that plaintiff never made any efforts to maintain the secrecy

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[2]S.B. 3001, 29th Leg. (Alaska 2015).

of his idea. Further, the court found that plaintiff's suggested solution lacked the characteristics and specificity to be a "protected idea."[3]

In *State, Dep't of Revenue v. BP Pipelines (Alaska) Inc.*, pipeline owners and municipalities sought review of the State Assessment Review Board's (SARB) 2007, 2008, and 2009 property tax value for the Trans-Alaska Pipeline System (TAPS) of $4.589 billion, $6.154 billion, and $9.046 billion, respectively. The municipalities asserted that the value of TAPS for each of the years in question should be about $14 billion, while the owners asserted that the value should be little more than $1 billion. The reason for the difference in these values was that the owners continued to argue for the income approach to valuation, which would limit TAPS's value based on its tariff income, while the municipalities advocated for a cost approach using the replacement-cost-new-less-depreciation method. On review, the superior court agreed with the municipalities' calculation methodology but arrived at a higher valuation of $8.941 billion in 2007, $9.644 billion in 2008, and $9.249 billion in 2009. The pipeline owners and municipalities thereafter appealed to the Alaska Supreme Court, which held that the superior court did not err in arriving at the final valuation and upheld the court's ruling in all respects.[4]

In *State v. Jewell*, the State of Alaska brought an action seeking an order directing the Secretary of the Interior to review the State's submitted plan for the exploration of oil and gas resources within the coastal plain of the Arctic National Wildlife Refuge (ANWR). The state submitted the exploration plan pursuant to section 1002 of the Alaska National Interest Lands Conservation Act (ANILCA) (16 U.S.C. § 3142(b)(1)). The court, in granting summary judgment in favor of the Secretary, held that the Secretary's interpretation that her statutory authority and obligation to review and approve exploration plans under section 1002 of ANILCA had ceased after 1987 was based on a permissible and reasonable construction of the statute.[5]

In *Kunaknana v. U.S. Army Corps of Engineers*, the court denied a second challenge to the U.S. Army Corps of Engineers' (USACE) decision to issue a permit to ConocoPhillips Alaska, Inc. to fill certain wetlands in order to develop a drill site known as CD–5, which is located in the National Petroleum Reserve—Alaska (NPR–A). The court held, *inter alia*, that (a) USACE's decision not to supplement the final environmental impact statement (FEIS) in lieu of changes to the proposed project, and (b) its decision not to prepare a supplemental environmental impact statement due to recent climate change information were not arbitrary and capricious.[6]

In *Alaska Wilderness League v. Jewell*, the court upheld the Bureau of Safety and Environmental Enforcement's (BSEE) approval of Shell Gulf of Mexico Inc. and Shell Offshore Inc.'s (collectively "Shell") oil spill response plans (OSRPs) for development of offshore oil and gas resources in the Beaufort and Chukchi seas. In granting summary judgment in favor of BSEE, the court held that BSEE's approval of Shell's OSRP was not arbitrary and capricious, since the BSEE lacked discretion to deny approval once it determined that the OSRPs satisfied the statutory requirements due to BSEE's interpretation of the Outer Continental Shelf Lands Act and its own regulations. The court further held that the Endangered Species Act consultation and the National Environmental Policy Act review were not required.[7]

In *Shell Offshore, Inc. v. Greenpeace, Inc.*, after granting a temporary restraining order against Greenpeace, Inc. for interference with Shell Gulf of Mexico Inc. and Shell

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[3]No. 3:13-CV-149 RRB, 2015 WL 999092 (D. Alaska Mar. 5, 2015).
[4]354 P.3d 1053, 1056-58 (Alaska 2015).
[5]No. 3:14-CV-00048-SLG, 2015 WL 4464576, at *6-7 (D. Alaska July 21, 2015).
[6]No. 3:13-CV-00044-SLG, 2015 WL 3397150, at *11-12 (D. Alaska May 26, 2015)
[7]788 F.3d 1212, 1226 (9th Cir. 2015).

Offshore Inc.'s (collectively "Shell") preparation to conduct oil exploration offshore of Alaska on the Outer Continental Shelf, the court denied Greenpeace's motion to dismiss Shell's complaint for trespass to chattels, interference with navigation, private nuisance, and civil conspiracy. Shell's complaint alleges that Greenpeace has been

> [B]lockading vessels in transit, blocking access to vessels attempting to dock at port, boarding vessels, placing swimmers in the water in front of vessels, hanging climbers on the sides of vessels, hanging survival pods on vessels, attempting to foul propulsion systems and chaining of individuals to anchors, vessels or other facilities.[8]

In *Alaska Eskimo Whaling Commission v. U.S. EPA*, the court remanded to the Environmental Protection Agency (EPA) "to reconsider . . . its determination that discharge of non-contact cooling water [by oil and gas exploration facilities] . . . will not cause unreasonable degradation of the marine environment." Specifically, the court required EPA to "identify evidence in the record sufficient to support its [] decision concerning the possible effect, or non-effect, of the discharge of non-contact cooling water on the bowhead whale migration and subsistence hunting season in the Beaufort Sea."[9]

C. Administrative Developments

The Alaska Oil and Gas Conservation Commission (AOGCC) approved an increased natural gas "offtake" rate of 3.6 billion cubic feet of gas per day from the Prudhoe Bay field on the North Slope to supply the planned Alaska LNG Project. The AOGCC's order amended a previous order from several years ago that allowed 2.7 billion cubic feet of gas to be produced.[10]

The AOGCC also approved pool rules for the Point Thomson field that ExxonMobil is developing on the North Slope. The rules, which would allow the initial cycling of gas through the Point Thomson reservoir for condensate production, also allow for the eventual annual average offtake of up to 1.1 billion cubic feet per day of natural gas to supply the planned Alaska LNG project.[11]

II. ARKANSAS

A. Legislative Developments

In its 2015 regular session, the Arkansas General Assembly enacted minor amendments to the statute which governs the integration procedure. The most important

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[8]No. 3:15-CV-00054-SLG, 2015 WL 3745641, at *3 (D. Alaska June 12, 2015) (internal quotations omitted); Order Granting Temporary Restraining Order and Scheduling Further Proceedings, Shell Offshore, Inc. v. Greenpeace, Inc., No. 3:15-cv-00054-SLG, 2015 U.S. Dist. LEXIS 47782 (D. Alaska Apr. 11, 2015).

[9]791 F.3d 1088, 1093 (9th Cir. 2015).

[10]Application of BP Exploration (Alaska) Inc. for Amendment of Prudhoe Oil Pool Rule 9, No. 341F (Alaska Oil and Gas Conservation Comm'n Oct. 15, 2015).

[11]The Application of ExxonMobil Alaska Production Inc. for an Order for Conservation Classification of a New Oil Pool and to Prescribe Pool Rules for Development of the Thomson Oil Pool Within the Pt. Thomson Field, Pt. Thomson Unit, East Harrison Bay, Beaufort Sea, Alaska, No. 719 (Alaska Oil and Gas Conservation Comm'n Oct. 15, 2015).

of those substituted the words "opportunity for a hearing" for "hearing" in the statute, enabling the Commission to issue orders without an actual public hearing under some circumstances when no hearing is requested by any interested party.[12]

B. Judicial Developments

Arkansas is a "forced pooling" jurisdiction. That pooling process is called "integration" in the Arkansas statutes. The authority of the Arkansas Oil and Gas Commission to integrate the interests of non-consenting owners into Commission-formed units originated in Arkansas' 1939 Oil and Gas Conservation Act.[13] The Act modified the common law rule of capture, creating an owner's previously non-existent correlative right to its fair share of the oil and gas beneath its lands in exchange for being required to elect among alternative ways to participate in unit development.[14]

In *Gawenis v. Arkansas Oil and Gas Commission*,[15] the owner of a small mineral tract who was integrated into a larger unit challenged the constitutionality of the integration process, contending that it constituted a taking without compensation and without opportunity for a jury trial to determine valuation. The Arkansas Supreme Court upheld the Act. Prior to the enactment of the Conservation Act, oil and gas beneath a mineral owner's tract were subject to capture by off-tract wells without liability. Thus, there was no vested property right taken by the integration process. Moreover, the challenged statute was found to be a legitimate exercise of the state's police power, as opposed to a "taking." Since no taking occurred, the Arkansas Constitution's jury trial guarantee was inapplicable.

Lewis v. EnerQuest Oil and Gas, LLC.,[16] reported in the 2014 edition of this report, was a decision dismissing a lease cancellation suit based upon the alleged failure of a unit operator to develop geological horizons outside of existing production. The district court dismissed because the lessors had not complied with lease provisions requiring that they first give notice of breach and an opportunity to cure. That decision has now been affirmed by the Eighth Circuit Court of Appeals.[17]

Stevens v. SEECO, Inc.[18] involved a surface owner's challenge to a prior mineral severance in her title chain based upon purported irregularities in the deed creating the severance. The Arkansas Court of Appeals affirmed the trial court's decision that the challenged deed was valid. In her appeal, the surface owner also contended that the severed mineral owner had abandoned his interest by failure to develop the severed interest. The appeals court refused to consider that argument because it was not developed before the trial court. However, in a concurring opinion, one member of the three-judge panel explained that there was no Arkansas precedent for abandonment of a severed mineral interest, nor does Arkansas have statutory termination of mineral interests through non-use. He then expressed doubt whether, absent such a statute, a severed mineral interest, being a perpetual interest in the oil and gas in place, could ever be subject to abandonment.

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[12]S.B. 778, 90th Gen. Assemb., Reg. Sess. (Ark. 2015) (amending ARK. CODE § 15-72-304 (a), (b)).

[13]ARK. CODE ANN. §§ 15-71-101 to 15-71-117 (Act No. 105 of 1939) (2015).

[14]Various ways to participate in unit development include: joining as a participant, executing an oil and gas lease, or being carried, non-consent, subject to recoupment of a risk-factor penalty.

[15]464 S.W.3d 453 (Ark. 2015).

[16]No. 12-CV-1067, 2014 WL 122568 (W.D. Ark. Jan. 13, 2014).

[17]Lewis v. EnerQuest Oil & Gas, LLC, 792 F.3d 872 (8th Cir. 2015).

[18]No. CV–14–604, 2015 WL 2437898 (Ark. Ct. App. May 20, 2015).

SEECO, Inc. v. Holden[19] involved an ownership dispute between two one-half mineral owners, one of whom also owned the surface while the other's mineral interest was severed. The severed owner's interest had been the subject of a purported 1958 tax forfeiture, which was clearly void. Still, the surface owner, who was the purchaser at the resulting void tax sale, claimed the interest. When the severed owner sued to quiet title to her interest, the surface owner contended that the suit was barred by limitations. She contended that her possession (her lessee had commenced drilling wells on the contested lands more than two years prior to commencement of the quiet title suit) precluded the suit.[20] The trial court ruled in favor of the surface owner, but the Arkansas Court of Appeals reversed. The appeals court's opinion confirmed that Arkansas adheres to the majority rule that production of minerals by a cotenant does not constitute adverse possession against non-producing cotenants. Since, under the two-year statute, exclusive possession is required to begin the running of the limitations period, the statutory period never began to run. Thus, the severed one-half owner could quiet title and set aside the void tax sale.

C. Administrative Developments

The Arkansas Oil and Gas Commission made minor revisions to several of its regulations in 2015. Since these regulations are constantly in revision, the practitioner is advised to regularly check online.[21]

III. CALIFORNIA

A. Legislative Developments

In 2015, the California Legislature continued to focus on increasing the regulation of oil and gas exploration, production, and transportation operations in California. Among the highest profile issues before the Legislature was the Division of Oil, Gas, and Geothermal Resources of the California Department of Conservation (DOGGR) supervision of water injection and disposal wells that are essential for California production operations. Senate Bill 83[22] establishes an aquifer exemption proposal process by which the DOGGR, as part of its implementation of the State's underground injection control program, will coordinate with the State Water Resources Control Board to evaluate aquifers prior to submitting exemption proposals to EPA for consideration. The bill also established biannual reporting requirements for DOGGR and the Water Board for underground injection control permits.

A high profile pipeline rupture, which spilled heavy crude oil along the Santa Barbara County coast on May 19, 2015, was the motivating factor behind Assembly Bill No. 864,[23] which amended the Lempert-Keene-Seastrand Oil Spill Prevention and

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[19]473 S.W.3d 36 (Ark. Ct. App. 2015).

[20]ARK. CODE § 18-61-106(a) (2015) bars a person who has been dispossessed by a tax purchaser for more than two years from maintaining a quiet title suit. However, numerous prior Arkansas decisions have interpreted that statute to require that the tax purchaser's possession be adverse.

[21]*Commission News and Alerts*, AOGC, http://www.aogc.state.ar.us (last visited Apr. 6, 2016).

[22]S.B. 83, 2015-2016 Reg. Sess. (Cal. 2015) (adding CAL. PUB. RES. CODE §§ 3130-3132).

[23]A.B. 864, 2015-2016 Reg. Sess. (Cal. 2015) (adding CAL. GOV'T CODE § 51013.1).

Response Act[24] and the Elder California Pipeline Safety Act of 1981.[25] The amendment requires any new or replacement pipeline near environmentally and ecologically sensitive areas in the coastal zone to use best available technologies to reduce the amount of oil released in an oil spill to protect state waters and wildlife by January 1, 2018. Operators of existing pipelines near these sensitive areas are required to submit a plan to retrofit such pipelines by July 1, 2018.

Senate Bill No. 295 added California Government Code section 51015.1 to require the State Fire Marshal to annually inspect all intrastate pipelines commencing January 1, 2017, and to adopt regulations to ensure compliance with applicable laws and regulations.[26]

Assembly Bill No. 1420[27] added section 3270.5 to the Public Resources Code to require DOGGR (which regulates gathering lines) to review, evaluate, and update by January 1, 2018, its existing regulations for all active gas pipelines that are four inches or less in diameter in defined "sensitive areas;" that is, within 300 feet of a home, school, hospital, or business, and pipelines which are ten years old or older. The new section also requires operators of active gas pipelines in those "sensitive areas" to submit maps identifying the location of those pipelines by January 1, 2018. DOGGR is also required to perform random periodic spot check inspections to ensure that the submitted maps are accurately reported and to maintain a list of active gas pipelines in sensitive areas. The bill also added section 3270.6 to the Public Resources Code to require operators who discover a leak from an active gas pipeline within a sensitive area to promptly notify DOGGR and the local health officer. Pursuant to section 101042 added to the Health and Safety Code, the local health officer then has the authority to direct the response to the leak at the responsible party's expense.

Assembly Bill No. 815[28] amended California Government Code section 8670.40 to impose an oil spill prevention and administration fee not to exceed $0.065 per barrel of crude oil. The fee will be imposed upon a person owning crude oil or petroleum products at the time that the crude oil or petroleum products are received at a refinery within the state by any mode of delivery that passes over, across, under, or through waters of the state.

B. Administrative Developments

Reflecting the increased public and legislative interest in underground injection wells used for waste water disposal and secondary recovery purposes and the perceived potential impact on drinking water aquifers, DOGGR adopted emergency regulations and proposed permanent regulations requiring operators injecting or disposing water into identified aquifers to obtain an aquifer exemption issued by EPA under the Safe Drinking Water Act by specified dates or to cease injection activity.[29] DOGGR is currently conducting public workshops regarding the permanent regulations.

DOGGR released a Renewal Plan[30] on October 8, 2015, to address a number of regulatory issues identified in a report submitted to the Legislature under the 2010

[24]CAL. GOV'T CODE §§ 8574.1-8574.15 (2015).
[25]CAL. GOV'T CODE §§ 51010-51019.1 (2015).
[26]S.B. 295, 2015-2016 Reg. Sess. (Cal. 2015).
[27]A.B. 1420, 2015-2016 Reg. Sess. (Cal. 2015) (adding CAL. PUB. RES. CODE §§ 3270.5, 3270.6 and CAL. HEALTH & SAFETY CODE § 101042).
[28]A.B. 815, 2015-2016 Reg. Sess. (Cal. 2015) (adding CAL. GOV'T CODE § 51015.1).
[29]CAL. CODE REGS. tit. 14, § 1779.1 (2015).
[30]CAL. DEP'T OF CONSERVATION DIV. OF OIL, GAS, AND GEOTHERMAL RES., RENEWAL PLAN FOR OIL AND GAS REGULATION (Oct. 2015) [hereinafter RENEWAL PLAN].

Senate Bill 855[31] with respect to DOGGR's enforcement and permitting of underground injection control operations.[32] The Renewal Plan includes DOGGR completing its review of aquifer exemptions and conducing a project-by-project review while ensuring that any UIC project approval letters clearly outline conditions of the permit. The plan also contemplates developing and updating DOGGR's regulations for hydraulic fracturing and underground injection control, as well as establishing standard practices for record-keeping and workforce training, to ensure consistent practices locally and statewide. Additionally, the plan includes building a publicly accessible online database and establishing deadlines for new regulations, public input, and well evaluations.[33]

To implement Senate Bill 4 enacted in 2013,[34] DOGGR adopted final regulations addressing hydraulic fracturing, acid fracturing, and acid matrix stimulation.[35] The regulations generally require notification to DOGGR prior to fracturing, and contain post-completion reporting requirements, public notification, chemical disclosure requirements, review of well construction standards, well integrity tests, information regarding the structural integrity of the overlying formation, groundwater protection and fluid management. The final regulations also require a permit to conduct well stimulation operations and require an operator to conduct evaluation operations prior to commencing well stimulation, including cement evaluation, formation isolation, well, geologic and fault review, and pressure testing. During the well stimulation operations, the operator will be required to continuously monitor the impact of well stimulation operations both during and after those operations. The regulations also contain requirements for the storage and handling of treatment fluids. After cessation of well stimulation operations, the operator will be required submit a report on those operations.

As part of its implementation of Senate Bill 4, the State Water Resources Control Board adopted Resolution No. 2015-0047 establishing model criteria for groundwater monitoring in areas of oil and gas well stimulation.[36]

At the end of 2014, DOGGR entered into memoranda of agreements pursuant to Senate Bill 4 to coordinate California state agencies' regulation of well stimulation treatments and related activities with the State Water Resources Control Board and Regional Water Quality Control Boards,[37] the California Department of Toxic Substances Control,[38] the California Air Resources Board and San Joaquin Valley Air

[31] S.B. 855, 2009-2010 Reg. Sess. (Cal. 2010).

[32] CAL. DEP'T OF CONSERVATION DIV. OF OIL, GAS, AND GEOTHERMAL RES., UNDERGROUND INJECTION CONTROL PROGRAM REPORT ON PERMITTING & PROGRAM ASSESSMENT (Oct. 2015), *available at* ftp://ftp.consrv.ca.gov/pub/oil/Publications/SB%20855%20Report%2010-08-2015.pdf.

[33] RENEWAL PLAN, *supra* note 30.

[34] S.B. 4, 2013-2014 Reg. Sess. (Cal. 2013).

[35] CAL. CODE REGS. tit. 14 §§ 1780-1789 (2015).

[36] CAL. STATE WATER RES. CONTROL BD., MODEL CRITERIA FOR GROUNDWATER MONITORING IN AREAS OF OIL & GAS WELL STIMULATION, Res. No. 2015-0047 (July 7, 2015).

[37] Memorandum of Agreement among Dep't of Conservation, Div. of Oil, Gas, and Geothermal Res.; Cal. State Water Res. Control Bd.; and Reg'l Water Quality Control Bds. Regarding Well Stimulation Treatments and Well Stimulation Treatment-Related Activities (Dec. 2014).

[38] Memorandum of Agreement between Dep't of Conservation, Div. of Oil, Gas, and Geothermal Res. and Cal. Dep't of Toxic Substances Control Regarding Well Stimulation Treatments and Well Stimulation Treatment-Related Activities (Dec. 2014).

Pollution Control District[39] and other local air districts,[40] the California Coastal Commission[41] and the Department of Resources Recycling and Recovery.[42]

Kern County, California's largest oil producing county, amended its County Zoning Ordinance to set forth new development standards for all future oil and gas exploration, extraction, operations, and production activities in unincorporated areas of the County.[43] The County also approved a master Environmental Impact Report[44] under the California Environmental Quality Act[45] (CEQA) for such operations in order to streamline the environmental review for permitting new oil and gas wells.[46] The Environmental Impact Report contemplates that any "Responsible Agency" under CEQA, including DOGGR, could use the County's certified EIR as the required CEQA documentation for their approvals.

IV. COLORADO

A. Legislative Developments

While the Colorado Legislature did not pass any legislation directly relating to oil and gas during the 2015 legislative session, one bill did pass that should be of interest to title examiners. Senate Bill 15-049 broadened a prior statute governing the effect of delivery of a deed to a corporation before it is incorporated to include other entities. The amended statute now provides that if a grantee described in a deed as an entity has not been formed at the time of delivery of the deed, title to the real property described in the deed vests in the grantee when the entity is formed, and no other instrument of conveyance is required. An "entity" includes a domestic or foreign corporation, general partnership, cooperative, limited liability company, limited partnership, limited partnership association, nonprofit association, nonprofit corporation, or any other organization or association recognized under law as a separate legal entity (including a foreign limited liability partnership or foreign limited liability limited partnership).[47]

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[39]Memorandum of Agreement among Dep't of Conservation, Div. of Oil, Gas, and Geothermal Res.; Cal. Air Res. Bd.; and San Joaquin Valley Air Pollution Control District Regarding Well Stimulation Treatments and Well Stimulation Treatment-Related Activities (Dec. 2014).

[40]Memorandum of Agreement among Dep't of Conservation, Div. of Oil, Gas, and Geothermal Res.; Cal. Air Res. Bd.; and Local Air Districts Regarding Well Stimulation Treatments and Well Stimulation Treatment-Related Activities (Dec. 2014).

[41]Memorandum of Agreement between Dep't of Conservation, Div. of Oil, Gas, and Geothermal Res. and Cal. Coastal Comm'n Regarding Well Stimulation Treatments and Well Stimulation Treatment-Related Activities (Dec. 2014).

[42]Memorandum of Agreement between Dep't of Conservation, Div. of Oil, Gas, and Geothermal Res. and Cal. Dep't of Res. Recycling and Recovery Regarding Well Stimulation Treatments and Well Stimulation Treatment-Related Activities (Dec. 2014).

[43]Kern County, Cal., Revised Amended Draft Oil and Gas Activities, ch. 19.98 (Nov. 9, 2015).

[44]*Environmental Impact Report for Revisions to the Kern County Zoning Ordinance*, PLANNING AND CMTY. DEV. (last visited Apr. 6, 2016).

[45]CAL. PUB. RES. CODE §§ 21000-21189.3 (2015).

[46]Kern County, *Transmittal Memorandum*, CEQA (Nov. 10, 2015), *available at* http://www.co.kern.ca.us/planning/pdfs/eirs/oil_gas/oil_gas_NOD_final.pdf.

[47]S.B. 15-049, 70th Gen. Assemb., Reg. Sess. (Colo. 2015) (amending COLO. REV. STAT. § 38-34-105).

B. Judicial Developments

As reported in the 2014 edition of this report, district court judges struck down three of the five local government bans on hydraulic fracturing that were approved by voters in 2012 and 2013 and challenged by the Colorado Oil and Gas Association, an industry group. In unpublished opinions, the court of appeals affirmed orders denying motions to intervene in the Fort Collins and City of Lafayette cases. The Colorado Supreme Court accepted certiorari in those cases on the question: "Whether home-rule cities are preempted from promulgating local land-use regulations that prohibit the use of hydraulic fracturing in oil and gas operations and the storage of such waste products within city limits when the Colorado Oil and Gas Conservation Commission regulates hydraulic fracturing within the state."[48]

In *Kinder Morgan CO_2 Co., L.P. v. Montezuma County Board of Commissioners*,[49] the court considered a question of first impression regarding taxation of oil and gas leaseholds. Carbon dioxide is valued for property tax purposed based on net-back methodology under either an "unrelated third-party" or a "related party" method. The court's finding that the Board of Assessment Appeals' (BAA) decision that Kinder Morgan and the Cortez Pipeline Company were related parties for purposes of calculating the transportation deduction was supported by competent evidence. The value of the leasehold had been underreported in 2008 under the statutory scheme. The court affirmed the decision of the BAA, holding that retroactive assessments of oil and gas leaseholds can occur where value has been underreported, even without evidence of omitted property or willfully false and misleading annual statements.

After multiple appeals, *Patterson v. BP America Production Company*[50] proceeded to trial, resulting in a jury verdict for the class of royalty owners and an entry of judgment in favor of the class. The class appealed the court's pretrial order denying its claim for moratory interest under Colorado Revised Statute section 5-12-102(1)(a). The Colorado Court of Appeals affirmed because the class was unable to prove BP's actual gain or benefit attributable to the money withheld from royalty payments. The Colorado Supreme Court denied the petition for certiorari, bringing the extended case to a conclusion.

In *Phelps Oil & Gas, LLC v. Noble Energy, Inc.*,[51] the court adopted the recommendation of the magistrate judge dismissing claims by Phelps and the class of royalty interests it sought to represent. The court agreed that Phelps, as a royalty owner, was not a third-party beneficiary of the percentage of proceeds sales contracts between DCP and Noble.

In 2012, the court certified a class for the purpose of addressing claims for declaratory relief which were decided this year in *A-W Land Co., LLC v. Anadarko E&P Co. LP.*[52] Anadarko acquired mineral interests from Union Pacific Railroad Company and discontinued Union Pacific's practice of acquiring surface owner agreements whereby it paid royalty to the owner of the surface. Plaintiffs sought a declaration that Anadarko's use of the surface exceeded the surface reservation in the underlying deeds to Union Pacific. The court held that (1) the deed was not ambiguous and allows use of the surface that is convenient from Anadarko's point of view, without abrogating the

[48]City of Ft. Collins, Colorado v. Colo. Oil & Gas Ass'n, No. 15SC668, 2015 WL 5554358 (Sept. 21, 2015).
[49]No. 13CA2187, 2015 WL 3504537 (Colo. App. June 4, 2015).
[50]360 P.3d 211 (Colo. App. 2015), *cert. denied*, No. 15SC246, 2015 WL 5934693 (Colo. Oct. 13, 2015).
[51]No. 14-2604-REB-CBS, 2015 WL 5561093 (D. Colo. Sept. 22, 2015).
[52]No. 09-CV-02293-MSK-MJW, 2015 WL 4464414 (D. Colo. July 22, 2015).

requirement that the use must be reasonable; (2) compliance with the Colorado Oil and Gas Conservation Commission (COGCC) permitting process does not preempt claims for trespass; and (3) Anadarko may be liable for its lessees' trespasses in certain circumstances, depending on factual proof. Having decided the common questions of law, the court initiated a process for decertification of the class.

In *Antero Resources Corporation v. Strudley*,[53] the Colorado Supreme Court affirmed the decision described in the 2013 edition of this report. Over a dissenting opinion supporting dismissal for failure to establish a prima facie claim, the court ruled as a matter of first impression that courts do not have the authority to issue modified case management orders that require prima facie evidence of a claim before full discovery can proceed.

C. Administrative Developments

In March 2015, the COGCC finalized safety rule changes that grew out of recommendations made by COGCC following the September 2013 flood affecting the Colorado front range. Rule 603.g requires all equipment at drilling and production sites in geological hazard areas to be anchored with anchors engineered to support the equipment and to resist flotation, collapse, lateral movement, or subsidence. Rule 603.h(1) requires notification of COGCC when a new proposed location is within a defined Floodplain (i.e., an area officially declared to be in a 100-year floodplain by a Colorado municipality, county, state agency, or by a federal agency); requires new wells within a defined Floodplain to be equipped with remote shut-in capabilities prior to commencing production; and requires secondary containment areas around tanks. Rule 603.h(2) requires Operators to maintain a current inventory of all existing wells, tanks, and separation equipment in a defined Floodplain as of April 1, 2016. Rule 603.h(2) also establishes the following requirements with respect to new wells and locations (effective June 1, 2015) and existing wells and locations (effective April 1, 2016, unless a variance is obtained): requires tanks and separation equipment to be anchored to the ground with anchors engineered to support the equipment and to resist flotation, collapse, lateral movement, or subsidence; requires containment berms around all tanks to be constructed of steel rings or another engineered technology that provides equivalent protection from floodwaters and debris; and requires COGCC approval for production pits, special purpose pits, and flowback pits containing E&P waste within a defined Floodplain.[54]

V. KANSAS

A. Legislative Developments

In 2015, K.S.A. 55-193 was amended to extend to 2020 payments to the abandoned oil and gas well fund, the "plugging" fund for wells drilled before July 1, 1996. The source of funding was modified to eliminate the $100,000 in annual funding from "the state water plan fund" by increasing the amount paid from the "conservation fee fund" from $100,000 to $200,000.[55] The conservation fee fund is a tax on Kansas oil

[53]347 P.3d 149 (Colo. 2015).

[54]*In re* Changes to the Rules of Practice and Procedure of the Oil & Gas Conservation Comm'n of the State of Colo., Cause No. 1R, Order No. 1R-124 (Oil & Gas Comm'n of the State of Colo. Mar. 2, 2015).

[55]Pollution Remediation, ch. 44, sec. 2, § 15-193, 2015 Kan. Sess. Laws 589-90.

and gas operators to pay the Kansas Corporation Commission Oil and Gas Conservation Division's expenses and administration costs.[56]

B. Judicial Developments

The most significant development in Kansas oil and gas jurisprudence in 2015, and during the past two decades, is the Kansas Supreme Court's decision in *Fawcett v. Oil Producers, Inc. of Kansas*.[57] The court reaffirmed its prior holdings that a lessee's obligation to market gas can be satisfied by a sale of gas at the well and that lessees have no obligation to seek out markets downstream of the wellhead or to otherwise enhance the value of the gas stream by treating it or moving it closer to downstream markets. The court rejected the plaintiff's attempt to have Kansas adopt Colorado's marketable product rule. Instead the court gave effect to the express terms of oil and gas leases that contemplate the lessee's royalty obligation will be based upon the value of gas as it is extracted at the well on the leased premises as opposed to downstream values at an interstate pipeline or other market.

In *Netahla v. Netahla*[58] the Kansas Supreme Court rejected the lower courts' use of common "subject to" language to incorporate the lease shut-in royalty clause to excuse a lack of required production under a defeasible term mineral interest habendum clause. Existing Kansas law requires actual production and marketing of oil and gas from the defeasible term interest in order to satisfy the "production" requirement of the habendum clause.[59] Absent express savings clause language in the document creating the defeasible interest, or express language incorporating the savings clauses of an oil and gas lease, the interest terminates when the primary term ends without production.

The duration of a defeasible term mineral interest was also addressed by the Kansas Court of Appeals in *OXY USA, Inc. v. Red Wing Oil, LLC*.[60] The court rejected a "subject to" argument similar to that raised in the *Netahla* case but also addressed whether including the interest in a pooled area would satisfy the "production" requirement to perpetuate it beyond its primary term that ended in 1965. Current Kansas law would perpetuate the interest to the extent the acreage shares in pooled production, even though the well for the pooled area is not located on the defeasible interest acreage.[61] The current rule, established in *Classen*, overruled a prior rule, established in the *Smith v. Home Royalty Association, Inc.*,[62] that acreage participating in pooled production would not extend the defeasible interest when the producing well was not physically on the defeasible interest lands. Although the court in *Kneller v. Federal Land Bank of Wichita*[63] suggested a *Classen*-like rule would apply during the time frame prior to the *Smith* holding in 1972, it refused to give *Classen* retroactive effect. This means the interest must satisfy the *Smith* production requirement during the June 10, 1972 through October 7, 1980 timeframe when the *Smith* rule applied. Under the facts, the interest terminated on June 10, 1972, for failing to have a well physically located on the defeasible interest acreage. The *OXY* court rejected estoppel, waiver, and statute of

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[56]KAN. STAT. ANN. § 55-143 (2015) (establishes the conservation fee fund that is implemented by regulation). KAN. ADMIN. REG. § 82-3-206 (2015) (tax on oil); KAN. ADMIN. REG. § 82-3-307 (2015) (tax on gas).
[57]352 P.3d 1032 (Kan. 2015).
[58]346 P.3d 1079 (Kan. 2015).
[59]Dewell v. Fed. Land Bank of Wichita, 380 P.2d 379 (Kan. 1963).
[60]360 P.3d 457 (Kan. Ct. App. 2015).
[61]Classen v. Fed. Land Bank of Wichita, 617 P.2d 1255 (Kan. 1980).
[62]498 P.2d 98 (Kan. 1972).
[63]799 P.2d 485 (Kan. 1990).

limitations arguments that would have imposed an obligation on the owner of the possibility of reverter to take affirmative action to declare that the defeasible interest had terminated and the reversion had taken place.

The court of appeals interpreted the Kansas plugging statute in *John M. Denman Oil Co. v. State Corporation Commission*,[64] where the defendant asserted that: (1) its plugging liability could not continue after it had transferred its rights to a purchaser because only one party may be held liable for plugging a well; and (2) joint and several liability is not possible under the statute. The court rejected both arguments holding that K.S.A. 55-179(b) contemplates that more than one party can be held liable and "the most sensible interpretation is that the parties would be jointly and severally liable."[65]

The Kansas oil and gas lien statute, K.S.A. 55-207, was interpreted in *Klima Well Service, Inc. v. Hurley*,[66] where the court addressed two issues of first impression. First, the court held the Kansas oil and gas lien statute allowed the lien claimant to limit the scope of its lien to the non-paying party's undivided interest in the lease. Second, the court held the operating agreement between the parties provided the necessary contract "with the owner of any leasehold" as required by the statute.

The court in *Gaudreau v. United States*[67] upheld the IRS denial of a $500,000 refund request by holding that the payment of "bonuses" to a landman under an "Employee's Incentive Agreement" did not create the requisite "economic interest" in individual properties to entitle him to a depletion deduction or capital gains treatment of his income.

C. Administrative Developments

The Kansas Corporation Commission, by Order dated March 19, 2015, reduced injection rates and pressures for Class II injection wells in Harper and Sumner Counties out of concern for "increasing seismic activity in Harper and Sumner Counties, correlating with increasing volumes of saltwater injected in those counties . . . ."[68]

VI. LOUISIANA

A. Legislative Developments

Act No. 448 establishes provisions for alternative dispute resolution for legacy suits, subject to the provisions of Act 312 (also known as La. R.S. 30:29). Most notably, the Act creates two methods to assist in narrowing the issues involved in a particular suit and/or in resolving a suit. First, Subsection B provides that within sixty days after the end of a stay of litigation required by La. R.S. 30:29(B)(1), "the parties shall meet and confer in an effort to assess the dispute, narrow the issues, and reach agreements useful or convenient for the litigation of the action."[69] Second, upon the earlier of any party's motion after discovery or 550 days after commencement of the action, the court must enter an order compelling the parties to enter nonbinding mediation. For any mediation

[64]342 P.3d 958 (Kan. Ct. App. 2015).
[65]*Id.* at 962.
[66]No. 14-1250-SAC, 2015 WL 5637536 (D. Kan. Sept. 24, 2015).
[67]71 F. Supp. 3d 1264 (D. Kan. 2014).
[68]*In re* Order Reducing Saltwater Injection Rates into the Arbuckle Formation, Applicable to Wells in Defined Areas of Increased Seismic Activity in Harper and Sumner Counties, Docket No. 15-CONS-770-CMSC (State Corporation Comm'n of the State of Kan. Mar. 19, 2015).
[69]S.B. 79, 2015 Reg. Sess. (La. 2015).

ordered, the parties will have fifteen days to agree on the details of the mediation such as date, time, and identity of the mediator. If the parties cannot agree, the court will conduct a contradictory hearing to determine such issues. Finally, Act No. 448 requires that each party in a mediation have a representative present with settlement authority or a person present with direct contact with a person having settlement authority on behalf of the client.

Act No. 253 modifies the definition of what constitutes a "drilling unit," which is now defined as "the maximum area which may be efficiently and economically drained by the well or wells designated to serve the drilling unit as the unit well, substitute unit well, or alternate unit well." The most notable aspect of this change is that it explicitly allows the Office of Conservation to create drilling units that are drained by multiple wells. Furthermore, it reinforces the Office of Conservation's practice of approving alternate unit wells—a practice that, while routine, has been challenged in court. Act No. 253 also recognized the Office of Conservation's authority to approve "Cross-Unit Horizontal Wells." The Act created La. R.S. 30:9.2 and defines the term "cross-unit well" as a "well drilled horizontally and completed under multiple drilling units that is designated by the commissioner after notice and public hearing to serve as a unit well, substitute unit well, or alternate unit well for said units."[70]

B. Judicial Developments

Within the past year, Louisiana appellate courts have addressed the question of whether or not the subsequent purchaser doctrine applies to claims asserted under a mineral lease in the context of legacy lawsuits. In *Wagoner v. Chevron*, the Louisiana Second Circuit Court of Appeal found that the right to damages under a mineral lease is a personal right and as such, did not pass to new owners of land in the absence of a specific conveyance of the right in the instrument.[71] The Louisiana Third Circuit has addressed this issue several times and upheld the application of the subsequent purchaser doctrine to mineral lease claims. Most recently, in *Bundrick v. Anadarko Petroleum*, the Third Circuit reinforced its previous decision and a similar decision of the First Circuit in *Global Marketing* and concluded that "the supreme court's instruction to the trial court in *Global Marketing* is a recognition that the subsequent purchaser rule applies in matters involving mineral leases."[72]

With regard to royalty demands under Louisiana law, at least one decision is notable. In *Samson Contour Energy E&P, L.L.C. v. Smith*, the Second Circuit arguably modified its previous holding in *Rivers v. Sun Exploration & Production Co.*, as to the standard for notice under Mineral Code article 137.[73] The court found that "[t]he total effect of the articles is to provide a spur to timely payment of royalties due while giving lessees a reasonable way to avoid the harsh remedy of cancellation."[74] While the Second

[70]S.B. 88, 2015 Reg. Sess. (La. 2015) (amending LA. REV. STAT. § 30:9(B) and enacting LA. REV. STAT. § 30:9.2).
[71]55 So. 3d 12, 23 (La. Ct. App. 2010).
[72]159 So. 3d 1137, 1143 (La. Ct. App. 2015), *cert. denied*, No. 2015-C-0557, 2015 WL 9597967 (La. Nov. 12, 2015); *see also* Global Mktg. Solutions, LLC v. Blue Mill Farms, Inc., 153 So. 3d 1209 (La. Ct. App. 2014).
[73]175 So. 3d 967 (La. Ct. App. 2014). The ruling in *Smith* was subsequently modified on rehearing, but the Second Circuit's rehearing decision did not impact its discussion of the notice standard under Mineral Code article 137. *See reh'g granted in part*, No. 49,494-CA, 2015 La. App. LEXIS 1180 (La. Ct. App. June 10, 2015). *See also* Rivers v. Sun Exploration and Production Co., 559 So. 2d 963 (La. Ct. App. 1990).
[74]*Samson Contour*, 175 So. 3d at 973 (internal citations omitted).

Circuit cited to *Rivers* in its articulation of the standard, the standard in *Smith* potentially alters the requirement that a demand provide information that would "allow for an appropriate investigation" by the mineral lessee. This is especially true when one considers the factual scenario in *Smith*. While the plaintiffs engaged in extensive correspondence with their mineral lessee regarding royalty payments to a succession, it occurred in a fashion that one could characterize as requests for information regarding certain payments, as opposed to an actual demand for payment.[75]

In *Hayes Fund v. Kerr-McGee*, a group of mineral owners contended that several mineral lessees failed to follow proper, customary, and industry-wide accepted protocol for drilling two oil and gas wells.[76] At the district court, a "battle of the experts" ensued.[77] The mineral owners' expert had a theory "premised on his belief [that] all three reservoirs were volumetric or depletion driven," which are not in communication with an aquifer and necessarily have no gas-water contact.[78] On the other hand, the lessees' expert attempted to establish that the formations at issue were water-driven.[79] The associated effects of each experts' theories were essential to each sides' respective arguments. The district court ultimately credited the lessees' experts over the mineral owners' expert and found that the mineral owners were unable to prove the lessees' "actions caused the loss of hydrocarbons."[80] Accordingly, the mineral owners' claims were dismissed. However, on appeal, the Third Circuit reversed the district court's factual findings as "manifestly erroneous."[81] After a painstaking review of the record that focused primarily on the scientific evidence, the Louisiana Supreme Court found that the record reasonably supported the district court's factual findings and determinations, thereby reinstating the district court judgment.[82]

In *McCarthy v. Evolution Petroleum Corp.*, the court analyzed whether Louisiana mineral law imposed "a duty on a mineral lessee purchasing the lessor's mineral royalty rights to disclose to the lessor that the lessee has already negotiated the resale of the mineral rights to a third party for a significantly higher price."[83] The Louisiana Supreme Court, which viewed the case as hinging on the court's interpretation of Mineral Code article 122, reversed the appellate court's decision and found that the Mineral Code did not provide a cause of action for the mineral lessors.[84] In its reasoning, the court began by recognizing that Mineral Code article 122 relieves a mineral lessee from any fiduciary obligation to its lessor.[85] While the court noted that "[f]raud may result from silence or inaction," it also noted that for a cause of action to exist, a party must have a "duty to speak or disclose information."[86] The court then went on to find that "under Article 122, the duty of a mineral lessee to develop and operate as a reasonably prudent operator has no component of disclosing the information about which plaintiffs complain."[87] The

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[75] *Id.* at 974.
[76] No. 2014-C-2592, 2015 La. LEXIS 2530 (La. Dec. 8, 2015).
[77] *Id.* at *1.
[78] *Id.* at *8-9.
[79] *Id.* at *11.
[80] *Id.* at *11-12.
[81] *Hayes*, 2015 La. LEXIS 2530 at *12.
[82] *Id.* at *106-08.
[83] No. 2014-C-2607, 2015 La. LEXIS 2242, at *1 (La. Oct. 14, 2015) (While not discussed at length herein, the court also reinforced Mineral Code article 17's prohibition against the rescission of the sale of mineral rights for the reason of lesion).
[84] *Id.* at *12-14.
[85] *Id.* at *13.
[86] *Id.* at *14-15 (internal citations omitted).
[87] *Id.* at *15.

court did note that "[p]arties may stipulate [as to what amounts to] reasonably prudent conduct on the part of a lessee[,]" including provisions regarding the disclosure of information, but no such contractual provision between the mineral lessors and lessee existed in the instant case.[88]

One way that a non-operator can secure payment of an obligation owed by the unit operator is through the non-operator's privilege. In order to state a valid privilege, a non-operator must set forth the items listed in La. R.S. 9:4887. One of the items that must be set forth is "the amount of the obligation due as of the date of the statement."[89] In *Hilcorp Energy I, L.P. v. Merritt Operating, Inc.*, the court addressed the meaning of this phrase and what information must be included in a non-operator's statement of privilege. In this case, the non-operator filed a statement of privilege that described the amount due in terms of the percentage of production.[90] Ultimately, the court found that the description of the amount due in terms of unit percentage was adequate. The court based its holding, in part, on the fact that the operator, as producer of the well, possessed information regarding the production and cost information associated with the unit well. As a result, the court concluded that the operator "had sufficient information in its possession to calculate the amount of the lien when provided with [the non-operator's] interest in the unit production."[91]

VII. NEW MEXICO

A. Judicial Developments

In *SWEPI, LP v. Mora County, New Mexico*,[92] the court issued a memorandum opinion and order granting in part SWEPI, LP's motion for summary judgment and striking down in its entirety the Mora County Community Water Rights and Local Self-Government Ordinance, Ordinance 2013-10 (the Ordinance) in a mammoth 199-page opinion. The Ordinance purported to ban and criminalize all oil and gas extraction and a number of related activities in the County, including the extraction of water for use in oil and gas operations and the construction or maintenance of pipelines and other oil and gas infrastructure. The Ordinance also purported to strip personhood rights under the Constitution, rights under the First and Fifth Amendments to the Constitution, and rights under the Commerce and Contracts Clauses of the Constitution from corporations and other business entities that sought to engage in activities prohibited by the Ordinance.

After addressing standing and ripeness, the court, among other rulings, rejected the notion that local governments may supersede state and federal law, invalidating the portions of the Ordinance that purported to strip corporations of their constitutional rights based on the Supremacy Clause of the U.S. Constitution.[93] The court also found that the Ordinance violated the First Amendment on its face.[94]

In *Anderson Living Trust v. WPX Energy Production, LLC*,[95] the court reluctantly denied plaintiffs' motion for class certification. In previous years, the court had dismissed plaintiffs' claim that the deduction of any post-production costs from royalty payments

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[88] *McCarthy*, 2015 La. LEXIS 2242, at *19 (quoting LA. REV. STAT. § 31:122 (2014)).
[89] LA. REV. STAT. § 9:4887(A)(2) (2014).
[90] 151 So. 3d 1000, 1002 (La. Ct. App. 2014).
[91] *Id.* at 1003.
[92] 81 F. Supp. 3d 1075 (D.N.M. 2015).
[93] *Id.* at 1173.
[94] *Id.* at 1188.
[95] 306 F.R.D. 312 (D.N.M. 2015)

violated the marketable condition rule,[96] and plaintiffs' subsequent claim that unreasonable or fraudulently deducted costs (rather than all post-production costs) violated the marketable condition rule,[97] finding in each case that *Elliot Industries LP v. BP America Production Co.*[98] barred the claims because the Tenth Circuit found no support for the marketable condition rule under New Mexico law. In this case, the court denied class certification for the remaining New Mexico royalty underpayment claims, including failure to pay on volumes of certain hydrocarbons, such as drip condensate and breach of the duty of good faith and fair dealing.

In *Diné Citizens Against Ruining Our Environment v. Jewell*,[99] the court denied plaintiffs' motion for a preliminary injunction to nullify 265 approvals of applications for permits to drill (APDs) on federal land in the Mancos Shale formation of the San Juan Basin. Plaintiffs claimed that the National Environmental Policy Act (NEPA) required the Bureau of Land Management (BLM) to prepare new environmental impact statements (EISs) because its 2003 resource management plan and accompanying EIS did not contemplate the application of modern directional drilling technology and modern slickwater hydraulic fracturing to the Mancos Shale. In denying plaintiffs' motion, the court found that plaintiffs had failed to satisfy three of the four elements required for a preliminary injunction. The court did, however, conclude that any environmental harms from the wells permitted under the APDs would be irreparable.

In *Smith v. Hess Corp.*,[100] the court denied plaintiff's request for summary judgment on his claim that defendant breached the implied covenant to market CO_2 produced from the West Bravo Dome Carbon Dioxide Unit by taking CO_2 in kind. The court held that no implied duty to market existed in this case because the unit agreement contemplated the taking in kind of CO_2 and "under New Mexico law, covenants are not implied for subjects that are treated in express provisions."[101] The court also held that, assuming plaintiffs could show sales applicable to the calculation of royalty on the CO_2 taken in kind, New Mexico law would allow deduction of post-production expenses to calculate the value of net proceeds at the well where the parties agreed that CO_2 was marketable at the well. In so holding, the court stated that whether the costs were actually value enhancing was not the focus; "rather, the focus is to reconstruct a wellhead value by deducting costs that were included in determining the downstream price."[102]

In *King v. Estate of Gilbreath*,[103] the court examined whether a defendant operator was entitled to summary judgment on cross-claims for breach of fiduciary duty filed by non-operating working interest owner defendants. The court held that the joint operating agreement (JOA) provision that the operator is only liable for "gross negligence or willful misconduct" demonstrated that the JOA does not create a fiduciary relationship and that the communitization agreement also did not create a fiduciary relationship.[104]

In *Woody Investment, LLC v. Sovereign Eagle, LLC*,[105] the appeals court reversed

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[96]Anderson Living Trust v. ConocoPhillips Co., 952 F. Supp. 2d 979, 998-99 (D.N.M. 2013).

[97]Anderson Living Trust v. WPX Energy Production, LLC, 27 F. Supp. 3d 1188, 1249 (D.N.M. 2014).

[98]407 F.3d 1091, 1113-14 (10th Cir. 2005).

[99]No. CIV 15–0209 JB/SCY, 2015 WL 4997207 (D.N.M. Aug. 14, 2015).

[100]No. 13-468 JCH/CG (D.N.M., Sept. 23, 2015).

[101]*Id.* slip op. at 12 (quoting Elliot Indus. Ltd. P'ship v. BP America Prod. Co., 407 F.3d 1091, 1113 (10th Cir. 2005)).

[102]*Id.* slip op. at 14-15, 18.

[103]No. 13-862 JCH/LAM (D.N.M. Sept. 29, 2015).

[104]*Id.* slip op. at 13, 15.

[105]362 P.3d 107 (N.M. Ct. App. 2015).

the district court's grant of summary judgment to defendants on plaintiffs' claims under the New Mexico Surface Owners Protection Act (SOPA).[106] Specifically, the court found that a geophysical survey is an "oil and gas operation" under SOPA.[107] SOPA imposes strict liability on operators for surface damage caused by oil and gas operations.[108]

B. Administrative Developments

On March 31, 2015, the New Mexico Oil Conservation Commission (OCC) repealed and replaced Rule 34, which regulates the disposition of produced water, to encourage the reuse and recycling of produced water.[109] The new rule creates new definitions for a "recycling facility" and a "recycling containment." A "recycling facility" is a "facility used exclusively for the treatment, re-use or recycling of produced water intended for disposition by use."[110]A "recycling containment" is effectively a synthetically lined pit used as a recycling facility or as part of a larger recycling facility.[111] Although no permit is required to dispose of produced water if the water is used in drilling, fracking, or secondary recovery operations, operators must register new recycling containments with the Oil Conservation Division and notify the surface owner when filing the registration form.[112]

VIII. NORTH DAKOTA

A. Judicial Developments

In *EOG Resources, Inc. v. Soo Line Railroad Co.*,[113] the court considered whether right-of-way deeds, by which the railroad acquired property interests for laying tracks across the state in the late 1800s and early 1900s, conveyed an interest in the minerals in and under the property. The court held that each deed must be read and considered independently; therefore, some right-of-way deeds to railroads must be read to convey fee simple title, including minerals, and others will be read to convey only an easement.

To reach its conclusion, the court rejected EOG's argument that the outcome of the case was dictated by the court's 1960 decision in *Lalim v. Williams County*.[114] In *Lalim*, the court held that a warranty deed from a landowner to Williams County for a strip of land used to construct a highway conveyed only an easement.[115] The *Lalim* court held that even though the deed facially appeared to grant fee simple title, it was ambiguous because counties usually acquire only easements for highways, the county could have acquired no more than an easement through eminent domain, and the grant

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[106]N.M. STAT. Ann. §§ 70-12-1 to 70-12-10 (2007).
[107]SOPA defines "oil and gas operations" to include "all activities affecting the surface owner's land that are associated with exploration, drilling or production of oil or gas[.]" *Id.* § 70-12-3(A). *Woody Inv.*, 362 P.3d at 110.
[108]*Woody Inv.*, 362 P.3d at 112.
[109]N.M. ADMIN. R. §§ 19.15.34.1-19.15.34.21 (2015). The New Mexico Oil Conservation Division regulates the disposition of produced water under N.M. STAT. ANN. § 70-2-12(B)(15), (21).
[110]N.M. ADMIN. R. § 19.15.34.7(A).
[111]N.M. ADMIN. R. § 193.15.34.7(B).
[112]N.M. ADMIN. R. §§ 19.15.34.8(A)(1), 19.15.34.10.
[113]867 N.W.2d 308 (N.D. 2015).
[114]*Id.* at 315; Lalim v. Williams Cnty., 105 N.W.2d 339 (N.D. 1960).
[115]*Lalim*, 105 N.W.2d 339, 347 (N.D. 1960); *see also Soo Line R.R. Co.*, 867 N.W.2d at 314–15.

reserved the grantor's interest in an existing easement adjacent to the property being conveyed.[116] Although the railroad, like the county in *Lalim*, usually acquired easements and could only have acquired an easement via eminent domain, the court distinguished the deeds at issue by noting that the railroad was not a public entity and that there was no reservation in the granting clause.[117]

In *Fleck v. Missouri River Royalty Corp.*,[118] the court held that an oil and gas lease requiring "production" to remain effective in its secondary term requires "production in paying quantities." Although the lease at issue did not define the amount of production required to maintain the lease, the court, following well-established law in other oil and gas producing states, concluded production in paying quantities was required. The court further held that the question of whether a well is producing in paying quantities cannot be answered by evidence demonstrating the well was operated at a loss over an arbitrary time period.[119] Instead, courts must consider all of the relevant evidence to determine whether, given the facts and circumstances of the particular case, a prudent operator would continue to operate the well for the purpose of generating a profit rather than mere speculation.[120]

In 2015, the North Dakota Supreme Court added additional clarity to the so-called Dormant Minerals Act,[121] which permits surface owners to claim severed mineral interests located in and under their surface estate if those mineral interests are "abandoned," as defined by the statute. In *Yesel v. Brandon*,[122] the plaintiffs claimed that royalty interests had been abandoned by their owners because they were not "used" within the requisite time period. The court declined to decide whether the statutory definition of "mineral interest" was broad enough to encompass royalty interests.[123] Instead, the court held that even if the statute applied to royalty interests generally, the royalty interests at issue had been "used" within the meaning of the statute when the underlying mineral interests were produced, leased, and pooled. As a result, the royalty interests were not abandoned by their owners.[124]

In *Northern Oil and Gas, Inc. v. Moen*,[125] the Eighth Circuit, applying North Dakota law, interpreted a unique Pugh clause. The clause at issue provided for the termination of an oil and gas lease at the end of its "primary term as to all of the leased lands except those lands located within the same section of a" producing spacing unit.[126] The lease at issue had been held, in part, by production from a well located on a 160-acre spacing unit located within a single 640-acre section. The parties agreed that the lease terminated at the end of its primary term as to all leased lands located outside that 640-acre section, but they disputed whether it remained in effect as to lands within 640-acre

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[116]*Soo Line R.R. Co.*, 867 N.W.2d at 315.
[117]*Id.* at 315, 317.
[118]872 N.W.2d 329 (N.D. 2015).
[119]*Id.* at 333.
[120]*Id.* at 335.
[121]N.D. CENT. CODE § 38-11.1-01 to 38-11.1-10.
[122]867 N.W.2d 677 (N.D. 2015).
[123]*See* N.D. CENT. CODE § 38-18.1-01 ("In this chapter, unless context or subject matter otherwise requires, 'mineral interest' includes any interest in oil, gas, coal, clay, gravel, uranium, and all other minerals of any kind and nature, whether created by grant, assignment, reservation, or otherwise owned by a person other than the owner of the surface estate."). *Yesel*, 867 N.W.2d at 680–81.
[124]*Yesel*, 867 N.W.2d at 682.
[125]808 F.3d 373 (8th Cir. 2015).
[126]*Id.* at 376.

section but outside the 160-acre producing spacing unit.[127] The court held that the word "section," as used in the Pugh clause, means a 640-acre, one square mile section, as that term is used by the Public Land Survey System to identify and describe property in much of the Western United States. The court further held that even though the Pugh clause should have been drafted to apply to lands in the same section "as" a producing spacing unit rather than "of" a producing spacing unit, the misused preposition did not alter the meaning of the clause. Accordingly, the lease remained valid as to all leased lands within the 640-acre section.[128]

In *Mosser v. Denbury Resources, Inc.*,[129] the court reaffirmed its 2014 decision that the operator of a secondary recovery unit that has been approved by the North Dakota Industrial Commission is authorized to use the surface of the unit area to dispose of salt water produced by the unitized formation. Having reached that conclusion, the court also considered whether the surface owners were entitled to compensation for alleged damage to their pore space caused by the injection of salt water. The plaintiffs claimed they were entitled to damages under a statute designed to provide compensation to surface owners who are adversely affected by oil and gas exploration operations.[130] The court concluded there was a material issue of fact as to whether the plaintiffs had sustained a compensable injury under the statute, but that they would be entitled to compensation if they could prove injection of salt water into their pore space reduced the value of their property or diminished their ability to use and access the property.[131]

In *Johnson v. Shield*, the court reaffirmed that an exception to a grant included in a deed need not be located in the granting clause to be effective.[132] The deed at issue in *Johnson* granted the plaintiffs' predecessors an interest fee simple title to certain property and contained no reservation in the granting clause. However, the warranty clause, in addition to warranting title to the property, reserved "to the grantor, fifty per cent (50%) of all the oil, gas, hydro-carbons and [other] minerals" in and under the property.[133] The court held that the reservation in the warranty clause effectively reserved half of the minerals in and under the property to the grantor.[134]

IX. OHIO

A. Legislative Developments

House Bill 64—Ohio's biennial budget bill—went into effect on September 29, 2015. The bill includes changes to Ohio's oil and gas regulatory program found in Chapter 1509 of the Revised Code.[135] Originally, the bill included a severance tax and provided fixed rates for oil and natural gas at 6.5% at the wellhead, and a lower rate of 4.5% for natural gas and natural gas liquids sold downstream. Small natural gas producers would not have been required to pay a severance tax. House Bill 64 was ultimately signed into law without the proposed fixed rates, but it did create a tax policy

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[127] *Id.*
[128] *Id.* at 377-80.
[129] 112 F. Supp. 3d 906, 933 (D.N.D. 2015); *see also* Fisher v. Cont'l Res., Inc., 49 F. Supp. 3d 637, 646 (D.N.D. 2014) (reaching the same conclusion).
[130] *Mosser*, 112 F. Supp. 3d at 919 (*citing* N.D. CENT. CODE ch. 38-11.1).
[131] *Id.* at 921-25; *see also* N.D. CENT. CODE § 38-11.1-04 (defining compensable injuries under the statute).
[132] 868 N.W.2d 368 (N.D. 2015).
[133] *Id.* at 370.
[134] *Id.* at 372.
[135] H.B. 64, 131st Gen. Assemb., 2015-2016 Reg. Sess. (Ohio 2015).

study commission tasked to reform Ohio's severance tax in a way that maximizes competitiveness and enhances the general welfare of the state with recommendations due by October 1, 2015.

Substitute House Bill 9, which became effective March 23, 2015, clarifies the issue of whether an oil and gas lease creates an interest in real estate under Ohio law. While the oil and gas industry has long regarded an oil and gas lease as creating a real estate interest, several decisions called this view into question. The Bill helps resolve the confusion by amending Ohio's oil and gas lease recording statute—R.C. section 5301.09—to state that all oil and gas leases and licenses "create an interest in real estate."[136]

B. Judicial Developments

The year began with a significant victory for the oil and gas industry when the Supreme Court of Ohio affirmed that the Division of Oil and Gas Resources Management (the Division) had sole and exclusive authority to regulate oil and gas operations in the state. In *State ex rel. Morrison v. Beck Energy Corp.*,[137] the City of Munroe Falls sought to enjoin Beck Energy Corporation from drilling within the city limits until Beck complied with certain city ordinances regulating oil and gas drilling. Beck, which had already obtained a drilling permit from the state, challenged the validity of the ordinances. The issue before the court was whether the city's ordinances were a valid exercise of the city's home-rule power under the Home Rule Amendment to the Ohio Constitution. The court concluded that R.C. section 1509.02[138] is a general law, that the city's ordinances conflicted with R.C. section 1509.02, and that they were therefore preempted and unenforceable. The opinion emphasized that the court's decision was limited to those ordinances at issue in the case. The decision left open the possibility that other types of local ordinances could co-exist with the state's regulatory scheme.

Over the past year, Ohio appellate courts continued to issue many important rulings on the interpretation of oil and gas lease terms. In *Kenney v. Chesapeake Appalachia, L.L.C.*,[139] for example, the oil and gas lease contained a clause granting the lessee an option to "extend or renew under similar terms a like lease" within sixty days after the expiration of the lease. Prior to the expiration of the primary term, the lessee attempted to extend the lease for an additional five years. The lessor argued that the extension clause did not give the lessee the option to unilaterally extend the lease but rather required the lessee to renegotiate the lease at the end of the initial primary term. The lessor further argued that the expiration of the lease was a condition precedent and as a result, that the lessee could not exercise the option prior to the lease's expiration. The court held that "extend" and "renew" have different definitions under Ohio law and that the phrase "under similar terms a like lease" does not modify "extend."[140] Accordingly, the lessee could extend the lease and was under no obligation to renegotiate with the lessor. The court also found that nothing in Ohio law prevented the lessee from exercising the option to extend prior to the expiration of the lease.

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[136]Sub. H.B. 9, 131st Gen. Assemb., 2015-2016 Reg. Sess. (Ohio 2015); OHIO REV. CODE ANN. § 5301.09 (West 2015). *See* Maxwell W. Gerwin, *House Bill 9 Reforms Ohio Receivership Law re: Real Property*, THE NAT'L L. REV. (Mar. 17, 2015), http://www.natlawreview.com/article/house-bill-9-reforms-ohio-receivership-law-re-real-property.

[137]37 N.E.3d 128 (Ohio 2015).

[138]OHIO REV. CODE ANN. § 1509.02 (West 2013).

[139]31 N.E.3d 136 (Ohio Ct. App. 2015).

[140]*Id*. at 153-54.

In *Reuschiling v. Cart*,[141] the lease allowed the lessor free gas for the principal dwelling on the property. The original lessor later subdivided the leased property and conveyed the property containing the well subject to a reservation of free gas for herself and her children and grandchildren, leaving herself with the remaining balance of the land, which included the dwelling. The plaintiffs acquired the property containing the dwelling via foreclosure and argued that they were entitled to free gas based on the original lessor's reservation because the property contained the "principle dwelling" for purposes of the lease. The court disagreed, finding that the reservation of free gas in the deed was limited to the original lessor, her children, and her grandchildren.

In *Feisley Farms Family, L.P. v. Hess Ohio Resources LLC*,[142] the lessor alleged that the lease had lapsed because the lessee failed to extend the primary term and make all required delay rental payments. Among other matters, the court found that where the lease allowed the lessee to delay development during the primary term by paying delay rentals, lease language authorizing the lessee to extend the lease for an additional five year term, and providing that the extension would be under the same terms and conditions contained in the lease, permitted the lessee to continue to pay delay rentals during the five-year extension period. The court also found that under the terms of the particular lease, an untimely delay rental payment did not result in the lease's forfeiture.

Ohio's Seventh District Court of Appeals reaffirmed its 2014 decision in *Hupp v. Beck Energy Corp.*[143] regarding the construction of certain form oil and gas leases in two cases: *Belmont Hills Country Club v. Beck Energy Corp.*[144] and *Bentley v. Beck Energy Corp.*[145] Those leases contained habendum clauses stating that they will continue for a primary term of a set number of years and "so much longer thereafter as oil or gas or their constituents are produced or are capable of being produced on the premises in paying quantities, in the judgment of the Lessee, or as the premises shall be operated by the Lessee in the search for oil and gas[.]"[146] The leases also contained a delay rental clause providing for lease termination unless the lessee paid a specified delay rental. The delay rental clause did not, however, expressly state that it applied only during the lease's primary term.

In each case, the court found that the form of lease in question was not perpetual. The delay rental clause only allowed the lessee to delay drilling a well during the primary term and could not be used to extend the lease into the secondary term. Language providing for the perpetuation of the lease into its secondary term so long as oil and gas were being produced or were capable of being produced *in the judgment of the lessee* did not vest the lessee with unlimited discretion in determining the duration of the lease, as the lessee was required to use good faith in determining whether drilling was economically feasible. Because the lease was not perpetual, it was not void for public policy, and therefore was not void ab-initio. Additionally, the court determined that the lease form waived any implied covenants.

The interpretation of an express forfeiture clause was the key issue in *Sims v. Anderson*.[147] Lessors filed suit claiming the lease terminated because the lessee failed to make the $400 minimum royalty payment in 2012 by a mere $8.55. The court held that

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[141]No. 2014-A-0074, 2015 Ohio App. LEXIS 3880 (Ohio Ct. App. Sept. 30, 2015).
[142]No. 2:14-cv-146, 2015 U.S. Dist. LEXIS 133479 (S.D. Ohio Sept. 30, 2015).
[143]20 N.E.3d 732 (Ohio Ct. App. 2014).
[144]No. 13 BE 18, 2015 Ohio App. LEXIS 1396 (Ohio Ct. App. Mar. 31, 2015).
[145]Nos. 13 BE 33, 13 BE 34, 2015 Ohio App. LEXIS 1395 (Ohio Ct. App. Mar. 31, 2015).
[146]*Belmont*, 2015 Ohio App. LEXIS 1396, at *12; *Bentley*, 2015 Ohio App. LEXIS 1395, at *12-13.
[147]38 N.E.3d 1123, 1133 (Ohio Ct. App. 2015).

the lease had been forfeited for failure to pay the required amount and focused its analysis on the express forfeiture clause. Particularly, the court held that when a lease contains an express forfeiture clause, that clause must be enforced to give effect to the parties' intentions absent some viable affirmative defense.

By contrast, in *Armstrong v. Chesapeake Exploration, L.L.C.*,[148] the lessors sought forfeiture of a lease also based on the lessee's failure to pay royalties. In this instance, however, the lease did not expressly contain a forfeiture clause. Therefore, the court found that "[a]bsent specific language in the lease, nonpayment of royalties is not grounds for cancellation of an oil and gas lease."[149]

In *Hoop v. Kimble*[150] the lessors filed suit claiming that the lease was forfeited due to an assignment by the lessee. The lease contained a breach of a trade-sale clause stating that the lease could not be traded or sold without the written permission of the lessor. The court found that the lease was breached but denied the lessors' forfeiture request and noted that in Ohio, courts uniformly hold that the "appropriate remedy for the breach of a clause similar to the trade-sale clause herein where consent of the lessor is required is voiding of the improper assignment and not forfeiture or cancellation of the underlying lease."[151]

In *Love v. Beck Energy Corp.*,[152] the subject lease contained a handwritten consent-to-assign clause stating that the lessee agreed not to assign or transfer the lease without lessors' consent. The lessee assigned the deep rights under the lease without consent, and the lessor filed suit claiming that the assignment was void. The court ruled in favor of the lessor and enforced the consent-to-assign clause because, based on the law at the time the lease was signed, the parties understood that the clause was not an unreasonable restraint on alienation. Further, the court held that the clause was not limited to assignments of the entire lease and applied to partial assignments. Moreover, the court also found that because the clause was not conditioned in any way—*i.e.*, it did not expressly contain language stating that consent would not be unreasonably withheld—the lessors could withhold consent for *any* reason, including their desire to receive monetary compensation for giving consent.

Ohio courts have also addressed the lessee's duty to fully develop the leasehold, including undeveloped formations where the deep rights of the lease are held by a different lessee than the shallow rights due to a partial lease assignment. The plaintiffs in *Marshall v. Beekay Co.*,[153] for example, argued that assignment of the interest in the shallow rights of an oil and gas lease essentially divided the lease and required both the shallow rights holder and the deep rights holder to comply with the habendum clause of the lease. The plaintiffs further argued that because the holders of the deep rights had not developed their interest, the interest in the deep rights had terminated for failure to comply with the habendum clause. The court cited the decision in *Popa v. CNX Gas Co, LLC*[154] and held that the assignment of the shallow rights did not create new obligations under the lease and that the continuous production of the shallow rights held the lease for all depths. The court also found that the deep rights holders did not breach the implied covenant to develop because the obligation to reasonably develop was met by the assignor's shallow production and there was no duty to further develop as long as gas and oil were being found in paying quantities.

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[148]No. 2014 AP 12 0056, 2015 Ohio App. LEXIS 3294 (Ohio Ct. App. Aug. 14, 2015).
[149]*Id.* at *6.
[150]No. 14 HA 9, 2015 Ohio App. LEXIS 2037 (Ohio Ct. App. May 28, 2015).
[151]*Id.* at *8.
[152]No. 14 NO 415, 2015 Ohio App. LEXIS 1192 (Ohio Ct. App. Mar. 31, 2015).
[153]27 N.E.3d 1 (Ohio Ct. App. 2015).
[154]*Id.* at 6-7; No. 4:14cv143, 2014 U.S. Dist. LEXIS 103968 (N.D. Ohio July 30, 2014).

The Ohio Dormant Mineral Act (DMA), R.C. section 5301.56,[155] received considerable attention in 2015 from the Supreme Court of Ohio. On June 18, 2015, the court issued its first decision involving the DMA—*Dodd v. Croskey*.[156] The court unanimously concluded that under the 2006 version of the DMA, a severed mineral interest holder can preserve his or her interest in the minerals by either filing an affidavit of record that identifies a savings event in the twenty years preceding the notice of abandonment *or* timely filing a claim to preserve within the sixty days immediately following the notice of abandonment.

The court addressed oil and gas leases under the DMA in *Chesapeake Exploration, L.L.C. v. Buell*.[157] In *Buell*, the court held that a recorded oil and gas lease is a "title transaction" and, therefore, a "savings event" that prevents minerals from being abandoned to a surface owner. Further, the court held that the unrecorded expiration of an oil and gas lease is *not* a savings event.

The court also heard oral arguments in three other cases involving the DMA. *Corban v. Chesapeake*[158] and *Walker v. Shondrick-Nau*[159] both consider whether the 1989 version of the DMA was "self-executing"—*i.e.* whether the statute operated automatically to abandon mineral interests in the surface owner where no savings events occurred during the applicable look-back period. *Corban* also involves the question of whether the payment of a delay rental during the primary term of a lease is a "title transaction," and therefore a "savings event," under the DMA.

The third DMA case heard by the court in 2015, *Eisenbarth v. Reusser*,[160] involved (1) the question of whether the 1989 version of the DMA had a "rolling" look back period that operated to vest a severed mineral interest in the owner of the surface if no savings events occurred during any twenty-year period in which the 1989 version of the DMA was in effect, and (2) whether a conveyance of a surface interest that referenced the severed mineral interest was a "title transaction" for the severed mineral interest, and therefore, a savings event. The *Eisenbarth* appellants also contend that an oil and gas lease executed by the owner of the surface and the executive rights to the severed mineral interest is not a "title transaction" for the purposes of the DMA.

C. Administrative Developments

Effective July 16, 2015, the Division implemented new rules regulating the construction of horizontal well sites.[161] Under the new rules, operators will submit detailed site plans developed, signed, and sealed by a professional engineer, which must be reviewed and approved by the Division prior to the construction of the well site location. The plans must include, in part, detailed drawings of well pad features, an emergency release conveyance map, a geotechnical report, and a sediment and erosion control plan. The Division's regional engineering staff will inspect sites during each stage of the construction to ensure compliance with the new standards.

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[155] *See* OHIO REV. CODE ANN. § 5301.56 (West 2013).
[156] 37 N.E.3d 147, 155 (Ohio 2015).
[157] No. 2014-0067, 2015 Ohio LEXIS 2971 (Ohio Nov. 5, 2015).
[158] No. 2:13-cv-246, 2014 U.S. Dist. LEXIS 182735 (S.D. Ohio May 14, 2014), *discretionary appeal accepted*, 139 Ohio St. 3d 1482 (July 23, 2014).
[159] 15 N.E.3d 883 (Ohio 2014), *certification of state law questions accepted*, 142 Ohio St. 3d 1510 (June 11, 2015).
[160] 18 N.E.3d 477 (Ohio Ct. App. 2014), *discretionary appeal accepted*, 141 Ohio St. 3d 1488 (Mar. 11, 2015).
[161] *See* OHIO ADMIN. CODE §§ 1501:9-2-01, 1501:9-2-02.

The Division also continues to work on several rule packages to address various issues that have arisen as a result of the growth in Ohio's oil and gas industry. Specifically, the Division is in the process of revising its rules on the spacing of wells and adopting rules regarding the permitting of waste management facilities. Additionally, rules for the classification of waste, incident notification, EPCRA reporting, simultaneous operations, and procedures in the event of seismicity near a well are in the drafting process. Several of these rules should be finalized and implemented in 2016.

2015 also saw the first appeal of a unit order issued by the Division in the case of *Gary L. Teeter Revocable Trust v. Division of Oil and Gas Resources Management*,[162] which was heard by the Ohio Oil and Gas Commission. The appellant, Mr. Teeter, contended that his land was unlawfully unitized and that the chief's unit order regarding appellant's compensation was unreasonable. In its decision, the Commission held, among other things, that the Division properly issued the order pursuant to Ohio's unitization statute, R.C. section 1509.28,[163] rather than the provision regarding mandatory pooling under R.C. section 1509.27;[164] the operator satisfied the statutory requirements necessary to obtain a unit order; and the terms of the order were just and reasonable, including the application of a 200% interest charge and the omission of a lease signing bonus. The Commission did, however, modify the order to require the payment of the average royalty in the unit during the payout period only, rather than the 12.5% royalty contained in the underlying order for that period. After payout, the royalty reverts to 12.5%. The Appellant's appeal of the matter to the Franklin County Court of Common Pleas was dismissed on December 9, 2015, for failing to perfect the court's jurisdiction.

X. OKLAHOMA

A. Judicial Developments

In *Ladra v. New Dominion, LLC*,[165] the Oklahoma Supreme Court was presented with the issue of whether the Oklahoma Corporation Commission (which regulates many aspects of oil and gas activities), rather than the courts, had jurisdiction over Ladra's suit seeking recovery of actual and punitive damages for personal injuries and injury to property that allegedly resulted from earthquakes that Ladra contended were the result of the defendants' oil and gas waste water disposal wells in the vicinity of her property. The court found that Ladra had pled a private cause of action alleging that the defendants "engaged in '*ultrahazardous activities*' that necessarily involve a risk of serious harm that cannot be eliminated by the exercise of utmost care."[166] The Oklahoma Supreme Court reversed the district court's dismissal of the case based upon the district court's finding that this action should be pursued before the Oklahoma Corporation Commission, and remanded the matter to the district court for further proceedings.

The case of *Stinson Farm and Ranch, L.L.C. v. Overflow Energy, L.L.C.*,[167] involved a suit by the plaintiff-seller of land to obtain rescission of the sale and transfer documents based on the defendant-buyer's alleged misrepresentation that it was buying the property for use as an equipment yard. Less than a year after the sale, the seller learned that the defendant had applied for a commercial disposal well permit several weeks after the closing of the sale. In rejecting the request for rescission based upon

[162] Appeal No. 895 (Oil & Gas Comm'n Sept. 17 2015).
[163] *See* OHIO REV. CODE ANN. § 1509.28 (West 2013).
[164] *See* OHIO REV. CODE ANN. § 1509.27 (West 2013).
[165] 353 P.3d 529 (Okla. 2015).
[166] *Id.* at 532 (emphasis added).
[167] No. CIV-14-1400-R, 2015 WL 4925921 (W.D. Okla. Aug. 18, 2015).

alleged fraud, the court ruled that the seller could not simply inquire about the intended usage, even on more than one occasion, and then seek to rely on the buyer's response without seeking to protect the seller by affirmatively stating in the sale documents that the property would not be used for certain specified offensive purposes. The court further noted that there was no evidence that the buyer did not actually intend to build an equipment yard on the property other than the fact that the buyer did not do so.

In *J.D. Kirk, LLC v. Cimarex Energy Co.*,[168] Kirk owned a working interest in certain leases that were subject to a JOA that contained a preferential right of purchase provision. Kirk sued Cimarex asserting that Cimarex breached the preferential right provision by purchasing leases from another company without first offering the interests to Kirk. The Tenth Circuit Court of Appeals affirmed the district court's ruling in favor of Cimarex. Although the statute of limitations for a suit on a written contract in Oklahoma had approximately two more years before it would expire, the court upheld the district court's conclusion that Kirk's conduct in waiting approximately three years before asserting its claims—while Cimarex incurred significant risk and expense in pursuing oil and gas activities of uncertain outcome—precluded Kirk, under the doctrine of laches, from seeking specific performance of the preferential right to purchase provision. The court cited prior cases for the long-established proposition that "the duty to act with dispatch is especially imperative where one claims an interest in property that is highly speculative."[169]

In *Chaparral Energy, L.L.C. v. Samson Resources Company*,[170] the predecessor to Circle F Ranch Company owned an undivided 320 mineral acres in Section 24 in Latimer County. That predecessor executed a deed that conveyed to the predecessor of Helm "an undivided one-half (1/2) interest in and to all of the oil and gas interests and royalties, and any and all other mineral interests which may be owned by Circle F Ranch, Inc."[171] Helm asserted that the above wording conveyed to its predecessor *all* of the 320 mineral acres owned by the grantor at the time of that deed. Circle F Ranch, in contrast, contended that the deed conveyed only *one-half* of the mineral interests (i.e., 160 mineral acres). The trial court entered summary judgment in favor of Circle F Ranch. Helm appealed. After reviewing the comments in certain treatises and prior case law, the court of appeals affirmed the district court's judgment quieting Circle F Ranch's title to a one-fourth (160 mineral acres) interest in Section 24.[172]

Buckles v. Triad Energy, Inc.,[173] involved the OG&E's (an electric utility) construction of an electrical highline to supply electricity to a well operated by Triad. The plaintiff landowners objected to the fact that the electrical supply line ran across a public right-of-way, including their lands in Section 28 in Woods County, in order to supply electricity to a well in Section 22. The landowners did not sue OG&E. Rather, they sued the operator Triad as an alleged aider and abetter of trespass in the construction of the line. Triad responded that it did not own, operate, or maintain the supply line and did not construct it. Triad was merely a customer of OG&E, which had the right to use the right-of-way as a public utility. The court of appeals affirmed the district court's ruling in favor of the operator Triad, finding that the landowner had not stated a legally cognizable claim against Triad for aiding and abetting a trespass.

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[168]604 Fed. App'x 718 (10th Cir. 2015) (applying Oklahoma law).
[169]*Id.* at 728 (internal citations and quotations omitted).
[170]348 P.3d 1104 (Okla. Civ. App. 2015).
[171]*Id.* at 1105.
[172]*Id.* at 1106; Hunsaker v. Brown Distrib. Co., 373 S.W.3d 153 (Tex. App. 2012).
[173]364 P.3d 665 (Okla Civ. App. 2015).

In late 2015, the Oklahoma Supreme Court issued what should be the final ruling in the long-pending litigation in *Krug v. Helmerich & Payne, Inc.*,[174] regarding the question of whether the plaintiff mineral owners who recovered certain damages for alleged improper drainage of oil and gas from their lands were entitled to *pre-judgment interest* on the drainage damages that they recovered. The court held as a procedural matter that the defendant did not owe "prejudgment interest" on the $3.65 million in drainage damages. Consistent with Oklahoma law, the court reaffirmed that (1) sums recovered as drainage damages years after the occurrence of the alleged drainage are not *proceeds of production* that are required to be paid under the Production Revenue Standards Act within set time periods (or else interest is owed), and (2) drainage damages, which were subject to conflicting expert testimony at trial as to the amount of any alleged damages, are not damages "certain, or capable of being made certain by calculation" and therefore do not fall within the pre-judgment interest provisions of Okla. Stat. tit. 23, § 6.

In *Calyx Energy, LLC v. Hall*,[175] a lawsuit filed under the Oklahoma Surface Damages Act,[176] the Halls appealed two orders denying their request for treble damages and two orders on other aspects of the case. Much of the prior history and factual background in the case is set forth in the 2013 decision in *Calyx Energy, LLC v. Hall*.[177] A separate tort claim that was tried and reduced to judgment in favor of the Halls on March 6, 2013, was satisfied and was not part of this appeal. In affirming the district court's conclusion that treble damages should not be awarded in this case, the court of appeals agreed that the landowners failed to show that any alleged violations of the Act were the kind of *willful and wanton* conduct required for an award of treble damages. With regard to the allegation that Calyx failed to negotiate with the landowners in good faith, the court agreed with the findings below that the landowners would have to first prove that they satisfied their own duty to negotiate in good faith before being able to argue a breach of that duty by Calyx. The court found that there was no such evidence in the record. Moreover, the court found that section 318.9 of the Act does not authorize the imposition of treble damages due to an operator's failure to negotiate in good faith.[178]

In *Xanadu Exploration Co. v. Welch*,[179] another lawsuit under the Surface Damages Act, the court: (1) found that the trial court did not err in instructing the appraisers to determine the diminished value of the *entire* tract owned by the landowners resulting from the drilling operations, as opposed to only the lands actually used and occupied; (2) agreed with the operator that the appraisers' report was flawed in that it did not describe the quantity, boundaries, and value of the property entered on or to be utilized in the drilling operations, as required by Okla. Stat. tit. 52, § 318.5(C); and (3) ruled that the appraisers had "no authority to direct mitigation, but may award the cost to restore land to its former condition, with compensation for loss of use of it, only if this cost is less than the diminution in fair market value of the land."[180]

The case of *Veteran Exploration & Production, LLC v. McCraw*[181] involved the court's careful review of the various steps to be followed by the parties and the Court Clerk's office in connection with a lawsuit under the Surface Damages Act. The court

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[174] 362 P.3d 205 (Okla. 2015); *see also* OKLA. STAT. tit. 23, § 6 (2015).
[175] 342 P.3d 1007 (Okla. Civ. App. 2014).
[176] OKLA. STAT. tit. 52, §§ 318.2-318.9 (2014).
[177] 295 P.3d 30 (Okla. Civ. App. 2012).
[178] *Calyx Energy*, 342 P.3d at 1015-16.
[179] 362 P.3d 237 (Okla. Civ. App. 2015).
[180] *Id.* at 240-41.
[181] 358 P.3d 958 (Okla. Civ. App. 2015).

concluded that the incomplete proceedings below did not lead to a *final* order, so the appeal was dismissed as premature and the case was remanded for further proceedings.

The court of appeals reached mixed outcomes on the many issues presented on appeal in *Chesapeake Operating, Inc. v. Kast Trust Farms*.[182] The appraisers in this action under the Oklahoma Surface Damages Act determined that the diminution in value of the property was $28,000. The landowner demanded a jury trial. The jury returned a verdict awarding the landowner $86,750. The trial court awarded the landowner $45,000 in attorney's fees and costs. Chesapeake appealed the judgment of the trial court, and both parties appealed the order awarding attorney fees to the landowner at the conclusion of the jury trial.

The court affirmed in part, reversed in part, and remanded with directions, while addressing several key issues. First, the court agreed and found that the factors to be considered under the prior decision in *Davis Oil Co. v. Cloud*[183] do not permit the consideration of stigma and its effect on the diminishment in value of the surface estate. Additionally, the court found that the instruction was worded to instruct the jury that there *was* stigma associated with the well on the landowner's property, thereby removing any discretion from the jury. Second, as a matter of trial procedure, Chesapeake asserted that the trial court erred by requiring Chesapeake to present its case first, as the plaintiff, even though the burden of proof was on the landowner. Third, the court rejected the landowner's assertion on appeal that the trial court erred in denying the landowner's claim for treble damages, which was based upon an alleged failure by Chesapeake to comply with the notice requirements under the Act.[184]

The court of appeals in *Carnahan v. Chesapeake Operating, Inc.*,[185] a case alleging claims for public and private nuisance and trespass associated with alleged oil field pollution, affirmed the district court's rejection of the defendant's *Daubert*-based challenges to the expert testimony admitted at trial and the defendant's complaints about the jury instructions. In Oklahoma, the factors to consider when assessing the admissibility of expert testimony are set forth in the landmark cases of *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and *Kumho Tire Co., Ltd. v. Carmichael*,[186] both of which were expressly adopted for application in Oklahoma civil actions in *Christian v. Gray*.[187] The court also cited and reviewed its later decision on these same issues in *Worsham v. Nix*.[188] In addition, the court reviewed the statutory provisions concerning expert testimony set out in Okla. Stat. tit. 12 §§ 2702 and 2703.[189]

In the case of *B&W Operating, L.L.C. v. Corporation Commission of Oklahoma*,[190] B&W sought to either modify or clarify the application of the longstanding concept of force pooling by the "unit" instead of "well-by-well" within the context of the current era of horizontal well drilling. After describing the complex factual and procedural history in this case, the court of appeals considered the policy and legal arguments that had been presented and concluded that B&W's request to depart from pooling by the "unit" as to horizontal wells would turn the development of the unit into a

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[182]352 P.3d 1231 (Okla. Civ. App. 2013), *reh'g denied* (Okla. Civ. App. Sept. 25, 2014), *cert. denied* (Okla. Jan. 6, 2015).
[183]766 P.2d 1347 (Okla. 1986).
[184]*Kast Trust Farms*, 352 P.3d at 1239-40 (citing OKLA. STAT. tit. 12, § 577), 1240-41.
[185]347 P.3d 753 (Okla. Civ. App. 2014), *cert. denied* (Okla. Mar. 2, 2015).
[186]Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).
[187]65 P.3d 591, 600 (Okla. 2003).
[188]145 P.3d 1055 (Okla. 2006).
[189]*Carnahan*, 347 P.3d at 759; *see also* OKLA. STAT. tit. 12, §§ 2702, 2703 (2011).
[190]362 P.3d 227 (Okla. Civ. App. 2015).

"wellbore" process in violation of Okla. Stat. tit., § 87.1(3). The provisions of that statute mandate that the Oklahoma Corporation Commission pool the spacing unit as a unit, and not by the wellbore. The court added that the remedy available to B&W would be to seek legislative enactments modifying current statutory law.

In *Eagle Energy Production, L.L.C. v. Corporation Commission*,[191] the court concluded that, where an oil and gas lease expires *after* the hearing before the Oklahoma Corporation Commission ALJ on a force-pooling application but *before* the issuance of the force-pooling order, the lessor-mineral owner who was not named in the pooling (due to the existence of the lease at the time of the hearing) will not be subject to the compulsory pooling order.

B. Administrative Developments

Documents filed in the rulemakings referred to below can be viewed on the Oklahoma Corporation Commission's (Commission's) website.[192] Amendments to Title 165, Chapter 10 of the Oklahoma Administrative Code (OAC), which comprises the Commission's *Oil and Gas Conservation Rules*, were addressed in Cause RM No. 201500001. Following is a brief list of certain amendments, which became effective on August 27, 2015:

OAC 165:10-1-2 was amended to modify the definition of commercial disposal well and to add definitions of business day, public water supply well(s) or public water well(s), reclaimed water, and regular mail; OAC 165:10-1-4 to update the list of effective dates for OAC 165:10 rulemakings; OAC 165:10-1-7 to update the list of Oil and Gas Conservation Division prescribed forms; OAC 165:10-1-24 regarding applications for emergency orders pertaining to well location exceptions; OAC 165:10-3-1 concerning temporary authorization to commence activities without an approved permit to drill; OAC 165:10-3-4 to delete provisions regarding notice of hydraulic fracturing operations and to revise rule subsections accordingly; OAC 165:10-3-10 to add provisions concerning notice of hydraulic fracturing operations and to change a reference from municipal water supplies to public water supplies; and OAC 165:10-3-28 was amended regarding horizontal drilling in accordance with 52 O.S. sections 87.6-87.9. and amendments thereto in Enrolled Senate Bill No. 78 (2014). OAC 165:10-3-28 was also amended concerning minimum distance of the perforated interval of an oil or gas non-horizontal well from the completion interval of any oil or gas horizontal well completed in the same common source of supply.[193]

OAC 165:10-5-2 was amended to change a reference from municipal water supply wells to public water supply wells with respect to approval of enhanced recovery injection wells or disposal wells; OAC 165:10-5-7 to add a provision regarding notice of initial commencement of operations for wells permitted as disposal wells in the Arbuckle formation and to revise rule subsections accordingly; OAC 165:10-7-5 regarding reporting of discharges of deleterious substances; OAC 165:10-7-6 to change a reference from protection of municipal water supplies to protection of public water supplies; OAC

[191]351 P.3d 750 (Okla. Civ. App. 2015), *reh'g denied* (Okla. Civ. App. Feb. 3, 2015), *cert. denied* (Okla. May 4, 2015).

[192]OKLAHOMA CORPORATION COMMISSION, http://www.occeweb.com/ (last visited Apr. 6, 2015). *See also In re* Permanent Rulemaking of the Okla. Corp. Comm'n Amending OAC 165:10, Oil and Gas Conservation, Cause No. RM 201500001 (Corp. Comm'n of Okla. Mar. 4, 2015).

[193]OKLA. ADMIN. CODE. §§ 165:10-1-2; 165:10-1-4; 165:10-1-7; 165:10-1-24; 165:10-3-1; 165:10-3-4; 165:10-3-10; 165:10-3-28 (2015). *See also* OKLA. STAT. tit. 52, §§ 87.6-87.9 (2014); S.B. 78, 2014 Reg. Sess. (Okla. 2014).

165:10-7-16 to change references from municipal water wells to public water wells and from working days to business days with respect to noncommercial pits; OAC 165:10-7-17 to change references from municipal water wells to public water wells and from working days to business days regarding surface discharge of fluids; and OAC 165:10-7-19 was amended to change references from municipal water wells to public water wells and from working days to business days concerning land application of water-based fluids from earthen pits, tanks and pipeline construction.[194]

In addition, OAC 165:10-7-20 was amended to change references from working days to business days with respect to noncommercial disposal or enhanced recovery well pits used for temporary storage of saltwater; OAC 165:10-7-22 to change references from working days to business days regarding permits for County Commissioners to apply waste oil, waste oil residue, or crude contaminated soil to roads; and OAC 165:10-7-34 is a new rule concerning use of reclaimed water in oil and gas operations. OAC 165:10-9-1 was amended to change references from municipal water wells to public water wells with respect to commercial pits; OAC 165:10-9-2 to change references from municipal water wells to public water wells and from working days to business days concerning commercial soil farming.[195]

Amendments to title 165, chapter 5 of the Oklahoma Administrative Code, which comprises the Commission's *Rules of Practice*, were addressed in Cause RM No. 201500002. Following is a brief listing of certain of the amendments which became effective on August 27, 2015:

OAC 165:5-1-3 was amended regarding definitions; OAC 165:5-1-5 concerning filing of documents; OAC 165:5-1-11, OAC 165:5-1-12, OAC 165:5-1-12.1, OAC 165:5-1-13, OAC 165:5-1-13.1, OAC 165:5-1-14, OAC 165:5-1-14.1, and OAC 165:5-1-14.2 are new rules pertaining to electronic filing of documents; OAC 165:5-3-1 with respect to filing of documents in paper form with the Court Clerk's Office and payments regarding electronic funds transfer; OAC 165:5-3-2 concerning payments by electronic funds transfer and to strike language specifying that a facility which has both petroleum and hazardous substances will be considered as one facility.[196]

OAC 165:5-7-6 was amended concerning drilling and spacing unit establishment or modification; OAC 165:5-7-6.2 with respect to multiunit horizontal wells was amended in accordance with Okla. Stat. tit. 52, §§ 87.6-87.9. and amendments thereto in Enrolled Senate Bill No. 78 (2014) and to provide that certain map(s) be attached to orders approving applications for multiunit horizontal wells in targeted reservoirs; and OAC 165:5-27-1, OAC 165:5-27-2, OAC 165:5-27-3, OAC 165:5-27-4, OAC 165:5-27-10, OAC 165:5-27-11, OAC 165:5-27-12, OAC 165:5-27-13, and OAC 165:5-27-14 are new rules pertaining to procedures for Pipeline Safety Department enforcement actions pursuant to Okla. Stat. tit. 63, §§142.1-142.13 and amendments thereto in Enrolled House Bill No. 2533 (2014).[197]

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[194]OKLA. ADMIN. CODE. §§ 165:10-5-2; 165:10-5-7; 165:10-7-5; 165:10-7-6; 165:10-7-16; 165:10-7-17; 165:10-7-19 (2015).

[195]OKLA. ADMIN. CODE. §§ 165:10-7-20; 165:10-7-22; 165:10-7-34; 165:10-9-1; 165:10-9-2 (2015).

[196]*See also In re* Permanent Rulemaking of the Okla. Corp. Comm'n Amending OAC 165:5, Rules of Practice, Cause No. RM 201500002 (Corp. Comm'n of Okla. Mar. 6, 2015). OKLA. ADMIN. CODE. §§ 165:5-1-3; 165:5-1-5; 165:5-1-11; 165:5-1-12; 165:5-1-12.1; 165:5-1-13; 165:5-1-13.1; 165:5-1-14; 165:5-1-14.1; 165:5-1-14.2; 165:5-3-1; 165:5-3-2 (2015).

[197]OKLA. ADMIN. CODE. §§ 165:5-7-6; 165:5-7-6.2; 165:5-27-1; 165:5-27-2; 165:5-27-3; 165:5-27-4; 165:5-27-10; 165:5-27-11; 165:5-27-12; 165:5-27-13; 165:5-27-14 (2015). *See also* OKLA. STAT. tit. 52, §§ 87.6-87.9 (2014); S.B. 78, 2014 Reg. Sess. (Okla. 2014);

A. Legislative Developments

A new act will encourage the use of treated mine water in natural gas drilling operations.[198] The act, known as the Treated Mine Water Act, will reduce the use of fresh water in natural gas drilling operations. The bill provides immunity to both mine operators and drillers under certain conditions, clarifying liabilities associated with using treated mine water in hydraulic fracturing.

On January 29, 2015, Governor Wolf signed Executive Order 2015-03. The order prevents the leasing for oil and gas development of State Park and State Forest lands owned or managed by the Pennsylvania Department of Conservation and Natural Resources (DCNR). The order stated that the leasing of State lands for oil and gas development was contrary to DCNR's duty to conserve and maintain State lands in the public trust for the use and benefit of all citizens as required under article 1, section 27 of the Pennsylvania Constitution, also known as the Environmental Rights Amendment.[199]

On May 27, 2015, Governor Wolf announced the formation of a Pipeline Infrastructure Task Force (PITF), which will assist the Commonwealth in developing best practices for the continued expansion of Pennsylvania's pipeline infrastructure. The first draft of the PITF report was released in November 2015. It features strategies aimed at limiting the environmental impact of new projects. A total of 184 recommendations were included in the report. Some recommendations from the draft report include requiring full-time inspectors on site for new projects and five years of post-construction monitoring after a site is completed. The report also recommended that no pipelines be placed parallel to streams or within their 100-year floodway.[200]

B. Judicial Developments

In *Harrison v. Cabot Oil & Gas Corp.*,[201] approximately halfway into the five-year primary term of the lease, the plaintiffs sued Cabot seeking a declaration that their lease was invalid. The federal district court dismissed all of the plaintiffs' claims, and Cabot sought summary judgment on a claim for equitable extension of the primary term, arguing that the uncertainty caused by the lessors' legal action had deprived the company of valuable time in which to conduct drilling operations. In July of 2014, the Pennsylvania Supreme Court accepted the certified question of whether Cabot was entitled to equitable relief. It held that Cabot was not entitled to an equitable extension of the lease on the basis of its analysis of Pennsylvania law governing anticipatory repudiation of contracts. The court was not convinced that an action seeking a declaration that a lease is invalid is an anticipatory repudiation of the lease, emphasizing that

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See also OKLA. STAT. tit. 63, §§ 142.1-142.13 (2015); H.B. 2533, 2014 Reg. Sess. (Okla. 2014).

[198]S.B. 875, 2015 Gen. Assemb., Reg. Sess. (Pa. 2015).

[199]Exec. Order No. 2015-03 (Pa. Jan. 29, 2015).

[200]Press Release, Pennsyvania Office of the Governor, Governor Tom Wolf Creates Task Force on Pipeline Infrastructure Development (May 27, 2015). *See also Pipeline Infrastructure Task Force*, PA. DEP'T OF ENVTL. PROT., http://www.dep.pa.gov/Business/ProgramIntegration/PipelineTaskForce/Pages/default.aspx#.VsuW4fkrJpg (last visited Apr. 6, 2016).

[201]110 A.3d 178 (Pa. 2015).

anticipatory repudiation "requires an absolute and unequivocal refusal to perform or a distinct and positive statement of an inability to do so."[202] The court declined to adopt a special approach to repudiation pertaining to oil and gas leases, despite noting that a substantial number of other jurisdictions would appear to have done so. The court noted that its decision was bolstered by the fact that oil and gas producers are free to negotiate express tolling provisions for inclusion in their leases. The court also noted that its opinion does not foreclose the availability of equitable relief to oil and gas producers where the lessor affirmatively repudiates the lease. It is unclear exactly what lessor conduct would be sufficient to warrant such equitable relief, but the court cited cases in which the lessors refused rental payments, prevented commencement of drilling operations, or refused the lessee access to property as examples of stronger evidence of affirmative repudiation of a lease.

In *Warren v. Equitable Gas Co.*,[203] the Pennsylvania Superior Court, in a non-precedential decision, affirmed a trial court's holding that a lessee may hold both production and storage rights where the leased property has been used only for storage under a dual-purpose lease, which provides that the lease remains in effect so long as natural gas is produced or stored. The court began its analysis by contrasting the case with Pomposini v. T.W. Phillips Gas & Oil Co.,[204] where the court held that storage on a property was impermissible because an oil and gas lease did not expressly allow for storage. The superior court held that, unlike in Pomposini, the lease at issue did allow for the storage of gas, and thus it was permissible for storage to extend the lease even in the absence of production.

In *Mason v. Range Resources-Appalachia L.L.C.*,[205] the plaintiff-landowners argued that a lease had expired before they acquired the property. The relevant lease language in the habendum clause provided that the lease would remain in effect for ten year, and as long thereafter as the described land or any portion thereof is operated by the lessee for any of four stated purposes. The court concluded that the use of the disjunctive conjunction "or" indicated that the lease extended into the secondary term when the lessee operated the property for any of the four listed purposes in the habendum clause. The district court concluded that because the plaintiff-landowner's property was used as part of a storage field for the protection of stored gas during the original ten-year primary term and had continually been used for the protection of stored gas since that time, the lease had not expired.

In *Seneca Resources Corp. v. S&T Bank*,[206] the court held that a dual-purpose lease was not severable and that Seneca did not violate the implied covenant to develop. The court first concluded that the lease was entire. The court also rejected the landowner's second argument that Seneca violated the implied covenant to develop because it had not acted with reasonable diligence in developing the land. The court looked to the language of the lease, which provided that the primary term would be extended "if oil or gas or either of them is stored in, produced or withdrawn from all or any portion of said leased premises."[207] Because Seneca was drilling on a portion of the

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[202] *Id.* at 184 (quoting McClelland v. New Amerstand Cas. Co., 185 A. 198, 200 (Pa. 1936)).

[203] No. 697 WDA 2014, 2015 Pa. Super. Unpub. LEXIS 3691 (Pa. Super. Ct. Feb. 4, 2015).

[204] *Id.* at *10; 580 A.2d 776 (Pa. Super. Ct. 1990).

[205] No. 12-369, 2015 WL 4531299 (W.D. Pa. July 27, 2015), *appeal docketed* No. 15-3000 (3d Cir. Aug. 20, 2015).

[206] 122 A.3d 374 (Pa. Super. Ct. 2015).

[207] *Id.* at 387.

leased premises, the court found that the lease foreclosed a finding of a breach of the implied covenant to develop and produce gas on unoperated acreage.

In *In re Mustafa Tayfur*,[208] the Court of Appeals for the Third Circuit, relying heavily on the superior court's recent decision in *Nolt v. T.S. Calkins & Associates*,[209] held that an oil and gas lease is not the type of lease governed by the Pennsylvania Landlord and Tenant Act. The plaintiff-landowner, Tayfur, executed an oil and gas lease in 2005, which was later assigned to SWEPI, L.P. In 2011, Tayfur filed for bankruptcy and subsequently attempted to sell the oil and gas rights subject to the lease to other parties. According to Tayfur, he could terminate the lease at any time because it was an "at will" lease. The superior court in *Nolt* rejected a similar contention, holding that an application of the Landlord Tenant Act to an oil and gas lease would ignore case law rejecting the notion that oil and gas leases are governed by landlord/tenant legal principles.[210]

The Supreme Court of Pennsylvania announced in November 2015 that it will again hear oral arguments on Act 13. The Public Utility Commission is challenging the Pennsylvania Commonwealth Court's ruling on remand in *Robinson Township v. Commonwealth* that a regulator cannot review local drilling ordinances.[211] The commonwealth court based its decision on the Pennsylvania Supreme Court's decision to strike down the statewide zoning rules.

In *Pennsylvania Environmental Defense Foundation v. Commonwealth*,[212] the Pennsylvania Environmental Defense Foundation (PEDF) sought declaratory relief against the Commonwealth challenging budget-related decisions from 2009 to 2015 related to leasing state lands for oil and gas development and the use of the monies in the Oil and Gas Lease Fund. PEDF argued that the actions by the Commonwealth violated article I, section 27 of the Pennsylvania Constitution, known as the Environmental Rights Amendment. Regarding section 1602-E of the Fiscal Code, which provides that the General Assembly shall appropriate all royalty monies in the Lease Fund, the court held that the General Assembly could vest in itself the power to appropriate certain monies in the Lease Fund, and the decision to do so did not reflect a failure by the General Assembly to uphold its trustee obligations under article I, section 27. Second, the court held that the legislature did not violate article I, section 27 by passing legislation, including Act 13, which appropriates monies from the Lease Fund. The court noted that the Environmental Rights Amendment merely required that monies be used for the benefit of all the people, and the General Assembly appropriated the Lease Fund monies for the benefit of all people of the Commonwealth. The commonwealth court ruled that the Environmental Rights Amendment did not require revenue from oil and gas drilling to go towards environmental goals. Finally, the court held that the Pennsylvania Department of Conservation and Natural Resources was best positioned to act consistent with its article I, section 27 duties related to further leasing of State lands for oil and gas development.

In *Gorsline v. Board of Supervisors of Fairfield Township v. Inflection Energy, L.L.C.*,[213] the court held that a natural gas well could be permitted in a residential zoning district. Inflection Energy applied for a conditional use permit to drill a natural gas well in Fairfield Township's Residential Agriculture District (RA District). Fairfield Township's Zoning Ordinance (Zoning Ordinance) does not permit or prohibit natural

[208]599 Fed. App'x 44 (3d Cir. 2015).
[209]96 A.3d 1042 (Pa. Super. Ct. 2014).
[210]*In re Tayfur*, 599 Fed. App'x 44.
[211]96 A.3d 1104 (Pa. Commw. Ct. 2014).
[212]108 A.3d 140 (Pa. Commw. Ct. 2015).
[213]123 A.3d 1142 (Pa. Commw. Ct. 2015).

gas wells, but it provides that if a use is neither specifically permitted or denied, and an application is made for such a use, the Zoning Officer is to refer the application to the Board of Supervisors to hear and decide such request as a conditional use. The Board of Supervisors approved the conditional use application, and the plaintiff-landowners appealed to a trial court. The trial court reversed the Board's grant of the conditional use permit. The Pennsylvania Commonwealth Court reversed the trial court decision, finding that a natural gas well was similar to a public service facility, which is expressly allowed in an RA District.

In *Pennsylvania General Energy Co. v. Grant Township*,[214] the court, in an unpublished opinion, held that several provisions of an ordinance enacted by Grant Township establishing a "Community Bill of Rights" were invalid or preempted by state law. Pennsylvania General Energy Company filed suit against Grant Township after the township enacted an ordinance banning the depositing of waste from hydraulic fracturing and invalidating any permit issued by a government agency, whether state or federal, in violation of the ordinance. The court held that Grant Township exceeded its legislative authority under the Second Class Township Code. Further, the court found that the challenged provisions were exclusionary in violation of Pennsylvania law that requires a municipality to authorize all legitimate uses somewhere within its borders.

On March 5, 2015, a jury found in favor of a class of plaintiff-lessors against defendant Energy Corporation of America (ECA), on claims that ECA had improperly deducted from royalties interstate pipeline costs and marketing expenses incurred after title passed to ECA's buyer.[215] Previously, the district court had granted summary judgment in favor of ECA on the rest of plaintiffs' claims, holding: (1) that plaintiffs were not entitled to royalties on gas that was lost before the point of sale; (2) that ECA was entitled to deduct post-production costs for transportation, processing, and marketing; (3) that ECA's method of allocating these costs among multiple wells behind the sales meters was proper; (4) and that plaintiffs were not entitled to royalties on ECA's hedging of gas. [216] Both parties have appealed.

In *Wright v. Misty Mountain Farm L.L.C.*,[217] the court held that explicit language is required in land transactions to release reservations of oil and gas rights under lease by landowners when the landowners agree to sell their property. The plaintiff argued that she owned the subsurface oil, gas, and mineral rights as the successor in interest to the grantees under a deed dated November 24, 1950. The deed reserved to the grantors the rights in the oil, gas, and minerals on the property, with such oil and gas having been leased under a 1949 lease. The plaintiff argued that, because the lease referenced in the deed had expired in 1959, the grantor's oil, gas, and mineral rights had terminated, thus vesting the plaintiff with those rights from that time onward. The court disagreed, finding that the reservation was an exception to the lease retaining in the grantor the title to the oil, gas, and minerals. The court further held that in order for the plaintiff's argument to prevail, the deed would have required an "exception to the exception" stating that the oil and gas rights would become vested in the grantees at the termination of the lease.

In *Bachmann v. EQT Production Co.*,[218] the court reversed and remanded a trial court decision, holding that a lease had expired due to lack of production. The relevant lease language provided that EQT would own the oil and gas rights in a property "as long

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[214]No. 14-209ERIE, 2015 WL 6002163 (W.D. Pa. Oct. 14, 2015).

[215]Pollock v. Energy Corp. of Am., No. 10-1553, 2015 WL 3795659 (W.D. Pa. June 18, 2015).

[216]Pollock v. Energy Corp. of Am., No. 10-1553, 2012 WL 6929174 (W.D. Pa. Oct. 24, 2012).

[217]125 A.3d 814 (Pa. Super. Ct. 2015).

[218]No. 229 WDA 2014, 2015 WL 7287802 (Pa. Super. Ct. Apr. 14, 2015).

after the commencement of operations [of the] land is operated for the exploration or production of gas or oil, or as gas or oil is found in paying quantities." The lease also contained a provision for certain royalty payments. The plaintiffs filed suit, arguing that the lease was void because EQT had failed to produce oil or gas and had not made royalty payments. The trial court granted the plaintiff's motion for summary judgment and concluded that the lease required actual gas production to remain effective. The superior court reversed and held that the Bachmanns had failed to establish their burden as moving parties in a summary judgment setting that there were no operations for the exploration of oil or gas.

In *Dewing v. Abarta Oil & Gas Co.*,[219] the plaintiff-landowners entered into a ten-year oil and gas lease with Abarta's predecessor in interest. The lease required a delay rental payment "of $5.00 per acre annually to maintain the lease during the primary term unless and until a well [was] drilled on the property" producing oil or gas in paying quantities. The lease provided that it would "never be subject to a civil action or other proceeding to enforce a claim of forfeiture due to the Lessee's alleged failure to perform as specified [in the lease], unless Lessee has received written notice of [the] Lessor's demand and thereafter fails or refuses to satisfy the Lessor's demand within 60 days from the receipt of the notice." The court held that, where the delay rentals were paid within sixty-days of notice, the lease could not be terminated, finding that the failure to pay delay rentals was not a material breach that would permit forfeiture.

XII. TEXAS

As in years past, Texas courts issued a number of decisions in 2015 addressing disputes related to the interpretation of oil and gas lease terms. In its highly publicized opinion in *Chesapeake Exploration, L.L.C. v. Hyder*,[220] the Texas Supreme Court ruled in a 5-4 decision that a lease royalty clause did not permit the lessee to deduct post-production costs from an overriding royalty held by a landowner. The court acknowledged that, as a general rule, an overriding royalty bears its share of post-production costs unless the parties agree otherwise. Thus, the only issue in *Hyder* was whether the applicable lease expressed an intent that the overriding royalty was to be free of post-production costs. The court held that the royalty provision, which provided for "a perpetual cost-free (except only its portion of production taxes) overriding royalty of 5% of gross production obtained" from certain wells, did not permit the lessee to deduct post-production costs from the overriding royalty. In reaching its decision, the court concluded that the term "cost-free" applied to both production and post-production costs.

The El Paso Court of Appeals reached a different conclusion regarding the deductibility of post-production costs in *Commissioner of the General Land Office of the State of Texas v. SandRidge Energy, Inc.*[221] At issue in *SandRidge* was the construction of a lease royalty clause contained in the Texas General Land Office (GLO) lease form covering royalties on non-processed gas. For a period of time, SandRidge sold carbon dioxide produced from the lease to a third party and paid royalties to the GLO based on such sales. However, SandRidge entered into an agreement with the owner of a gas plant whereby SandRidge gave the carbon dioxide to the plant owner free of charge in exchange for the plant owner not charging SandRidge for the costs of extracting the carbon dioxide from its produced natural gas. The GLO argued that it was entitled to royalties on carbon dioxide based on the unprocessed gas royalty clause in the GLO lease form and the prohibition on post-production deductions contained in a separate clause.

[219] No. 268 MDA 2015, 2015 WL 6666786 (Pa. Super. Ct. Sept. 4, 2015).
[220] No. 14-0302, 2015 WL 3653446 (Tex. June 12, 2015).
[221] 454 S.W.3d 603 (Tex. App. 2014).

SandRidge argued that the non-processed gas royalty clause, when read in the context of the entire lease form, functions as a "market value at the well" clause. The court agreed with SandRidge, holding that the non-processed gas royalty clause was the "functional equivalent" of a *market value at the well* clause because its terms make it clear that the royalty is payable only on a single substance: raw gas, as it comes out of the ground from the well, together with carbon dioxide and all of the other various components. Further, the court held that the no deduction language in the lease did not apply because the non-processed gas royalty clause constituted a *market value at the well* clause, which renders the no deduction language surplusage as a matter of law.

Texas courts addressed the construction of "retained acreage" clauses in multiple cases this year. For example, in *ConocoPhillips Company v. Vaquillas Unproven Minerals, Ltd.*,[222] the court held that ConocoPhillips breached two oil and gas leases by failing to release certain acreage under identical retained acreage clauses in both of the leases. The retained acreage clauses provided that at the end of a continuous drilling program, ConocoPhillips would retain "40 acres for each producing oil well and 640 acres for each producing or shut-in gas well, except that in case any rule adopted by the Railroad Commission of Texas . . . provide[d] for a spacing or proration establishing different units of acreage per well, then such established different units [would] be held under [the] lease by such production[.]" Under the applicable Railroad Commission rules, the standard drilling unit size is forty acres. Because these rules provide for different unit sizes—forty acres versus the 640 acres described in the lease—ConocoPhillips only retained forty acres around each producing or shut-in gas well.

Chesapeake Exploration L.L.C. v. Energen Resources Corp.[223] similarly involved the construction of identical retained acreage clauses in two oil and gas leases. The leases both covered a total of 640 contiguous acres. Five-hundred-sixty acres were pooled into one unit, and the remaining eighty acres were pooled into a different unit. The unit in which eighty acres were pooled contained a well that was still producing at the time of trial, while production from the unit with 560 acres ceased production in 1988. Both leases provided that "when continuous development ends, the lease terminates as to all acreage except for each proration unit established under the rules and regulations of the RRC or upon which there exists (either on the described land or on lands pooled or unitized therewith) a well capable of producing oil and/or gas in commercial quanitites." The issue was whether the lease was perpetuated as to all 640 acres or only as to the eighty acre portion included in the unit with a producing well. The court held that the lease remained in effect as to all 640 acres because the plain language of the retained acreage clause did not provide for the "rolling" termination of proration units as they cease to produce. Instead, the retained acreage clause operated once and only once—at the end of continuous development.

Another case interpreting a retained acreage clause, *Endeavor Energy Resources, L.P. v. Discovery Operating, Inc.*[224] involved the construction of a lease which provided, in pertinent part, that the lessee will retain only those lands located "within a governmental proration unit assigned to a well producing oil or gas in paying quantities . . . with each such governmental proration unit to contain the number of acres required to comply with the applicable rules and regulations of the Railroad Commission of Texas for obtaining the maximum producing allowable for the particular well." The lessee filed proration plats with the Railroad Commission ultimately assigning eighty acres to each of four wells located on the lease. However, to obtain the maximum allowable, the Railroad Commission field rules permitted proration units of up to 160 acres. The lessee argued

[222]No. 04-15-00066-CV, 2015 WL 4638272, at *1-4 (Tex. App. Aug. 5, 2015).
[223]445 S.W.3d 878 (Tex. App. 2014).
[224]448 S.W.3d 169 (Tex. App. 2014).

that it retained 160 acres for each well due to these field rules. The court disagreed, holding that the lessee only retained eighty acres for each of its producing wells, because acreage can only be *assigned* to a well if a proration plat is filed with the Railroad Commission. As such, the plain language of the lease provided that it would terminate as to all acreage not included in a governmental proration unit assigned to a well in a certified proration plat filed with the Railroad Commission.

In *XOG Operating, LLC v. Chesapeake Exploration Limited Partnership*,[225] the retained acreage clause was included in an assignment of four oil and gas leases acres from XOG to Chesapeake. The clause provided, in pertinent part, upon the expiration of the primary term of the assignment, the leases covered thereby would revert to XOG, "save and except that portion of [the] lease included within the proration or pooled unit of each well drilled under [the] [a]ssignment and producing or capable of producing oil and/or gas in paying quantities." The clause further provided that the term "proration unit" means "the area within the surface boundaries of the proration unit then established or prescribed by field rules or special order" of the Railroad Commission and, "[i]n the absence of such field rules or special order, each proration unit would be deemed to be 320 acres." XOG contended that Chesapeake only retained 802 acres by drilling six wells, the production acreage reflected in its P-15 filing with the Railroad Commission. Chesapeake contended that it retained the entire 1,625 acres covered by the assignment because the applicable field rules establish a proration unit of 320 acres. Because the field rules prescribed 320 acre proration units for five of the six wells, and the proration unit for the sixth well was 320 acres by virtue of the agreement of the parties, the court held that the assignment permitted Chesapeake to retain all 1,625 acres covered thereby based on the definition of "proration unit" in the assignment.

Albert v. Dunlap Exploration, Inc.[226] involved a lease which contained a horizontal Pugh clause providing that it would terminate at the end of the primary term "as to all depths below the deepest depth drilled theretofore established in a well located on lands covered by this lease." During the lease's primary term, the lessor executed a Declaration of Pooled Unit which pooled all gas "produced under and by virtue of [the] leases, from the lands covered by [the] leases, and as to all depths covered by [the] leases[,]" and further provided that lessors expressly consented to the formation of the described pooled unit, and adopted, ratified, and confirmed the same. Production was obtained from the pooled unit before the expiration of the lease's primary term. The issue was whether the lease terminated as to all depths below the deepest depth drilled at the end of its primary term under the horizontal Pugh clause. The court held that it did not terminate because the execution of the pooling agreement had effectively modified the lease, allowing all depths to be maintained by production from the pooled unit.

In *BP America Prod. Co. v. Laddex, Ltd.*,[227] the court held that a trial court abused its discretion in connection with issuing a jury charge regarding cessation of production in paying quantities that limited the analysis of the issue to a specific fifteen-month period. In doing so, the court re-iterated the long-standing rule in Texas that, whether a lease should be terminated is assessed through a two-part test for determining profitability:

> (1) viewed over a reasonable period of time, did the lease cease to pay a profit after deducting operating and marketing expenses, in other words, did the lease cease to produce in paying quantities; and (2) would a

[225]No. 07-13-00439-CV, 2015 WL 5244718 (Tex. App. 2015).
[226]457 S.W.3d 554 (Tex. App. 2015).
[227]458 S.W.3d 683 (Tex. App. 2015).

reasonably prudent operator continue to operate under the lease for profit and not merely for speculation.[228]

In *KCM Financial LLC v. Bradshaw*,[229] the court once again examined the contours of the duty the executive-right holder (executive) owes to a non-participating royalty interest holder (non-executive). In *Bradshaw*, the non-executive claimed that the executive breached its duty by negotiating a lease that provided for a below-market royalty in exchange for an above-market bonus. Citing a long line of Texas cases addressing the duty owed by the executive to the non-executive, the court acknowledged that the contours of the duty remain somewhat indistinct. Nonetheless, the court concluded that "the controlling inquiry is whether the executive engaged in acts of self-dealing that unfairly diminished the value of the non-executive interest."[230] With respect to the non-executive's claim, the court held that the negotiation of a below market royalty does not conclusively establish a breach of duty, nor is it irrelevant. A determination of whether the duty was breached depends on an analysis of the lease and the circumstances of its execution as a whole, so the claim was remanded to the trial court for further proceedings. On an ancillary issue, the court held that the non-executive's derivative-liability claim lacked merit because the lessee does not owe a fiduciary duty to the non-executive, and the lessee merely entered into an arms-length transaction with the executive.

Lightning Oil Co. v. Anadarko E&P Onshore, LLC[231] involved a dispute between a surface lessee and a mineral lessee. Lightning owned several mineral leases, the surface above which was owned by Briscoe. Anadarko entered a mineral lease covering lands adjacent to the land owned by Briscoe. In order to access the minerals beneath its lease, Anadarko entered into a Surface Use and Subsurface Easement Agreement with Briscoe that allowed it to drill from the surface of Briscoe's land to access the minerals covered by its adjacent lease. Lightning sued Anadarko for trespass and tortious interference with contract to prevent Anadarko from placing drilling rigs on Briscoe's surface estate and from drilling through Lightning's mineral estate to reach the mineral estate covered by its adjacent lease. The court found in favor of Anadarko, holding that "the surface estate owner controls the matrix of the underlying earth," and the summary judgment evidence conclusively proved the surface estate owner gave Anadarko permission to site and drill. The court further noted that Lightning's lease did not give it the "right to control the subterranean structures in which any hydrocarbon molecules might be found," and such rights are not automatically conveyed pursuant to an oil and gas lease under Texas law.[232]

Griswold v. EOG Resources, Inc.[233] involved the construction of a deed in which the grantor conveyed a tract of land to grantee "less, save and except an undivided one-half of all oil, gas and other minerals found in, under[,] and that may be produced from the [] tract heretofore reserved by predecessors in title." At the time of the conveyance, the grantor's predecessors in title did not own any interests in the minerals beneath the tract, giving the grantor fee title to all of the minerals at the time the conveyance was executed. The issue was whether the provision in the deed conveyed all of the minerals or one-half of the minerals to the grantee. The court acknowledged that exceptions from conveyances "operate to prevent the excepted interest from passing at all," and that reservations run in favor of the grantor. Nonetheless, the court concluded that the

[228] *Id.* at 688 (internal citations omitted).
[229] 457 S.W.3d 70 (Tex. 2015).
[230] *Id.* at 82.
[231] No. 04-14-00170-CV, 2015 WL 5964939 (Tex. App. October 14, 2015).
[232] *Id.* at *1, *8.
[233] 459 S.W.3d 713 (Tex. App. 2015).

conveyance was only effective to convey one-half of the minerals to the grantee and that the reference to minerals reserved by predecessors in title was "but a recital purporting to state why the exception was made." The court explained that, even though the recital was incorrect, "giving a false reason for an exception from a grant does not operate to alter or cut down the interest or estate excepted, nor does it operate to pass the excepted interest or estate to the grantee."[234]

Medina Interests, Ltd. v. Trial[235] involved the construction of a deed with a reservation of an "undivided interest in and to the 1/8 royalties paid the land owner upon production of oil, gas and other minerals from [the] 278 acre tract of land." Despite appellant's argument that the phrase "our undivided interest in and to the 1/8 royalties" unambiguously reserved a fixed 1/8 royalty, the court examined the deed in its entirety and concluded that the phrase "royalties paid the land owner" denotes a royalty that floats in accordance with the size of the landowner's royalty contained in a given lease. Hence, the court found for appellee, holding that the deed did not reserve a 1/8 fixed royalty, but rather reserved an undivided interest in a floating royalty. The Eastland Court of Appeals reached a similar conclusion in *Bulter v. Horton*,[236] in which it construed a reservation of one-half of the usual one-eighth royalty on all oil, gas, casinghead gas, and gasoline. The court also reached a similar conclusion in *Leal v. Cuanto Antes Mejor LLC.*[237]

Orca Assets, G.P., LLC v. Burlington Resources Oil and Gas Company, L.P.,[238] addressed issues related to unrecorded conveyances. On June 17, 2010, the Red Crest Trust entered into a lease agreement with GeoSouthern. A memorandum of the lease agreement was filed in the real property records on December 9, 2010. On December 6, 2010, before the GeoSouthern memorandum was recorded, Red Crest Trust entered into a letter agreement to lease the same mineral interests to Orca. The letter agreement contained a clause that negated any warranty of title. Orca argued that the letter agreement transferred equitable title to Orca and that such title was superior to GeoSouthern's because Orca was a bona fide purchaser for value. Without deciding whether the letter agreement constituted a conveyance of equitable title, the court held that Orca was not a bona fide purchaser for value because the disclaimer of title warranties made the letter equivalent to a quitclaim. In doing so, the court re-affirmed the long standing rule that the recipient of a quitclaim is not entitled to the protections afforded to a bona fide purchaser for value.

Roland Oil Co. v. Railroad Commission of Texas[239] was an administrative appeal that involved the interpretation of a unit agreement. In 2005, a unit operator (Roland) asked the Railroad Commission for an extension to complete the required testing on a well located on a lease. After reviewing the well's history, the Commission realized that Roland had been delinquent in its required testing since 1994. Therefore, the Commission denied Roland's request and issued a severance order preventing Roland from producing from any well on the lease. After Roland completed the necessary repairs and testing, the severance order was lifted. In 2006, a mineral owner contended that Roland's lease had lapsed during the period of non-production, while the severance order was in place. After being notified by the mineral owner, the Commission cancelled plugging deadline extensions for the wells. Roland appealed, arguing that the leases in question, which were subject to a unit operating agreement, continued in full force and effect despite a lapse in production. Roland asserted that the lease had been perpetuated pursuant to the terms of

[234]*Id.* at 718-20 (internal citations omitted).
[235]469 S.W.3d 619 (Tex. App. 2015).
[236]447 S.W.3d 514 (Tex. App. 2014).
[237]No. 04-14-00694-CV, 2015 WL 3999034 (Tex. App. July 1, 2015).
[238]464 S.W.3d 403 (Tex. App. 2015).
[239]No. 03-12-00247-CV, 2015 WL 870232 (Tex. App. Feb. 27, 2015).

the unit operating agreement because: (1) the Commission's actions constituted force majeure events that extended the term of the lease, and (2) the unit operator's testing and repairing of inactive wells constituted "Unit Operations" which extended the term of the lease. The court rejected the first argument because in order for the force majeure clause to be triggered, the event needs to be beyond the control of the unit operator, and the Commission's suspension could have been avoided by Roland and thus was not a force majeure event by the terms of the lease. The court rejected the second argument because "Unit Operations" were defined in the unit agreement to include only operations on account of the development and operation of the leases for the production of hydrocarbons, and Roland's testing and repairing of inactive wells were not performed in an endeavor to produce hydrocarbons.

The court in *Anderson Energy Corp. v. Dominion Oklahoma Texas Exploration & Prod., Inc.*[240] dealt with two issues: "(1) whether as a matter of law the term "Contract Area" in the joint operating agreement (JOA) is limited to the lands, oil and gas leasehold interests, and oil and gas interests owned by the original parties" on the date the JOA was executed; and (2) if the JOA does apply to after-acquired interests, "whether the [JOA] is terminable at will due to the absence of a specific duration." In its analysis, the court stated that the term Contract Area had to be construed in the context of the whole JOA, not in isolation. The court noted that the inclusion of an "area of mutual interest" (AMI) provision in the JOA indicated that the parties intended that future acquisitions of leasehold, mineral, or fee interest in any of the land within the Contract Area also be included in the Contract Area. Further, the court stated that reference in the JOA's Exhibit A to "Land *and* Leases" showed that the parties intended that the Contract Area include unleased land, as well as existing wells and leases. Harmonizing all of the JOA's language, the court concluded as to this first issue that the parties intended that interests acquired in the future by them and their successors within the Contract Area be subject to the JOA. As to the second issue, the court implied that the JOA was to go on for a reasonable term in order to effectuate the AMI provision and Preferential Right of Purchase provision.

In *Hooks v. Samson Lone Star*,[241] Hooks executed a lease in favor of Samson which prohibited pooling and contained certain offset obligations. The offset obligations provided that if a well was drilled within 1,320 feet of the Hooks lease line, Samson would either drill, release, or pay compensatory royalties. Samson requested that Hooks permit it to pool the lease with acreage for a well that was to be drilled on adjacent land. Samson provided Hooks with a plat depicting the well as being 1,400 feet from the lease line, and Hooks agreed to permit the pooling. However, the well was actually located such that it bottomed around 1,186 feet of the lease line based on Railroad Commission records. Several years later, Hooks sued Samson for fraud and breach of contract, and Samson argued that the statute of limitations barred the claim. In response, Hooks asserted that Samson's fraud tolled the limitations period. The issue before the court was whether Hooks should have known the location of the well based on the Railroad Commission filing. The court noted that, in some instances, courts treat Railroad Commission filings as constructive notice, while in other instances, the focus is on what would have been discovered after reasonable diligence. The court held that this case falls into the latter category, raising a question of fact, which can only be determined by the factfinder and, as such, the court did not overturn the jury's award to Hooks.

XIII. WEST VIRGINIA

[240]No. 04-14-00170-CV, 2015 WL 3956212, at *1 (Tex. App. 2015).
[241]457 S.W.3d 52 (Tex. 2015).

A. Legislative Developments

The West Virginia Legislature passed H.B. 2001, repealing the state's Alternative and Renewable Energy Portfolio Standard (AREPS).[242] The AREPS required utilities to source 25% of electricity from renewable and alternative fuel resources by 2025, with compliance requirements beginning in 2015. The new law repeals West Virginia Code sections 24-2F-1 to -7 and 24-2F-9 to -12. The sole remaining provision of the AREPS pertains to net metering.

S.B. 423 revised the recently passed (2014) aboveground storage tank regulations (2015 Act).[243] The 2015 Act removes blanket exemptions for any particular industry; however, pipeline facilities—including gathering lines, interstate pipelines regulated by the NGA or the Hazardous Liquid Pipeline Safety Act of 1979, or intrastate pipelines regulated by the Public Service Commission—are excluded from the above ground storage tanks definition. The 2015 Act creates four categories of activities or facilities—three are specific to tanks and the fourth applies to potential sources of contamination to water supplies—whether from a regulated tank or not.

The West Virginia Legislature addressed the Clean Air Act's section 111(d), regulating carbon dioxide emission from existing fossil fuel-fired electric generating units. H.B. 2004 amends West Virginia Code section 22-5-20 to require the West Virginia Department of Environmental Protection (WVDEP) to submit a report within 180 days after EPA finalizes its rule regarding the feasibility of the state's compliance with the section 111(d) rule.[244] If the WVDEP determines that submission of a state plan is feasible, then the WVDEP will propose a state plan and submit it to the legislature for consideration. The plan must propose separate standards of performance for carbon dioxide emissions from existing coal-fired units and from existing natural-gas fired units. Under the new law, the legislature must approve any state plan before it is submitted to the EPA.

After the passage of S.B. 280, horizontal well work permits may now be transferred in West Virginia with prior written consent of the Secretary of the WVDEP. The bill modified West Virginia Code section 22-6A-7. Previously, these permits were nontransferable, and this change will make both the acquisition and transfer of existing wells easier.[245]

B. Judicial Developments

In *West Virginia Department of Transportation, Div. of Highways v. W. Pocahontas Properties, L.P.*,[246] the court addressed how to calculate the value of a mineral leasehold estate taken by eminent domain. The court found error in the trial court's failure to instruct the jury that just compensation for the condemnation of a mineral leasehold estate cannot be based solely on the mineral lessee's lost profits.[247] The court held that "the raw profit lost from a business conducted on property . . . may not be the sole consideration in establishing just compensation"; instead, the fair market value of the condemned property at the time of the taking is the proper basis for calculating just compensation.[248] When making this calculation, the court found that "[e]very element

[242]H.B. 2001, 82d Leg., 1st Reg. Sess. (W. Va. 2015).
[243]S.B. 423, 82d Leg., 1st Reg. Sess. (W. Va. 2015).
[244]H.B. 2004, 82d Leg., 1st Reg. Sess. (W. Va. 2015).
[245]S.B. 280, 82d Leg., 1st Reg. Sess. (W. Va. 2015).
[246]777 S.E.2d 619 (W. Va. 2015).
[247]*Id.* at 640-41.
[248]*Id.* at 630, 633.

that private parties would consider in a sale of real estate should be weighed in setting a just compensation for that real estate in a condemnation action, and considerations that would not reasonably affect market value are excluded."[249] Thus, when the "real estate *itself* generates income—such as . . . the extraction of crops, timber, or minerals—that income may be considered in a condemnation action." The court noted "[t]he distinction between future profits of a business on real estate, and the future earning power of the real estate itself."[250] The court found that the principal distinction between future earning power and future profits is "income as a *criterion* of value" as opposed to "income as *evidence* of value."[251]

In *Geological Assessment & Leasing v. O'Hara*,[252] the plaintiffs retained the defendant as a representative and consultant in their negotiations with oil and gas companies—the defendant even signed several leases on behalf of the plaintiffs.[253] When the validity of the leases were subsequently challenged, the plaintiffs asserted claims against the defendant for the unauthorized practice of law and requested all fees and payments made to defendant be returned. All of the leases contained arbitration clauses, and the defendant filed a motion to dismiss, arguing that the claims should be resolved via arbitration.[254] The court upheld the denial of defendant's motion, concluding that West Virginia state law prohibits the arbitration of claims involving the unauthorized practice of law.

In *SWN Prod. Co., LLC v. Edge*, [255] the plaintiff lessee sought a preliminary injunction to enjoin the defendant landowners from denying entry to the property to conduct oil and gas operations. Applying the Fourth Circuit's four-factor injunction analysis, the court found the plaintiff clearly demonstrated it is likely to succeed on the merits.[256] The court also concluded that irreparable harm would result to the plaintiff if the injunction was not granted. With respect to the third factor, the court found the balance of equities tipped in favor of the plaintiff-lessee, citing West Virginia Code section 22-6A-2(a)(8), which "favors the responsible development of the state's natural gas resources."[257] Finally, the court also concluded the grant of the injunction was in the public interest citing West Virginia Code section 22-6A-2(a)(8) and West Virginia Code section 22-7-1, providing the "exploration for and development of oil and gas reserves in this state must coexist with the use, agricultural or otherwise, of the surface of certain land and that each constitutes a right equal to the other," as the basis of this conclusion.[258]

In *Leggett v. EQT Prod. Co.*,[259] plaintiff-lessors of an oil and gas lease alleged that the defendant-lessee attempted to avoid or reduce royalty payments owed under the lease by improperly deducting expenses incurred by non-lessee defendants, all of which were separate subsidiaries or related entities of the defendant-lessee. The plaintiff-lessors asserted several causes of action, including breach of a fiduciary duty, which the court dismissed. The court found that "only a duty of ordinary prudence, rather than that of a

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[249] *Id.* at 634.
[250] *W. Pocahontas Prop.*, 777 S.E.2d at 634.
[251] *Id.* at 641.
[252] No. 14-1210, 2015 WL 7369518 (W. Va. Nov. 18, 2015)
[253] *Id.* at *2.
[254] *Id.* at *2-3.
[255] No. 5:15CV108, 2015 WL 5786739, at *1 (N.D. W. Va. Sept. 30, 2015).
[256] *Id.* at *2 (citing The Real Truth About Obama, Inc. v. Fed. Election Comm'n, 575 F.3d 342, 346-47 (4th Cir. 2009)), *4.
[257] *Id.* at *6.
[258] *Id.* at *6-7 (citing W. VA. CODE R. § 22-7-1 (2012)).
[259] No. 1:13CV4, 2015 WL 1212342 (N.D. W. Va. Mar. 17, 2015)

fiduciary applies" between a lessor and lessee of an oil and gas lease.[260] The court further noted that, "as a general rule, a fiduciary relationship is established only when it is shown that the confidence reposed by one person was actually accepted by the other, and merely reposing confidence in another may not, of itself, create the relationship."[261]

Braden v. Chesapeake Appalachia, L.L.C.,[262] involved a declaratory judgment action where, shortly before the expiration of the lease's primary term, the lessee filed an amended declaration of pooled unit, pooling the lease at issue into an existing unit with an existing well. The lessee also had plans to drill additional wells from the same well pad in the existing unit and in another contiguous planned unit, and filed applications to drill those wells within a week after the lease's primary term. After finding that the habendum clause and the pooling provision in the lease were unambiguous, the court rejected the implication that the pooling clause should be interpreted against the lessee because it was allegedly "one-sided."

The district court, affirmed by the Fourth Circuit, found the plain meaning of the pooling provision allowed the lessee to pool the lease and that operations anywhere in the unit were deemed to be operations on plaintiff's property. *Braden* reaffirms the *Fleming Oil & Gas Co. v. South Penn Oil Co.*[263] rule that an oil and gas lease may be extended no matter how slight the commencement of any portion of the work that was a necessary and indispensable part of the work required.

C. Administrative Developments

The WVDEP issued General Permit G70-B in an effort to prevent and control regulated air pollutants from eligible natural gas facilities located at well sites. The terms of General Permit G70-B are applicable to all facilities engaged in natural gas production activities. It allows registrants "to install and operate specified equipment, air pollution control devices and/or emission reduction devices to control emissions of regulated pollutants into the air."[264] The General Permit G70-B establishes an emission cap on regulated and hazardous pollutants. The "fugitive emissions of a stationary source shall not be considered in determining whether it is a major stationary source" for the purposes of acquiring operating permits pursuant to West Virginia Code of State Rules section 45-30-2 or for eligibility for the General Permit G70-B. [265]

XIV. WYOMING

A. Legislative Developments

During its 2015 General Session, the Wyoming legislature passed H.B. 8, indemnifying surface landowners from lawsuits arising from oil and gas pipeline spills and contamination.[266] The new statute, effective July 1, 2015, indemnifies a surface

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[260]*Id.* at *3, *7.
[261]*Id.* (internal citations and quotes omitted).
[262]610 F. App'x 331 (4th Cir. 2015); No. 5:13CV107, 2014 WL 6633231 (N.D. W. Va. Nov. 21, 2014).
[263]17 S.E. 203, 207 (W. Va. 1893).
[264]W. Va. Dep't of Envtl. Prot., *General Permit G70-B Engineering Evaluation/Fact Sheet*, *available at* http://www.dep.wv.gov/daq/permitting/Documents/G70-B%20Final/G70-B%20Fact%20Sheet%20v2.pdf.
[265]W. VA. DEP'T OF ENVTL. PROT., CLASS II GENERAL PERMIT G70-B (Nov. 2, 2015).
[266]H.B. 0008, 63d Leg., 2015 Gen. Sess. (Wyo. 2015) (amending WYO. STAT. ANN. § 35-11-1801(a)(v), (vi) and adding WYO. STAT. ANN. § 35-11-1801(a)(vii)).

owner as an "innocent owner," as long as the owner did not participate in the "installation, operation or maintenance of the pipeline."[267]

The legislature also addressed enhanced oil recovery (EOR) and the geologic sequestration of carbon dioxide (CO_2) in S.F. 84. Under the new law, an EOR operator may apply to the Wyoming Oil and Gas Conservation Commission (WOGCC) for an order recognizing and certifying that the operator's EOR activities result in sequestration of CO_2.[268] It is unclear exactly what benefits an operator would enjoy from sequestration certification, but the statute provides a framework for certification and grants the WOGCC rulemaking authority over the issue.[269] The new statute does not subject the EOR operator to Wyoming's existing carbon sequestration regulatory requirements.[270]

Two state tax measures important to the oil and gas industry also passed the legislature in 2015. First, the legislature expanded and clarified the definition of "well site" for sales tax purposes. Under existing Wyoming law, equipment used within a well site is exempt from sales tax. Effective July 1, 2015, the legislature changed the definition of well site from the area within 250 feet of the wellbore, to a detailed definition based on specific production equipment, including wellheads, valves, dehydrators, and flares.[271]

Second, the legislature created a task force charged with studying and recommending improvements to Wyoming's mineral tax system. The task force is made up of four legislative members and six members appointed by Wyoming's governor. The task force's work may result in future severance and ad valorem/gross products tax legislation.[272]

B. Judicial Developments

Pennaco Energy, Inc. v. KD Company LLC addressed assignments of surface use agreements (SUAs).[273] In the 1990s, Pennaco Energy, Inc. acquired oil and gas leases and entered into surface use agreements (SUAs) with surface landowners. Under the SUAs, Pennaco agreed to pay the landowners for use of the lands, as well as damages and remediation. Pennaco drilled wells and produced coalbed methane from the lands for several years. During this time, Pennaco made the payments required by the SUAs and conducted reclamation activities on the lands. In 2010, Pennaco assigned its oil and gas interests, as well as the SUAs, to CEP-M. CEP-M then assigned the interests to High Plans. After the assignments, Pennaco stopped making payments under the SUAs. The assignees never made payments under the SUAs. Three years after the assignments, the landowners sued Pennaco, CEP-M and High Plains for breach of the SUAs for failure to make required payments.[274]

The district court granted summary judgment to the landowners. The district court determined Pennaco remained liable under the SUAs under Wyoming contract law, even

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[267] *Id.*

[268] S.F. 0084, 63d Leg., 2015 Gen. Sess. (Wyo. 2015) (creating WYO. STAT. ANN. § 30-5-502 (2015)); *see* WYO. STAT. ANN. § 30-5-502(a).

[269] *See* WYO. STAT. ANN. § 30-5-502(b) (2015).

[270] WYO. STAT. ANN. § 30-5-502(a) (2015) (citing WYO. STAT. ANN. §§ 35-11-313 through 35-11-318).

[271] WYO. STAT. ANN. § 39-15-101(a)(xviii) (2015); H.B. 0051 63d Leg., 2015 Gen. Sess. (Wyo. 2015).

[272] S.F. 0042, 63d Leg., 2015 Gen. Sess. (Wyo. 2015).

[273] 363 P.3d 18 (Wyo. 2015).

[274] *Id.* at 21-22.

after the assignments.[275] The Wyoming Supreme Court affirmed. It determined the SUAs created a contractual relationship between Pennaco and the landowners, not a relationship based on privity of estate.[276] The SUAs imposed payment obligations on Pennaco until production operations ceased and the lands were reclaimed, regardless of the assignments to CEP-M and High Plains.[277] According to the supreme court, the SUAs did not specifically or sufficiently demonstrate the parties' intent to discharge Pennaco from obligations under the SUAs.[278]

Ultra Resources, Inc. v. Hartman was the Wyoming Supreme Court's second opinion in a complicated dispute between these owners.[279] Five years earlier, the supreme court issued its first opinion in the case, largely affirming a district court's declaratory judgment ruling. In its 2010 decision, the supreme court enforced an interest provision in a net profits contract between net profits interest owners in leases (plaintiffs) and a group of working interest owners (defendants).[280] After the supreme court's first decision, the defendants paid the district court's monetary judgment to the plaintiffs.

Shortly after the payment, the plaintiffs claimed the defendants failed to provide a proper accounting under the net profits contract. The plaintiffs filed a motion to enforce judgment with the district court. The defendants claimed the plaintiffs' claim should have been a new action, as opposed to a motion to enforce the prior order, but the district court determined it had jurisdiction over the matter, agreed with the plaintiffs' accounting claims, and required defendants to pay plaintiffs' attorney fees.[281]

The defendants appealed. The court determined the district court had jurisdiction over the matter through the plaintiffs' motion to enforce the earlier judgment.[282] The court also affirmed the district court's decision on the accounting issue. Specifically, the court determined that while the net profits contract in the case imposed additional reporting requirements on the defendants as operators, there was nothing unfair or inequitable about the accounting requirements.[283]

In *Basic Energy Services, L.P. v. Petroleum Resource Management Corp.*,[284] an equipment owner filed suit against an oil well owner and operator to recover damages to equipment resulting from an oil well fire. The equipment owner claimed breach of contract and alleged the owner/operator negligently hired a third-party independent contractor. The district court granted summary judgment to the owner/operator. It recognized there was a contract between the owner/operator and the equipment owner, but determined the owner/operator did not breach the contact. On the negligent hiring claim, the district court found the independent contractor caused the fire and the owner/operator had no duty to the equipment owner. The district court concluded the owner/operator could not be held liable for the independent contractor's acts.[285] On appeal, the Wyoming Supreme Court determined the owner/operator failed to meet its burden of proof on one portion of the breach of contract issue, and remanded the case for further examination of the contract claim.[286] It also reversed the district court's

[275] *Id.* at 21-22.
[276] *Id.* at 25, 29.
[277] *Id.* at 27, 29, 32.
[278] *Id.* at 31, 40.
[279] 346 P.3d 880 (Wyo. 2015).
[280] *Id.* at 885-86 (citing Ultra Resources, Inc. v. Hartman, 226 P.3d 889 (Wyo. 2010)).
[281] *Id.* at 886.
[282] *Id.* at 886-92.
[283] *Id.* at 903.
[284] 343 P.3d 783 (Wyo. 2015).
[285] *Id.* at 786-87.
[286] *Id.* at 788, 792.

determination on the negligent hiring claim. For the first time, the Wyoming Supreme Court adopted the Restatement (Second) of Torts section 411 (1965) and determined the equipment owner should have the opportunity to prove the elements of negligent hiring.[287]

C. Administrative Developments

On April 14, 2015, the WOGCC commenced a formal rulemaking case to revise its oil and gas well setback requirements. The new rules require that wells and production facilities must be located no closer than 500 feet from an existing occupied structure. The rules also require operators to give notice to owners of occupied structures for any wells or production facilities to be located within 1,000 feet. The WOGCC's chief administrator may approve variances or exceptions from the new requirements. The rules define an "occupied structure" as "a building that was specifically constructed and approved for human occupancy such as a residence, school, office, or other place of work, or hospital." Excluded from the definition are "outbuildings such as, but not limited to sheds, barns or garages."[288]

[287] *Id.* at 790-92.
[288] WYO. OIL & GAS CONSERVATION COMM'N RULES Ch. 3 § 47 (2015).

Chapter 20 • PETROLEUM MARKETING
2015 Annual Report[1]

It was not a robust year in 2015 for reported decisions involving the Petroleum Marketing Practices Act (PMPA).[2] The limited number of reported decisions was matched by the narrow scope of the PMPA issues that courts addressed in those cases. The reported decisions involved: the propriety of franchise terminations and related notices; franchisor compliance with the statutory requirement to make a bona fide offer to sell, or to grant a franchisee an opportunity to exercise a right of first refusal on an offer to purchase, franchise premises; the scope and reach of the U.S. Supreme Court's 2010 decision in *Mac's Shell*;[3] and questions concerning the preemptive effects of the PMPA.

I. Termination Notices and Adequacy of Grounds Supporting Termination

In *Scarsdale Central Service Inc. v. Cumberland Farms, Inc.*, the U.S. District Court for the Southern District of New York rejected the plaintiff franchisee's claims seeking an injunction to prevent the franchisor from evicting the franchisee from the station premises and terminating the franchise relationship, and to compel the franchisor to comply with the PMPA requirement to make a bona fide offer to sell, or to grant a franchisee an opportunity to exercise a right of first refusal on an offer to purchase, the franchise premises. The court granted the defendants' motion for summary judgment, finding that the franchisor terminated the franchise agreement in accordance with the PMPA.[4]

The plaintiff franchisee leased a Gulf-branded station from Cumberland. In October 2012, Cumberland entered into negotiations to sell the station premises to 880 CPA, which had made an unsolicited offer to buy.[5] Cumberland notified plaintiff of the negotiations and informed the plaintiff not only that it "had thirty days to submit an offer to purchase[,]" but also that plaintiff retained its right of first refusal under the PMPA should 880 CPA make an offer.[6] When 880 CPA's bid was higher than plaintiff's, Cumberland notified plaintiff of its right of first refusal.[7]

On October 11, 2013, plaintiff brought suit against Cumberland and Gulf Oil, seeking to enjoin defendants' sale of the premises, to enjoin defendants from evicting the plaintiff, to prevent defendants from terminating the franchise relationship, and to order defendants to honor plaintiff's right of first refusal, among other things.[8] Defendants counterclaimed, seeking a declaration that Cumberland satisfied the nonrenewal requirements of the PMPA, 15 U.S.C. §§ 2802, 2804.[9] Previously, the court had granted

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[2]*See* 15 U.S.C. §§ 2801-2841 (2012).

[3]Mac's Shell Serv., Inc. v. Shell Oil Prods., 559 U.S. 175 (2010).

[4]Scarsdale Cent. Serv. Inc. v. Cumberland Farms, Inc., No. 13-CV-8730 (NSR), 2015 WL 678761, at *6-8 (S.D.N.Y. Feb. 13, 2015).

[5]*Id.* at *1.

[6]*Id.* at *2.

[7]*Id.*

[8]*Id.* at *1, *3.

[9]*Scarsdale*, 2015 WL 678761, at *1, *8.

defendants' motion for a preliminary injunction due to plaintiff franchisee's "continued occupancy of the [p]remises and wrongful act of selling gasoline under the Gulf Oil trademark[.]"[10]Defendants then moved for summary judgment on their counterclaims and for dismissal plaintiff's claims.[11]

The PMPA requires franchisors to give at least ninety days' notice prior to the termination or nonrenewal date.[12] The grounds for termination or nonrenewal must be made "in good faith and in the normal course of business . . . to sell [the] premises" in order to protect against discriminatory and arbitrary nonrenewal.[13] Additionally, as here, when the premises were leased to a franchisee, the franchisor must offer a right of first refusal or make "a bona fide offer to sell, transfer, or assign to the franchisee [the] franchisor's interest in such premises."[14]

Plaintiff accepted that the decision to sell the premises was made in the ordinary course of business, but challenged that it was made in good faith and asserted that defendant did not make any bona fide offer.[15] Plaintiff claimed defendants' oral representations that the agreement would be renewed evidenced bad faith.[16] The court rejected plaintiff's argument, holding that although representations to plaintiff may have been premature, defendants ceased any assurances and notified plaintiff in writing of negotiations with 880 CPA as soon as discussions advanced and terms crystalized.[17] Further, it was acceptable for defendants to state two different purposes for termination because "[d]efendants had every right to exercise their business judgment to terminate on whatever permissible grounds existed."[18]

"Plaintiff also argue[d] for the first time [at] summary judgment that [d]efendants did not satisfy the separate statutory requirement of either (a) a right of first refusal or (b) a bona fide offer to sell . . . ."[19] The agreement between defendants and 880 CPA provided that defendants would dispose of all personal property, including equipment necessary for fuel sales, and that defendants would absorb remediation costs.[20] According to plaintiff, this provision would gut its business, such that any right of first refusal would not protect its interests, making the right inapplicable.[21] The court held that even if there was no "right of first refusal" here, there was a bona fide offer to sell the premises.[22] In rejecting *Roberts* and adopting the holding in *Atlantic Avenue* and *Tobias v. Shell Oil Co.*, the court held that "the franchisor need not offer the franchisee those items of property on the premises that pose a threat of future pollution and liability."[23] Here, given the possible liability for environmental contamination, the provision was not a creature of

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[10]*Id.* at *1.
[11]*Id.*
[12]15 U.S.C. § 2802(a), (b)(2).
[13]*Scarsdale*, 2015 WL 678761, at *5; 15 U.S.C. § 2802(b)(3)(D)(i)(III).
[14]*Scarsdale*, 2015 WL 678761, at *5; 15 U.S.C. § 2802(b)(3)(D)(i)(I).
[15]*Scarsdale*, 2015 WL 678761, at *5.
[16]*Id.*
[17]*Id.* at *6.
[18]*Id.*
[19]*Id.*
[20]*Scarsdale*, 2015 WL 678761, at *6.
[21]*Id.*
[22]*Id.* at *7.
[23]*Id.* (citing Roberts v. Amoco Oil Co., 740 F.2d 602, 607 (8th Cir. 1984) (finding that a bona fide offer to sell leased marketing premises under the PMPA must include gasoline tanks, storage tanks, and other equipment); quoting Atl. Ave. Oil & Gas Ltd. v. Texaco Refining & Mktg., Inc., 699 F. Supp. 27, 31 (E.D.N.Y. 1988); citing Tobias v. Shell Oil Co., 782 F.2d 1172, 1174 (4th Cir. 1986)).

bad faith to put the plaintiff out of business.[24] Additionally, plaintiff had opportunities to clarify the provision's application to above ground equipment but did not do so.[25] Therefore, the court held defendants' termination was not wrongful.[26]

In *Amphora Oil & Gas Corp. v. Cumberland Farms, Inc.*, the U.S. District Court for the Eastern District of New York denied plaintiff's motion for a preliminary injunction, finding defendants did not violate the PMPA when it terminated the plaintiff franchisee's lease.[27]

Beginning September 10, 2003, Defendant Cumberland Farms, Inc. and its affiliate Gulf Oil Limited Partnership (Cumberland Gulf) leased property that was utilized as a gas station and convenience store.[28] On April 5, 2004, Plaintiff Amphora Oil & Gas Corp. (Amphora) and Cumberland Gulf entered into a Retail Motor Fuel Outlet Lease (the Sublease) and other related agreements which collectively were a franchise agreement.[29] Attached to the Sublease was a "Notice of Underlying Lease," which informed Amphora the Sublease was subject to the Master Lease, and in the event the Master Lease expired, the Sublease and franchise agreement would also end.[30] According to the court, the Sublease was due to expire on September 9, 2015, despite plaintiff's contention that it was "automatically renewed."[31]

On December 8, 2014, Cumberland Gulf sent a letter to its landlord informing that it "did not intend to renew its Master Lease and therefore it would expire on December 31, 2015."[32] Cumberland Gulf then sent a letter to Amphora (Termination Notice), stating the agreements between the parties would expire on September 9, 2015, but according to the PMPA, it had the right to extend the underlying lease on the condition that it provided Cumberland Gulf with an unconditional release from liability executed by it and Zanghi.[33] Although Amphora informed Cumberland Gulf of its intention to extend the lease, the new landlord, Parkway Realty, refused to sign an unconditional release.[34] Specifically, Parkway Realty refused to substitute Amphora for Cumberland Gulf because Amphora was a small operator with few resources, and it would not be able to ensure the same level of protection.[35] Parkway Realty subsequently entered into a new lease for the gas station with Bolla Operating L.I. Corp. (Bolla).[36]

Amphora then filed suit against defendants claiming it would be wrongfully displaced. Specifically, Amphora sought: (1) declaratory judgment that Parkway Realty wrongfully refused to recognize Amphora's rights under the PMPA, (2) declaratory judgment that Cumberland Gulf undermined Amphora's right to maintain its business in violation of the PMPA, (3) a permanent injunction preventing Cumberland Gulf from terminating the agreements until a final determination of the case, and (4) damages under

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[24]*Scarsdale*, 2015 WL 678761, at *7, *8.
[25]*Scarsdale*, 2015 WL 678761, at *8.
[26]*Id.*
[27]Amphora Oil & Gas Corp. v. Cumberland Farms, Inc., No. 15-CV-4638(ADS)(AYS), 2015 WL 6143730, at *15 (E.D.N.Y. Oct. 19, 2015).
[28]*Id.* at *2.
[29]*Id.* at *2, *3.
[30]*Id.* at *3.
[31]*Id.* In rejecting Plaintiff's contention, the court looked to the plain language of the Sublease and the parties' previous execution of lease renewal documents. *Id.*
[32]*Amphora*, 2015 WL 6143730, at *15.
[33]*Id.*
[34]*Id.* at *5-6 (in late 2014 or early 2015, Zanghi sold the premises to the new landlord and defendant in this case, 750 Motor Parkway Realty LLC (Parkway Realty)).
[35]*Id.* at *6.
[36]*Id.* at *7.

the PMPA.[37] Amphora then sought preliminary relief to prevent Cumberland from terminating the lease, and the court issued a temporary injunction effective until October 30, 2015.[38]

During the pendency of the motion, Amphora filed an amended complaint.[39] In the complaint, Amphora alleged that Parkway Realty should have given Cumberland Gulf notice and an opportunity to exercise a preferential right to the new lease, which Cumberland was then required to offer to Amphora.[40]

The PMPA authorizes franchisors to terminate a franchise relationship for "[t]he occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable . . . ."[41] According to 15 U.S.C. § 2804(c)(4), this event can include the expiration of the underlying lease, given certain conditions are met. Franchisees are entitled to seek expiration of the underlying lease against franchisors for failure to comply with the requirements of 15 U.S.C. § 2802.[42]

In analyzing the motion for preliminary injunction, the court first noted that Amphora's franchise was clearly terminated.[43] Next, the court addressed the merits of Amphora's claim that it had a right to assume any options that Cumberland Gulf held under the Master Lease, so that Parkway Realty's unwillingness to consent to the assignment was a violation of the PMPA.[44] According to the court, the PMPA only requires franchisors to offer to assign an option to its franchisees, which Cumberland Gulf clearly did in its December 2014 termination letter.[45] Further, 15 U.S.C. § 2802(c)(4) allowed Cumberland to condition an assignment on receiving an unconditional release of future liability.[46] The fact that the PMPA allows for an unconditional release implicitly contemplated that Parkway Realty could decline the release.[47] The court went on to note that plaintiff's "failure" to secure an unconditional release was not the type of statutory "failure" that prevents franchisors from terminating a franchise relationship.[48] Finally, the court rejected plaintiff's contention that Parkway Realty wrongfully entered into the Bolla Lease.[49] As a preliminary matter, any preferential right would belong only to Cumberland Gulf. Additionally, the PMPA only requires an option to extend the underlying lease or purchase the marketing premises; here, the Bolla Lease was neither of these.[50] In determining the neither party violated the PMPA, the court denied plaintiff's motion for preliminary injunction.[51]

In *Getty Properties Corp. v. ATKR, LLC*, the Supreme Court of Connecticut declined to address the defendant's PMPA claims, concluding that they were inadequately briefed.[52] Plaintiffs Getty Properties Corporation and NECG Holdings

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[37] *Amphora*, 2015 WL 6143730, at *7.
[38] *Id.*
[39] *Id.*
[40] *Id.* at *8.
[41] *Id.* at *9 (quoting 15 U.S.C. § 2802(b)(2)(C)).
[42] *Amphora*, 2015 WL 6143730, at **9-10 (citing 15 U.S.C. §§ 2804, 2804(c)).
[43] *Id.* at *11.
[44] *Id.*
[45] *Id.* at *12.
[46] *Id.* at *11.
[47] *Amphora*, 2015 WL 6143730, at *12.
[48] *Id.* at *13.
[49] *Id.* at *14.
[50] *Id.*
[51] *Id.* at *15.
[52] Getty Props. Corp. v. ATKR, LLC, 107 A.3d 387, 413 (Conn. 2015).

Corporations were the owners of property on which defendants operated retail gasoline service stations.[53] Getty Properties entered into a master lease with Getty Marketing, which subsequently entered into subleases with defendants.[54] The subleases were subject to the master lease and stated that they would automatically terminate upon the termination of the master lease.[55] Getty Marketing filed for bankruptcy, and the bankruptcy court ultimately deemed the master lease between Getty Marketing and Getty Properties terminated.[56] When defendants refused to vacate the premises, plaintiffs commenced summary process actions.[57]

After a bench trial which rendered judgment of immediate possession for plaintiffs, defendants appealed, claiming, among other things, that the court failed to dismiss the action as premature pursuant to the PMPA.[58] Specifically, defendants asserted that the action was "premature" because they had a right of first refusal and that 15 U.S.C. § 2806(a) preempted the summary process action.[59] Additionally, defendants invoked the "prior pending action" doctrine, referring to the action filed in the District Court of the District of Connecticut.[60] In affirming the judgment, the court refused to address the PMPA claims, holding that they were inadequately briefed.[61]

II. No Wrongful Termination When Franchisee Failed to Pay Rent and Failed to Operate Station

In *Hillmen, Inc. v. Lukoil N.A., LLC*, the U.S. District Court for the Eastern District of Pennsylvania held that a franchisee's claim for wrongful termination under the PMPA failed because the franchisor rightfully terminated the franchise agreement for failure to pay rent and for failure to operate for seven consecutive days.[62]

Pursuant to the franchise agreement, Defendant Lukoil (Lukoil) delivered motor fuel to Plaintiff Hillmen (Hillmen) on Tuesday, February 19, 2013, around 11:50 PM, and debited Hillmen's account three days after.[63] When Hillmen's check bounced, it claimed that payment was not due until Monday, February 25, 2013.[64] Subsequently, Hillmen failed to pay for the next delivery made on February 22.[65] As a result of Hillmen's nonpayment, Lukoil sent Hillmen a termination letter with notification that the franchise would be terminated effective April 9, 2013.[66] Hillmen then filed a complaint against Lukoil alleging wrongful termination under the PMPA and sought a preliminary injunction.[67] The court rejected Hillmen's motion, and Lukoil filed a motion for summary judgment.[68]

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[53] *Id.* at 390.
[54] *Id.* at 391-92.
[55] *Id.*
[56] *Id.* at 396.
[57] *Getty*, 107 A.3d at 397-98.
[58] *Id.* at 398-99.
[59] *Id.* at 413.
[60] *Id.* at 413, n.13.
[61] *Id.*
[62] Hillmen, Inc. v. Lukoil N.A., LLC, No. 13-4239, 2015 WL 3947960, at *7 (E.D. Pa. June 26, 2015).
[63] *Id.* at *2.
[64] *Id.* at *2-3.
[65] *Id.* at *4.
[66] *Id.* at *4-5.
[67] *Hillmen*, 2015 WL 3947960, at *1.
[68] *Id.*

Hillmen admitted that it did not purchase or sell gasoline for seven consecutive days and that this failure was a PMPA violation; however, Hillmen argued that its failure to pay for fuel and operate the premises was a result of Lukoil's wrongful conduct.[69] Specifically, Hillmen alleged that by increasing its rent, the cost of petroleum, and making improper debits, Lukoil caused Hillmen to violate the PMPA.[70] According to Hillmen, these "failures" excused its nonperformance.[71]

The court rejected Hillmen's arguments, reasoning that 15 U.S.C. § 2801(13), which has been considered as "'merely a legislated excuse for nonperformance,'" did not include a franchisee's lack of funds to pay invoices because this is not "beyond the franchisee's reasonable control."[72] Additionally, the court held that Lukoil's actions were within the scope of Lukoil's allowable business discretion and expressly agreed to by Hillmen.[73] Finally, the court determined Lukoil's debits were consistent with the terms of the credit policy and the parties' past practices.[74] Because Hillmen's "failures" were not attributable to "'a cause beyond the control of the franchisee,'" the court granted summary judgment for Lukoil on Hillmen's PMPA claims.[75]

Lukoil went on to argue that Hillmen's remaining state law claims for breach of contract, violation of the Uniform Commercial Code (UCC), and fraud were preempted by the PMPA.[76] In applying the "intimately intertwined" test from *Kehm Oil Co. v. Texaco, Inc.*, the court found that Hillmen's UCC claim was not preempted because it was premised upon Lukoil's improper setting of petroleum prices.[77] To the extent that other claims were not preempted, the court granted summary judgment in favor of Lukoil.[78]

Similarly, in *Wynn v. Lukoil N.A., LLC*, Plaintiff Darryl Wynn (Wynn), a gas station franchisee, sought a preliminary injunction enjoining Defendant Lukoil (Lukoil), franchisor, from terminating its franchise agreement in violation of the PMPA.[79] The U.S. District Court for the Eastern District of Pennsylvania denied Wynn's motion for preliminary injunction. Wynn operated a gas station franchise for Lukoil for more than eighteen years.[80] However, beginning in 2012, Wynn began missing regular payments.[81] In April 2013, Lukoil entered into its First Repayment Agreement with Wynn, which stated that Wynn would pay an initial $20,000 and then monthly installments of $5,000 until the $50,703.70 debt was paid in full.[82] Wynn's financial situation did not improve, and in August 2014, the parties entered into the Second Repayment Agreement in which Wynn released any and all claims against Lukoil.[83] After August 2014, Wynn failed to sell any gasoline or obtain fuel deliveries, and as a result, Lukoil sent Notice of

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[69] *Id.* at *8.
[70] *Id.*
[71] *Id.*
[72] *Hillmen*, 2015 WL 3947960, at *8 (internal citations omitted).
[73] *Id.* at *9.
[74] *Id.*
[75] *Id.*
[76] *Id.*; *see* 15 U.S.C. § 2806(a)(1).
[77] *Hillmen*, 2015 WL 3947960, at *10; Kehm Oil Co. v. Texaco, Inc., 537 F.3d 290 (3d Cir. 2008).
[78] *Hillmen*, 2015 WL 3947960, at *10.
[79] Wynn v. Lukoil N.A., LLC, No. 15-166, 2015 WL 1954275, at *1-2 (E.D. Pa. Apr. 29, 2015).
[80] *Id.* at *1.
[81] *Id.*
[82] *Id.*
[83] *Id.*

Termination on October 2, 2014, to be effective October 14, 2014.[84] Wynn did not contest the amount that he owed Lukoil, but instead argued that the manner in which Lukoil negotiated payments created an impossible financial situation.[85]

The PMPA, which sets a lower threshold than permitted by the Federal Rules of Civil Procedure, requires that a plaintiff seeking a preliminary injunction show: (1) the franchise agreement has been terminated or not renewed; (2) there are "'sufficiently serious questions going to the merits to make such questions a fair ground for litigation'"; and (3) if the injunction is denied, the hardships on plaintiff would exceed the hardships the franchisor would face if the injunction would be granted.[86] As to the second factor, the court noted that 15 U.S.C. § 2804(a) allows a franchisor to give less than ninety-days' notice before termination if it would otherwise "not be reasonable."[87] Here, Wynn went long periods of time not selling fuel, and despite this, Lukoil attempted to continue the franchise through two separate Repayment Agreements.[88] Similar to *Hillmen*, Wynn failed to show a "serious question[]" going to the merits of the case.[89]

In looking at the last factor, the court found that denial of the injunction would only continue the status quo, while also allowing Lukoil to proceed with eviction.[90] Furthermore, although Wynn suffered financial hardships, Lukoil continued to lose profits and rent with no assurance of payment. Therefore, Wynn failed to show he would suffer a greater hardship, and the court denied his motion for preliminary injunction.[91]

After denying Wynn's preliminary injunction, the court granted Lukoil's motion for summary judgment and dismissed the complaint.[92] In readdressing the facts, the court found that Lukoil properly and appropriately terminated the franchise agreement according to the PMPA.[93] Specifically, Lukoil terminated the agreement for proper grounds—Wynn admittedly failed to sell fuel for seven consecutive days.[94] In citing its decision in *Hillmen,* the court reiterated that 15 U.S.C. § 2802(c)(9)(A) included this as an "event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise is reasonable."[95] Further, Wynn failed to offer any evidence showing that Lukoil caused him to violate the agreement.[96] Any underlying reasons for Wynn's debt were immaterial to excuse him from violating the franchise agreement.[97]

Next, the court held that while the PMPA usually requires a franchisor provide ninety days' notice to terminate the relationship, Lukoil's notice was reasonable under

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[84]*Wynn*, 2015 WL 1954275, at *1.
[85]*Id.* at *2.
[86]*Id.*; 15 U.S.C. § 2805(b)(2) (2015).
[87]*Wynn*, 2015 WL 1954275, at *3; 15 U.S.C. § 2804(b)(1).
[88]*Wynn*, 2015 WL 1954275, at *3.
[89]*Id*; 15 U.S.C. § 2805(b)(2)(A)(ii).
[90]*Wynn*, 2015 WL 1954275, at *3.
[91]*Id.* at *4. Although it ultimately decided the issue, the court noted that the plaintiff's motion was untimely because it was filed more than thirty days after the termination took effect, as required by 15 U.S.C. § 2805(b)(1). *Id.* at *2.
[92]Wynn v. Lukoil N.A., LLC, No.15-166, 2015 WL 5093051, at *8 (E.D. Pa. Aug. 28, 2015).
[93]*Id.* at *3, *8.
[94]*Id.* at *4.
[95]*Id.* (citing Hillmen v. Lukoil N.A., LLC, No. 13-4239, 2015 WL 3947960, at *7 (E.D. Pa. 2015)).
[96]*Id.*
[97]*Wynn*, 2015 WL 5093051, at *4.

the circumstances.[98] According to 15 U.S.C. §§ 2804(a) and (b)(1)(A), a franchisor can give less notice if providing ninety days would be "unreasonable." In recognizing past case law, the court held that monetary default which causes a franchisee to stop operations for seven consecutive days is considered "reasonable."[99] Additionally, the court noted that Wynn's failure to pay his deliveries on time as well as failure to keep and sell adequate fuel reserves provided Lukoil even more leeway to provide shorter notice.[100] Given Wynn's experience as a businessman, along with Lukoil's notifications, Wynn could not credibly claim that he was surprised by the termination.[101]

In addition to finding proper termination of the franchise agreement, the court dismissed Wynn's related state law claims. First, the court declined to exercise supplemental jurisdiction over a tortious interference claim because Wynn sued under the PMPA, invoking federal jurisdiction.[102] Second, the court denied Wynn's duress excuse because Lukoil could have terminated the agreement earlier, but instead chose to give Wynn an opportunity to salvage the relationship.[103] Thus, the Repayment Agreements were not "wrongful threats."[104] Further, the Repayment Agreements were valid because they did not renew the relationship, and Wynn was rightfully compensated.[105]

III. NO WRONGFUL TERMINATION WHEN FRANCHISEE FAILED TO TIMELY PAY FOR FUEL DELIVERIES

In *MS & BP, LLC v. Big Apple Petroleum, LLC*, the U.S. District Court for the Eastern District of New York denied the plaintiff's motion for preliminary injunction where plaintiff clearly failed to pay for its fuel deliveries in violation of the franchise agreement.[106] Plaintiff, MS & BP, LLC (MS & BP), a gas station operator, entered into both a supply and lease agreement with Big Apple Petroleum, LLC (Big Apple), an Exxon/Mobil fuel distributor.[107] Big Apple's affiliated company and wholesaler, Capitol Petroleum Group (CPG), delivered the fuel and billed MS & BP on behalf of Big Apple.[108] According to the terms of the agreements, MS & BP was required to maintain sufficient funds to make payments via Electronic Funds Transfer (EFT).[109]

Beginning around September 2013, MS & BP's EFT payments repeatedly bounced, and on January 22, 2014, Big Apple sent MS & BP a letter demanding $30,000 security deposit for its failure to maintain adequate funds.[110] MS & BP paid the amount, but payments continued to bounce, and on June 17, 2014, Big Apple issued and served a Notice of Termination effective September 15, 2014.[111] According to Big Apple's notice, it was terminating for failure to timely and repeatedly pay.[112] MS & BP then sought a

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[98] *Id.* at *4-5.
[99] *Id.* at *5.
[100] *Id.*
[101] *Id.*
[102] *Wynn*, 2015 WL 5093051, at *6.
[103] *Id.* at *7.
[104] *Id.*
[105] *Id.*
[106] MS & BP, LLC v. Big Apple Petroleum, LLC, No. 14-CV-5675 (RRM)(RER), 2015 WL 2185038, at *12 (E.D.N.Y. May 8, 2015).
[107] *Id.* at *1.
[108] *Id.*
[109] *Id.* at *2.
[110] *Id.* at *3.
[111] *MS & BP, LLC*, 2015 WL 2185038, at *3-4.
[112] *Id.* at *4.

preliminary injunction enjoining Big Apple from terminating the agreements and ordering it to engage in good faith negotiations and renew the agreements.[113] Specifically, MS & BP argued: (1) Big Apple never clarified what constituted "late payment;" (2) there could be no late payments after the security deposit because the purpose was to offset any bounced payments; (3) Big Apple's acceptance of untimely payments constituted a waiver; (4) there were inconsistencies in the times of payment; and (5) Big Apple acted in bad faith, providing MS & BP opportunity to cancel under 15 U.S.C. § 2802(c)(9).[114] As an initial matter, the court noted that Big Apple's notice was timely because it gave notice ninety days before the effective termination and had actual or constructive notice of the events giving rise to the termination within 120 days prior.[115] In following the Second Circuit's "continuing violation theory," the court held it irrelevant whether or not defendant had knowledge of an ongoing violation before the period began.[116]

Rejecting plaintiff's first argument, the court held that the terms of the agreements clearly stated payment was due at the time of delivery and rent was due on the fifteenth.[117] Further, the trade practices between the parties revealed CPG typically initiated payment on the third business day.[118] Thus, payment obligations were clear.[119] Second, looking at the terms of the agreement, defendant was able to obtain a security deposit as a remedy for plaintiff's indebtedness, and there was nothing requiring defendant to use the payment to offset future untimely payments.[120]

Third, in looking at the express terms of the agreement, continuing to accept late payments did not operate to waive defendant's rights to terminate.[121] Fourth, the court noted that neither CPG nor any of its affiliates exercised control over the processing of cash-less payment receipts that were credited to plaintiff's account, and therefore defendant did not create the conditions that led to the alleged breach.[122] Finally, the court rejected the plaintiff's collusion argument because defendant did not seek to terminate the franchise based on failure to order fuel for seven days, but instead for failure to timely pay for fuel deliveries.[123] Plaintiff failed to demonstrate serious questions going to the merits as required by 15 U.S.C. § 2805(b).[124]

IV. BONA FIDE OFFER TO SELL

In *Transbay Auto Service, Inc. v. Chevron USA Inc.*, the Ninth Circuit vacated the trial court's decision which held that defendant did not make a bona fide offer to sell as required by the PMPA.[125] In this case, Chevron and Transbay entered into a service station franchise relationship in 2001, and in 2008, Chevron informed Transbay of its

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[113] *Id.* at *7.
[114] *Id.* at *8.
[115] *Id.*; 15 U.S.C. §§ 2805(a), 2802(b)(2)(A)(i), (C)(i).
[116] *MS & BP, LLC*, 2015 WL 2185038, at *6.
[117] *Id.* at *9.
[118] *Id.*
[119] *Id.*
[120] *Id.* at *10.
[121] *MS & BP, LLC*, 2015 WL 2185038, at *10.
[122] *Id.* at *11.
[123] *Id.* at *12.
[124] *Id.*
[125] Transbay Auto Serv., Inc. v. Chevron USA Inc., 807 F.3d 1113, 1118, 1121-22 (9th Cir. 2015).

intent to sell the property.[126] Transbay accepted Chevron's offer to buy the unbranded station for $2.375 million, but in 2009, it filed suit, alleging that Chevron's failure to make a bona fide offer to sell the property violated the PMPA.[127] The district court denied Chevron's motion for summary judgment, and the trial court returned a verdict in favor of Transbay.[128] Subsequently, Chevron filed a motion for a new trial based on the district court's exclusion of an appraisal of the premises.[129] The appeals court ultimately remanded the case for a new trial, holding that the appraisal should have been admitted into evidence.[130]

V. Reliance on PMPA for Interpretation of State Franchise Law

In *Fabbro v. DRX Urgent Care, LLC*, the Court of Appeals for the Third Circuit referenced the PMPA analysis from *Mac's Shell Service* to New Jersey's franchise statute and affirmed the district court's dismissal of the franchisees' claims.[131] Here, two franchisees operating "Doctors Express" medical facilities brought claims alleging "constructive termination" of the franchises.[132]

The court discussed *Mac's Shell Service, Inc. v. Shell Oil Products*, where the U.S. Supreme Court held that there can be no claim for constructive termination under the Petroleum Marketing Practices Act when the franchise continued to operate. [133] Although the court determined *Mac's Shell* was not controlling, it noted the distinction "is without a difference." The court found that even to the extent the New Jersey Supreme Court would follow *Maintainco, Inc. v. Mitsubishi Caterpillar Forklift America, Inc.*, which contained a more expansive interpretation of constructive termination under the New Jersey Franchise Practices Act (NJFPA), plaintiffs still did not state a valid claim.[134] Specifically, the court found no breach of contract or implied covenant, and it was not defendant's intent to cease doing business with plaintiffs to the benefit of another dealer.[135] Thus, the court determined the decision to terminate was made in good faith and in the normal course of business.[136]

VI. PMPA Preemption

In *Lukoil N.A. LLC v. Turnersville Petroleum Inc.*, the U.S. District Court for the District of New Jersey held that defendant's counterclaims were not preempted by the PMPA.[137] Plaintiff Lukoil North America LLC (LNA) terminated its franchise agreement with Defendant Turnersville Petroleum Inc. for defendant's default and brought suit against defendant for continuing to sell its oil and gas.[138] In answering plaintiff's

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[126] *Id.* at 1116.
[127] *Id.* at 1116-17.
[128] *Id.* at 1117-18.
[129] *Id.* at 1118.
[130] *Transbay Auto Serv., Inc.*, 807 F.3d at 1122.
[131] Fabbro v. DRX Urgent Care, LLC, 616 F. App'x 485, 490 (3d Cir. 2015).
[132] *Id.* at 487, 489.
[133] *Id.* at 489 (citing Mac's Shell Serv., Inc. v. Shell Oil Prods., 559 U.S. 175 (2010)).
[134] *Id.* at 489-90 (citing Maintainco, Inc., v. Mitsubishi Caterpillar Forklift Am., Inc., 975 A.2d 510 (N.J. Super. Ct. App. Div. 2009)).
[135] *Id.* at 490.
[136] *Fabbro*, 616 F. App'x at 490.
[137] Lukoil N.A. LLC v. Turnersville Petroleum Inc., No. 14-3810 (RMB/AMD), 2015 WL 1735369, at *1 (D.N.J. Apr. 16, 2015).
[138] *Id.*

complaint, defendant counterclaimed, asserting breach of contract, violation of the UCC, breach of duty of good faith and fair dealing, and violations of the NJFPA.[139] Plaintiff moved to dismiss defendant's counterclaims on the theory that they were preempted by the PMPA.[140]

In following the Third Circuit, the court emphasized that the PMPA only preempts state laws that "limit the permissible substantive reasons that a petroleum franchisor can terminate a franchisee."[141] According to plaintiff, defendants claims were "intimately intertwined" with plaintiff's termination because the "very genesis of Turnersville's counterclaims is that LNA allegedly set prices unreasonably, such that Turnersville was unable to perform under the Franchise Agreement[.]"[142] In rejecting this argument, the court found that defendant sought independent damages from events that happened prior to the termination of the franchise relationship.[143] As stated in *O'Shea v. Amoco Oil Co.*, the PMPA does not reference "any legislative intent to preempt the general common law of contract, even to the extent that it may become involved in a PMPA action."[144] Therefore, just because the franchise agreement was terminated did not mean all counterclaims were automatically preempted by the PMPA.[145]

[139] *Id.* at *1-2.
[140] *Id.* at *2.
[141] *Id.* at *3 (citing Kehm Oil Co. v. Texaco, Inc., 537 F.3d 290, 298 (3d Cir. 2008)).
[142] *Lukoil*, 2015 WL 1735369, at *4.
[143] *Id.* at *5.
[144] *Id.* (citing O'Shea v. Amoco Oil Co., 886 F.2d 584, 593 (3d Cir. 1989).
[145] *Id.*

Chapter 21 • PUBLIC LAND AND RESOURCES
2015 Annual Report[1]

The year 2015 saw the issuance of numerous judicial opinions that considered federal statutes affecting federal public lands not otherwise covered by specific chapters in this YIR issue, including: agency decision making under the Federal Land Policy Management Act; the standing required to bring lawsuits related to public lands; rights-of-way across federal lands under Revised Statute R.S. 2477; Bureau of Land Management leases of public lands under the Geothermal Steam Act; and criminal sentencing for arson on federal public lands.

I. AGENCY DECISIONMAKING UNDER FLPMA

In *Rags Over the Arkansas River, Inc. v. Bureau of Land Management*,[2] a federal court considered the validity of agency decision making under the Federal Land Policy Management Act of 1976 (FLPMA).[3] Under FLPMA, the Bureau of Land Management (BLM) is required to manage federal public lands under principles of multiple use and sustained yield.[4] "Multiple use requires balancing the competing uses of land," while sustained use requires BLM to control competing uses over time.[5] BLM does this through a "'multi-step planning and decisionmaking process' that begins with the formation of a land use plan for a geographic region called a resource management plant ("RMP")[;]" specific projects are reviewed individually, but they must conform to the relevant RMP.[6]

In 1996, installation artists Christo and Jean-Claude proposed construction of a temporary art project in which several miles of steel cables would be anchored on the riverbanks of the Arkansas River, with fabric panels suspended over them.[7] "As 160 acres of the project [were] planned to be located on federal land" within the Royal Gorge RMP in Colorado, BLM approval was required.[8] After several years of input from the public and state and federal agencies, the BLM found that the project, which was conditioned on a variety of mitigation and avoidance measures, conformed to the Royal Gorge RMP.[9] A group opposed to the project appealed the decision to the Interior Board of Land Appeals, which upheld the BLM's decision.[10] The group then appealed the decision to federal district court, claiming that BLM violated the Administrative Procedures Act by, inter alia, failing to comply with FLPMA.[11]

The *Rags* plaintiff argued that while BLM found the project "broadly consistent" with the Royal Gorge RMP, BLM was instead required to consider the specific terms of

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[1]This report was prepared by Stan N. Harris, Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, New Mexico, sharris@modrall.com. The report attempts to cover significant developments in federal agency action and published judicial decisions. State legislation, agency action, and judicial developments are beyond the scope of this report. The statements made herein represent solely the view of the author.

[2]77 F. Supp. 3d 1038 (D. Colo. 2015).

[3]43 U.S.C. §§ 1701-1787 (2012).

[4]*Rags*, 77 F. Supp. 3d at 1053; *see also* 43 U.S.C. § 1732(a).

[5]*Rags*, 77 F. Supp. 3d at 1053 (quoting 43 U.S.C. § 1702(c), (h)).

[6]*Id.* (quoting Theodore Roosevelt Conservation P'ship v. Salazar, 616 F.3d 497, 504 (D.C. Cir. 2010)).

[7]*Id.* at 1046.

[8]*Id.*

[9]*Id.*

[10]*Rags*, 77 F. Supp. 3d at 1046-47.

[11]*Id.* at 1047.

the RMP rather than looking only at its broad goals.[12] The district court rejected this argument, reasoning that because the project was so unique, it was unsurprising that the specific terms of the RMP would not provide much guidance; thus BLM was justified in looking at the broad goals of the RMP.[13] BLM's approval was appropriately based on its findings that "the project would create an added recreation attraction that would draw additional visitors," and that this result conformed with the RMP's "overall goal of using the natural resources in a manner that supports local and regional economies, while protecting the resources from irreparable damage."[14]

The *Rags* court also rejected arguments suggesting that the BLM "must favor preservation of natural resources and wildlife above all other relevant considerations," holding instead that, while the court may wish that were the case under the statute, "FLPMA requires that BLM manage the federal lands under its control for multiple uses, and this includes approving projects that could deplete resources."[15]

Finally, the *Rags* plaintiff argued that BLM violated FLPMA by failing to prioritize the areas of critical environmental concern (ACECs) within the Royal Gorge RMP.[16] When developing RMPs, "FLPMA requires BLM to 'give priority to the designation of areas of critical environmental concern,'" which the statute defines as areas where special management attention is required to protect and prevent irreparable damage to important resources.[17] Plaintiff noted, for example, that BLM found that bighorn sheep and raptors may be moderately affected by the project.[18] The *Rags* court rejected this argument as well, noting that it suggested that BLM should not be permitted to take any action that could potentially have an impact on a special management concern within an ACEC.[19] In contrast, "FLPMA states that designation of an area as an ACEC 'shall not, of itself, change or prevent the management or use of public lands[,]'" and BLM found that the conditions it imposed ensured that the project would not result in any irreparable damage to ACECs with the RMP.[20] The district court therefore affirmed BLM's approval of the project.[21]

II. STANDING TO BRING LAWSUITS RELATED TO PUBLIC LANDS

In *Swanson Group Mfg. LLC v. Jewell*,[22] the D.C. Circuit Court of Appeals considered the standing required to bring lawsuits related to public lands. In *Swanson*, a district court issued a permanent injunction ordering BLM to sell a certain amount of timber pursuant to the Oregon and California Lands Act of 1937 (O&C Act).[23] The district court held that the O&C Act regulates timber production on federal lands in western Oregon and mandates that the federal government shall sell not less than the annual sustained yield capacity (ASYC) of the timber on such lands.[24] For several years BLM failed to offer for sale the ASYC of timber in two districts managed by the BLM

[12] *Id.* at 1054.
[13] *Id.*
[14] *Id.* (internal quotations omitted).
[15] *Rags*, 77 F. Supp. 3d at 1055.
[16] *Id.*
[17] *Id.* at 1055-56 (quoting 43 U.S.C. § 1712(c)(3)).
[18] *Id.* at 1056-57.
[19] *Id.* at 1058.
[20] *Rags*, 77 F. Supp. 3d at 1058.
[21] *Id.*
[22] 790 F.3d 235 (D.C. Cir. 2015).
[23] 43 U.S.C. § 1181a (2012).
[24] Swanson Grp. Mfg. LLC v. Salazar, 951 F. Supp. 2d 75 (D.D.C. 2013).

and covered by the O&C Act.[25] Several timber manufacturing companies and trade associations based in the Pacific Northwest filed suit against the BLM, and the district court granted plaintiffs' summary judgment enjoining the BLM to sell or offer for sale the ASYC for the lands at issue for each future year, in accordance with the mandatory requirements of the O&C Act.[26]

On appeal, the D.C. Circuit did not reach the merits of the application of the O&C Act. Instead, the court began and ended its consideration of the case on the issue of standing, noting first that the U.S. Constitution confines jurisdiction of the federal courts to actual cases and controversies; that plaintiffs bear the burden of demonstrating standing; and that because plaintiffs sought injunctive relief, they must show an imminent future injury.[27] The court then rejected each of plaintiffs' claims of injury resulting from the BLM's failure to sell the ASYC. For example, the appeals court found that one plaintiff's claims of past suffering of economic loss as a result of the sharp decrease in BLM timber sales and averments that such loss may occur in the future were conclusory allegations inadequate to demonstrate standing.[28] The court separately noted that another plaintiff's declaration did not aver whether he was dependent on the timber from the districts at issue, or whether other identified sources of timber supply will or will not meet the company's needs.[29] The court also rejected consideration of declarations offered by plaintiffs after the grant of summary judgment.[30] The D.C. Circuit therefore vacated the summary judgment and instructed the district court to dismiss the complaint.[31]

III. REVISED STATUTE 2477

Federal Revised Statute 2477, commonly referred to as "R.S. 2477," was passed in 1866 and provided for public access across unreserved public domain by granting rights-of-way for the construction of highways.[32] R.S. 2477 presented "a free right-of-way 'which takes effect as soon as it is accepted by the State.'"[33] Although repealed in 1976 by the passage of FLPMA, any valid, existing R.S. 2477 rights-of-way were preserved.[34] Actions to establish R.S. 2477 claims are brought pursuant to the federal Quiet Title Act (QTA), which allows a plaintiff to name the United States as a defendant in a civil action to "adjudicate a disputed title to real property in which the United States claims an interest[.]"[35]

In 2015, the U.S. Supreme Court denied certiorari to a Tenth Circuit Court of Appeals opinion that considered the "disputed title" requirement of the QTA as applied to R.S. 2477 in *Kane County Utah v. United States*.[36] In *Kane County*, the Tenth Circuit held that "to satisfy the 'disputed title' element of the QTA, a plaintiff must show that the

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[25]*Id.* at 82-83.
[26]*Id.* at 83-84.
[27]*Swanson Grp. Mfg.*, 790 F.3d at 239-40.
[28]*Id.* at 242-43.
[29]*Id.* at 244.
[30]*Id.* at 241.
[31]*Id.* at 246.
[32]43 U.S.C. § 932 (repealed 1976).
[33]Mills v. United States, 742 F.3d 400, 402 (9th Cir. 2014) (quoting Lyon v. Gila River Indian Cmty., 626 F.3d 1059, 1077 (9th Cir. 2010)).
[34]*Id.* at 403 n.1.
[35]28 U.S.C. § 2409a(a) (2012).
[36]772 F.3d 1205 (10th Cir. 2014). The Kane County R.S. 2477 litigation has been the subject of numerous previous opinions. *See, e.g.*, *Public Land and Resources*, ABA ENV'T, ENERGY, AND RES. L. THE YEAR IN REVIEW 2009, 2010, 2011, 2013, and 2014.

United States has either expressly disputed title or taken action that implicitly disputes it."[37] "Under this standard, a plaintiff need not show the [government] took direct action to close or deny access to a road—indirect action or assertions that conflict with a plaintiff's title will suffice."[38] Moreover, the United States does not have sovereign immunity when it is not currently disputing a plaintiff's title that it disputed in the past.[39] However, actions that "merely produce some ambiguity regarding a plaintiff's title are insufficient to constitute 'disputed title.'"[40] The appeals court then analyzed several specific roads at issue, ruling that no disputed title had been shown, and that there was thus no jurisdiction over the QTA claims to those roads.[41] On October 31, 2015, the United States Supreme Court denied certiorari in *Kane County*.[42]

The QTA's relationship to R.S. 2477 claims was at issue in another Utah case, *United States v. Lyman*.[43] In *Lyman*, two criminal defendants were convicted of violating federal law by operating vehicles on BLM lands that it had closed to motorized use.[44] Defendants sought a new trial based in part on the post-trial discovery of a map in BLM's files that defendants argued showed the road at issue to be an R.S. 2477 public right-of-way.[45] However, there had not yet been any adjudication of whether the road was in fact an R.S. 2477 right-of-way.[46] The court held that a claimed R.S. 2477 right-of-way may only be adjudicated with a QTA lawsuit.[47] The court further held that the limited waiver of sovereign immunity found in the QTA only extends to governmental entities, not private parties.[48] The court therefore held that defendants had no standing to challenge the legality of the BLM's closure of the trails at issue by asserting an unadjudicated R.S. 2477 defense.[49]

Calculation of the limitations period to bring an R.S. 2477-related QTA claim was at issue in a case decided by a district court in late 2014 and on appeal in 2015, *North Dakota v. United States*.[50] In *North Dakota*, several counties and the State of North Dakota brought a QTA action against the federal government to establish R.S. 2477 rights-of-way through federal grasslands administered by the Forest Service.[51] The United States filed a motion to dismiss, asserting that plaintiffs' claims were barred by

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[37] *Id.* at 1212.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Kane*, 772 F.3d at 1212-15.
[42] No. 14-1497, 2015 U.S. LEXIS 6453 (U.S. Oct. 13, 2015).
[43] No. 2:14-cr-00470-DN, 2015 U.S. Dist. LEXIS 144391 (D. Utah Oct. 22, 2015).
[44] *Id.* at *1-2.
[45] *Id.* at *2.
[46] *Id.* at *10.
[47] *Id.* at *11. But note *Mills*, 742 F.3d at 405 n.6 (noting that although claims for rights of access to federal lands must proceed under the QTA, the QTA is not the exclusive remedy for claims that are founded on administrative wrongdoing, which might be brought under the Administrative Procedures Act).
[48] *Lyman*, 2015 U.S. Dist. LEXIS 144391, at *13; *see also*, Cnty. of Shoshone v. United States, 912 F. Supp. 2d 912, 922-23 (D. Idaho 2012) (member of the public's right to use a road established pursuant to R.S. 2477 is not a sufficient interest to establish standing under QTA; rather, interest must be an interest in the title to the property).
[49] *Lyman*, 2015 U.S. Dist. LEXIS 14391, at *7, *14 n.45.
[50] North Dakota v. United States, 64 F. Supp. 3d 1314 (D.N.D. 2014); North Dakota v. United States, 787 F.3d 918 (8th Cir. 2015).
[51] *North Dakota*, 64 F. Supp. 3d at 1319-20.

the twelve-year limitation period for commencing an action under the QTA.[52] The parties agreed to conduct additional discovery on this issue, and plaintiff subsequently filed a motion to compel production of documents that the United States claimed were attorney-client privileged.[53]

In considering the motion, the *North Dakota* court discussed when a QTA claim accrues. The court noted that the QTA provides that notice for the purposes of accrual of an action brought by a state shall be by public communications which are reasonably specific to put the claimant on notice of the federal claim to the lands, or by the use of the claimed lands which is open and notorious under the circumstances.[54] The court then noted the rule that

> [I]f the United States at any point "clearly and unequivocally abandons" a property interest which is purportedly in conflict with that claimed by a plaintiff, "the government's outright abandonment effectively removes the cloud on a plaintiff's title and extinguishes his obligation to file a quiet title action within 12 years[.]"[55]

Then, if the government later reasserts the claim, it is "properly regarded as a new claim and a new twelve-year period begins in which a plaintiff may file [its] QTA action against the government."[56] The *North Dakota* plaintiffs argued that they believed a U.S. Forest Service attorney issued opinions in the 1980s to the effect that the road at issue was a valid R.S. 2477 road, which in turn would establish an abandonment of the United States' interest in the road and toll the twelve-year limitations period.[57] The court considered the withheld documents in camera and noted that it appeared the documents were not followed by the U.S. Forest Service to any significant degree, and it was soon decided to rely upon older opinions from higher-ranking government counsel in Washington instead.[58] The court held in part that the documents would not support a clear and unequivocal abandonment by the United States to its claim of unfettered title.[59]

On appeal of the *North Dakota* district court's denial of a request by several conservation groups to intervene in the case,[60] the Eighth Circuit Court of Appeals concluded that the interest of the United States in maintaining title to the lands at issue "subsumes the interest of the Groups in preserving federal protection of those lands, thus precluding intervention as of right."[61] The court of appeals also found that the district court did not abuse its discretion in rejecting the group's permissive intervention request in light of "the Groups' lack of Article III standing, their lack of a legally-protected interest in the litigation, and the potential for delay caused by the introduction of ancillary issues."[62]

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[52]*Id.* at 1322.
[53]*Id.*
[54]*Id.* at 1324.
[55]*Id.* at 1325 (quoting Spirit Lake Tribe v. North Dakota, 262 F.3d 732, 739 (8th Cir. 2001)).
[56]*North Dakota*, 64 F. Supp. 3d at 1325.
[57]*Id.*
[58]*Id.* at 1326.
[59]*Id.*
[60]*North Dakota*, 787 F.3d 918.
[61]*Id.* at 922.
[62]*Id.* at 922-23.

A different type of limitations period potentially applicable to an R.S. 2477 action was at issue in *Abdo v. Reyes*.[63] In *Reyes*, a federal district court had jurisdiction over a pending case in which the State of Utah and one of its counties (collectively "the State") sought to establish an R.S. 2477 right-of-way pursuant to the QTA.[64] An individual and an environmental group (plaintiffs) filed a lawsuit in state court seeking a declaration that the State's lawsuit was in violation of a state statute of limitations, and to enjoin the State from using any funds on the lawsuit.[65] The intended effect of the plaintiffs' case was to bar not only the pending R.S. 2477 action, but also the numerous other R.S. 2477 cases filed by the State and separately pending before the court. The State removed the state action to federal court, and the plaintiffs moved to remand.[66]

The state statute of limitations at issue precluded the state from bringing any action based on the State's right or title to real property unless the right or title accrued within seven years prior to the action.[67] In considering and rejecting the State's argument that the QTA completely preempted the state action, the *Abdo* court held that the twelve-year statute of limitations was the outer limit by which a county may bring an R.S. 2477 action, but that nothing in the QTA precluded a county from imposing a shorter limitations period.[68] The court also considered an argument that removal is proper when a state claim requires application of federal law, but rejected it because that argument requires the state-law claim be actually disputed.[69] The court reasoned that because all R.S. 2477 cases necessarily arose before FLPMA's repeal of R.S. 2477 in 1976, "there [could] be no actual dispute that more than seven years had passed since the State Defendants may have acquired title" in the instant case.[70] The court therefore granted plaintiffs' motion to remand.[71]

However, because the *Abdo* court had jurisdiction over the R.S. 2477 cases currently pending before the court, and because plaintiffs' "state court proceeding, if successful, would effectively divest [the] court of control over the *res*," which it had already acquired, the court considered, sua sponte, whether an exception to the Anti-Injunction Act applied to bar plaintiffs' actions.[72] The Anti-Injunction Act provides that a federal court may not grant an injunction to stay proceedings in a state court except, inter alia, "where necessary in aid of the federal court's jurisdiction."[73] Applying Supreme Court precedent, the *Abdo* court held that were the parties to the state court proceeding not enjoined, the intended effect of the action would be to defeat the jurisdiction of the federal court, and, accordingly, the court believed that the "necessary in aid of its jurisdiction" exception to the Anti-Injunction Act applied.[74] Because this ruling had been issued sua sponte and from the bench, however, the court directed the parties to submit briefs as to whether a writ should be issued to enjoin plaintiffs from proceeding with its state court action.[75]

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[63] 91 F. Supp. 3d 1225 (D. Utah 2015).
[64] *Id.* at 1227.
[65] *Id.*
[66] *Id.* at 1229.
[67] *Id.* at 1228 (citing UTAH CODE § 78B-2-201 (2014)).
[68] *Abdo*, 91 F. Supp. 3d at 1230-31.
[69] *Id.* at 1231 (citing Devon Energy Prod. Co. v. Mosaic Potash Carlsbad, Inc., 693 F.3d 1195, 1208 (10th Cir. 2012)).
[70] *Id.* at 1232.
[71] *Id.* at 1234.
[72] *Id.* at 1232.
[73] 28 U.S.C. § 2283 (2012).
[74] *Abdo*, 91 F. Supp. 3d at 1233 (citing Kline v. Burke Constr. Co. 260 U.S. 226 (1922)).
[75] *Id.* at 1234.

IV. BLM LEASES UNDER THE GEOTHERMAL STEAM ACT

In *Pit River Tribe v. Bureau of Land Management*[76] the Ninth Circuit Court of Appeals considered standing and procedural issues involved in the leasing by BLM of federal land under the Geothermal Steam Act (GSA).[77]

Congress enacted the GSA in 1970 to promote the development of geothermal leases on federal lands.[78] The GSA authorizes the Secretary of the Interior to issue leases for geothermal steam development on federal land and in national forests.[79] Under section 1005(a) of the GSA, "[g]eothermal leases on federal land have a primary term of ten years. At the end of that term, the Secretary must grant a continuation of the lease for a term up to forty additional years if 'geothermal steam is produced or utilized in commercial quantities.'"[80] Under former section 1005(g) of the GSA, when "geothermal steam has not been produced or utilized in commercial quantities by the end of the initial, ten-year lease term, the Secretary may extend the lease for successive five-year terms if certain conditions are met."[81] Under former section 1005(g), the "BLM must conduct a review pursuant to [the National Environmental Policy Act (NEPA)] and [the National Historic Preservation Act (NHPA)] considering the cultural, historical, and environmental effects of its leasing decision before making its lease-extension determination."[82]

Between 1982 and 1988, BLM granted the leases at issue in *Pit River*.[83] Subsequently, the lessee requested, and was granted, five-year extensions for the leases.[84] Subsequent to this, the lessee requested that BLM rescind its lease extensions and retroactively grant forty-year continuations of the leases, which BLM also granted.[85] The Pit River Tribe and several environmental groups (plaintiffs) filed suit challenging the BLM's decision to vacate its earlier-granted extensions of the leases and to grant lease continuations instead, alleging BLM's decision to vacate the leases violated the GSA, NEPA, and the NHPA.[86] The district court ruled: (1) that plaintiffs lacked prudential standing to bring their claim because they did not fall within the "zone of interests"[87] of the GSA's lease-continuation provision, former section 1005(g); and (2) dismissed plaintiffs' NEPA and NHPA claims on the basis that BLM lacked discretion to consider

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[76]793 F.3d 1147 (9th Cir. 2015).
[77]30 U.S.C. §§ 1001-1028 (1998)
[78]*Pit River Tribe*, 793 F.3d at 1149.
[79]*Id.* at 1149-50 (citing 30 U.S.C. § 1002).
[80]*Id.* at 1150 (quoting 30 U.S.C. § 1005(g)).
[81]*Id.* (citing 30 U.S.C. § 1005(g)).
[82]*Id.*
[83]*Pit River Tribe*, 793 F.3d at 1151.
[84]*Id.*
[85]*Id.* at 1152.
[86]*Id.* at 1153-54.
[87]Plaintiffs brought their action pursuant to the Administrative Procedures Act, which, in addition to Article III standing (injury-in-fact that is fairly traceable to defendant's conduct that would likely be redressed by a favorable decision), requires that the interests a plaintiff asserts must be arguably within the zone of interests to be protected by the statute under which suit is brought. *Id.* at 1155.

environmental and cultural factors in considering whether to grant lease-continuations under section 1005(a).[88]

On appeal, the Ninth Circuit reversed the district court. In so doing, the court held that plaintiffs' claims fell within (former) section 1005(g)'s zone of interests because their complaint did not expressly limit their claims to any particular provision of the GSA, and plaintiffs' claims included an operative section 1005(g) challenge.[89] The *Pit River* court then also reversed the district's court's decision that BLM had no discretion to apply NEPA and the NHPA under section 1005(a) because plaintiffs' claim also included the operative challenge under former section 1005(g), which did require compliance with NEPA and the NHPA.[90]

In all of this, however, the *Pit River* court noted that the 2005 amendments to the GSA "eliminated BLM's discretion to consider environmental and cultural factors in making lease-extension decisions under [section] 1005(g)" and that the future extension of the leases at issue may not be subject to NEPA or NHPA review.[91]

V. SENTENCING FOR ARSON ON FEDERAL LANDS

In 2015, the United States Supreme Court denied certiorari in a case involving mandatory minimum sentencing resulting from the convictions of two defendants found guilty of intentionally setting fires on federal lands. In *United States v. Hammond*,[92] the Ninth Circuit Court of Appeals considered the criminal sentencing of two defendants in Eastern Oregon. The defendants were long-time ranchers who leased public land for grazing but were not permitted to burn those lands without prior authorization from the BLM.[93] The defendants had set multiple fires on the leased lands over several years, including a fire that they claimed was designed to burn off invasive species on their property, but for which they did not obtain prior permission.[94] The government ultimately prosecuted the defendants, and a jury returned a verdict of maliciously damaging real property of the United States by fire, in violation of 18 U.S.C. § 844(f)(1).[95] Convictions under section 844(f)(1) carry a minimum term of five years of imprisonment;[96] however, the district court concluded that the Eighth Amendment prohibiting cruel and unusual punishment required deviation from the statutory minimum sentence, and therefore it gave the defendants lesser sentences.[97] The district court reasoned that Congress had not intended for the sentence to cover fires in the wilderness and that the five-year sentences would be grossly disproportionate to the severity of the offenses.[98]

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[88] *Pit River Tribe*, 793 F.3d at 1154-55.
[89] *Id.* at 1158.
[90] *Id.* at 1159.
[91] *Id.* at 1158 n.14.
[92] 742 F.3d 880 (9th Cir. 2014).
[93] *Id.* at 881.
[94] *Id.*
[95] *Id.* at 882.
[96] *See* 18 U.S.C. § 844(f)(1) (2012) ("Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other personal or real property in whole or in part owned or possessed by, or leased to, the United States . . . shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both.")
[97] *Hammond*, 742 F.3d at 882.
[98] *Id.*

On appeal, the Ninth Circuit held that a minimum sentence mandated by statute is not a suggestion that courts have the discretion to disregard.[99] "Although the district court attempted to justify lesser sentences on Eighth Amendment grounds," the *Hammond* court held that the mandatory five-year minimum sentences would not have been unconstitutional.[100] In so doing, the appeals court reasoned that Congress has broad authority to determine the appropriate sentence for serious crimes, and that even a fire in a remote area such as the federal grazing lands at issue "has the potential to spread to more populated areas, threaten local property and residents, or endanger the firefighters called to battle the blaze."[101] Therefore, the *Hammond* court held the district court erred in sentencing the defendants to prison terms less than the statutory minimum and remanded the case for resentencing.[102]

In 2015, the Supreme Court denied the defendants' petition for certiorari to reconsider the case.[103] In response to the mandatory minimum sentencing and jailing of the *Hammond* defendants, an armed group of persons critical of what they claim is the expansion of federal government control over public lands occupied a building on the Malheur National Wildlife Refuge in Southeastern Oregon.[104] As of the date of writing in early January 2016, this occupation continues.[105]

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[99] *Id.* at 844.
[100] *Id.*
[101] *Id.*
[102] *Hammond*, 742 F.3d at 884.
[103] Hammond v. United States, 135 S. Ct. 1545 (Mar. 23, 2015).
[104] *See, e.g.*, Cassandra Vinograd, et. al., *Ammon Bundy, Rancher's Rights Protesters Occupy Malheur National Wildlife Refuge in Oregon*, NBC NEWS (Jan. 3, 2016), http://www.nbcnews.com/news/us-news/ammon-bundy-ranchers-rights-protesters-occupy-malheur-national-wildlife-refuge-n489311.
[105] Significant discussion has been generated by the mandatory sentencing in *Hammond* and related occupation of the wildlife refuge building. *See, e.g.*, Victor Li, *Armed protesters Occupy Federal Building in Oregon, Calling Ranchers' Sentences Unjust*, ABA JOURNAL (Jan. 4, 2016, 4:15 PM), http://www.abajournal.com/news/article/armed_protesters_occupy_federal_building_in_oregon_calling_ranchers_arson_s/; Lorelei Laird, *Supreme Court Turned Down Arson Case at Center of Oregon Standoff*, ABA JOURNAL (Jan. 5, 2016, 4:20 PM), http://www.abajournal.com/news/article/supreme_court_turned_down_arson_case_at_center_of_oregon_standoff; Danielle Wiener-Bronner, *Sorry, Oregon Militants: National Parks and Refuges are Definitely Constitutional*, FUSION (Jan. 4 2016, 4:05 PM), http://fusion.net/story/251129/oregon-militants-bundy-refuge-constitutional; Conor Friedersdorf, *Oregon and the Injustice of Mandatory Minimums*, THE ATLANTIC (Jan. 5, 2016), http://www.theatlantic.com/politics/archive/2016/01/oregon-mandatory-minimums/422433/.

Chapter 22 • RENEWABLE, ALTERNATIVE, AND DISTRIBUTED ENERGY RESOURCES
2015 Annual Report[1]

The following sections provide an overview of items notable to the Renewable, Alternative, and Distributed Energy Resources (RADER) community from 2015.

I. RENEWABLES RAMP-UP

States continued to ramp-up expectations and requirements for renewable energy production in 2015, with ambitious legislation passed in California and Hawaii. In June, Hawaii enacted H.B. 623, which directs the state's utilities to generate 100% of their electricity sales from renewable resources by 2045.[2] In September, California passed S.B. 350, the "Clean Energy and Pollution Reduction Act of 2015," which increases the amount of energy to be procured from renewable sources from 33% as of 2020, to 50% as of 2030.[3] Finally, in December, New York Governor Andrew Cuomo directed the New York State Public Service Commission (NYPSC or PSC) make actionable the state's long-term goal "to provide 50% of its electricity from renewable resources by 2030[,]" as well as to enable continued availability of the emissions free benefits from some nuclear plants.[4] In response, the NYPSC expanded its pending "Reforming the Energy Vision"-related proceeding (more on this below) addressing large-scale renewable generation[5] to include the implementation of a State Clean Energy Standard by June 2016.[6]

II. REVVING UP: 2015 UPDATES TO NEW YORK'S REFORMING THE ENERGY VISION PROCEEDING

In April 2014, the NYPSC initiated its Reforming the Energy Vision proceeding (REV)[7] to advance the following goals: improve electric system efficiency, resiliency,

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[1]This section was edited by Paul Ghosh-Roy, Senior Managing Associate, Dentons US LLP. Contributions were prepared by Sarah Butler, U.S. Department of Energy, Office of the Assistant General Counsel for Regulation, Legislation, and Energy Efficiency; Andrew Landrum, JD Candidate 2016, University of Richmond Law School; Chris Raup, Section Manager, Distributed Resource Integration; Deidre Altobell, Director, Utility of the Future Team, Consolidated Edison Company of New York, Inc.; and Paul Ghosh-Roy. The viewpoints expressed by Sarah Butler are those of the author and not the U.S. Federal government or Department of Energy.

[2]H.B. 623, 28th Leg., Reg. Sess. (Haw. 2015).

[3]S.B. 350, 2015-2016 Reg. Sess. (Cal. 2015).

[4]Letter from Andrew M. Cuomo, Gov., State of N.Y., to Audrey Zibelman, CEO, N.Y. State Dep't of Pub. Serv. (Dec. 2, 2015).

[5]In the Matter of the Implementation of a Large-Scale Renewable Program, Notice Instituting Proceeding, Soliciting Comments and Providing for Technical Conference, No. 15-E-0302 (N.Y. Pub. Serv. Comm'n June 1, 2015).

[6]*Id.*; In the Matter of the Implementation of a Large-Scale Renewable Program, Order Expanding Scope of Proceeding and Seeking Comments (N.Y. Pub. Serv. Comm'n Jan. 21, 2016).

[7]N.Y. Dep't of Pub. Serv., Reforming the Energy Vision, Case 14-M-0101 (Apr. 24, 2014); *see also* Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision, Order Instituting Proceeding, No. 14-M-0101 (N.Y. Dep't of Pub. Serv. April 25, 2014).

and reliability; encourage renewable energy resources; support adoption of distributed energy resources (DER); and empower customer choice through new technologies. The NYPSC divided REV into two separate tracks. Track One was focused on the establishment of a Distributed System Platform (DSP) to integrate and coordinate DER in electric system operations and to provide data and tools so that customers can manage their energy use and be engaged in controlling their electric bill. Under Track Two, the NYPSC is examining how its ratemaking practices and the utility business model should be modified to incent utility practices to promote REV objectives.

In February 2015, the NYPSC issued a comprehensive implementation order in Track One (February REV Order) and ruled, among other things, that distribution utilities will serve as the DSP in their respective service territories.[8] Utilities will function as integrated distribution system planners, grid operators and market operators, integrating behind-the-meter renewable resources, other generation resources, energy efficiency, and demand response in their electric systems.[9] The PSC also directed New York electric utilities to file initial individual Distributed System Implementation Plans (DSIP) by June 2016, to be followed by a joint utility Supplemental DSIP in September 2016. The February REV Order requires utilities to develop demonstration projects to test new business models where third parties partner with utilities to pay for value provided. Consolidated Edison Company of New York, Inc., for example, filed three demonstration projects on July 1, 2015, that will deploy batteries to optimize residential solar production and establish marketplaces designed to improve customer access to renewables and energy-efficient products and services.[10]

To address Track Two, in July 2015, the NYPSC staff issued a white paper on ratemaking and utility business models.[11] Among the proposals were utility market-based earnings opportunities through fee-based value-added services and utility performance-based earnings mechanisms addressing peak demand reduction, energy efficiency, customer engagement and information access, affordability, and DER interconnections. A PSC order in Track Two is expected in 2016.

Also as part of the REV proceeding, the NYPSC is examining new ways to advance and incentivize the development of large-scale renewable energy projects and issued an order in June initiating a proceeding to do so.[12] As part of this proceeding, the New York State Energy Research and Development Authority issued the "Large-Scale Renewable Energy Development in New York: Option and Assessment Final Report," in which it proposed program design elements, including: bundled power purchase agreements (PPAs) to reduce costs and electricity price volatility; flexible procurements to foster competition and ensure the selection of the lowest-cost projects; centralized

[8]Proceeding on Motion of the Comm'n in Regard to Reforming the Energy Vision, Order Adopting Regulatory Policy Framework and Implementation Plan, 14-M-0101 at 48-53 (N.Y. Pub. Serv. Comm'n Feb. 26, 2015) [hereinafter February REV Order].

[9]*Id.*

[10]Proceeding on Motion of the Comm'n in Regard to Reforming the Energy Vision, Cover Letter to Secretary of N.Y. Pub. Serv. Comm'n, from Consolidated Edison Company of New York, Inc., 14-M-0101 (July 1, 2015), attaching CONnectED Homes Demonstration Project, REV Demonstration Project Outline Building Efficiency Marketplace, and REV Demonstration Project Outline Clean Virtual Power Plant.

[11]Proceeding on Motion of the Commission in Regard to Reforming the Energy Vision, Staff White Paper on Ratemaking and Utility Business Models, No. 14-M-0101 (N.Y. Pub. Serv. Comm'n July 28, 2015).

[12]In the Matter of the Implementation of a Large-Scale Renewable Program, Notice Instituting Proceeding, Soliciting Comments and Providing for Technical Conference, No. 15-E-0302 (N.Y. Pub. Serv. Comm'n June 1, 2015).

project solicitation and evaluation by a third party; new mechanisms to facilitate voluntary market activity; and securitization to lower the cost of project debt.[13] This proceeding was expanded by the NYPSC to include implementation of Governor Cuomo's Clean Energy Standard (discussed above).

III. MAY THE SUN SHINE AND THE WIND BLOW: INVESTMENT TAX CREDIT AND PRODUCTION TAX CREDIT EXTENSIONS

Congress showed a rare ability to make a bipartisan deal in 2015, and on December 18, it approved, and the President signed into law, an omnibus appropriations bill, the "Consolidated Appropriations Act, 2016"[14] (the Act), which extended both the solar Investment Tax Credit (ITC) and the wind Production Tax Credit (PTC), but also lifted the forty-year ban on U.S. oil exports. The extension of these credits is generally seen as a boon to the solar and wind industries.[15]

The Act extends the 30% ITC for solar power facilities commencing construction on or before December 31, 2019, and placed in service before 2024, and then incrementally decreases the available ITC for projects commencing construction after December 31, 2019.[16] There will be a 26% ITC available to projects commencing construction in 2020 and placed into service before 2024; a 22% ITC available to solar projects commencing construction during 2021 and placed into service before 2024; and a 10% ITC available to projects that commence construction during 2021 or placed in service after 2023.[17] The Act also extended the tax credit available to residential solar installations, maintaining the current 30% credit for residential solar installations made prior to January 1, 2020, and then decreasing the credit to 26% for installations made in 2020, and down to 22% for installations made in 2021.[18] There is no credit available to residential solar installations made after 2021

The Act also extended the wind PTC for projects that begin construction before 2020, by restoring the credit which expired last year and making it retroactive to January 1, 2015.[19] Wind projects that begin construction before 2017 are eligible for PTCs for sales of electricity equal to 1.5 cents per kilowatt, as adjusted for inflation (currently 2.3 cents). The PTC will then be decreased by 20% for projects beginning construction in 2017; 40% for projects beginning construction in 2018; and 60% for projects beginning construction in 2019, after which the PTC is phased out.[20]

IV. NEGATIVITY ON NET METERING

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[13]N.Y. STATE ENERGY RESEARCH AND DEV. AUTH., LARGE-SCALE RENEWABLE ENERGY DEV. IN N.Y.: OPTIONS AND ASSESSMENT (June 1, 2015).
[14]H.R. 2029, 114th Cong. (2015).
[15]Joshua S. Hill, *Solar & Wind Tax Credit Extensions Big Boost to Solar & Wind Growth*, CLEAN TECHNICA (Dec. 17, 2015), http://cleantechnica.com/2015/12/17/us-government-extends-renewables-tax-credits/.
[16]Paul Dvorak, *Five Things You Need to Know About the Extension of the ITC/PTC*, WINDPOWER ENG'G AND DEV. (Jan. 6, 2016), http://www.windpowerengineering.com/policy/five-things-you-need-to-know-about-the-extension-of-the-itcptc/.
[17]*Id.*
[18]*Id.*
[19]*Id.*
[20]*Id.*

Despite the extension of the ITC, all is not rosy in the solar world. On October 12, 2015, the Hawaii Public Utilities Commission (HPUC) issued an order that ended the net metering program in Hawaii for new solar systems (existing systems and applications filed by October 12 were grandfathered in).[21] The HPUC replaced the net metering program with two new tariffs for solar installation, the "Self-Supply Tariff" and the "Grid Supply Tariff."[22] The Self-Supply Tariff, which is designed for solar systems that do not export electricity to the grid, does not provide customers any compensation, but expedites the approval process, while the Grid Supply Tariff will continue to compensate customers for excess electricity that is generated by rooftop solar systems and exported to the grid, but at a lower rate than under the former net metering program.[23] The Grid Supply Tariff will also impose a cap on the amount of customers that may take advantage of the program.[24]

In addition to Hawaii's decision, in December 2015, the Public Utilities Commission of Nevada (PUCN) issued a decision to cut the payments for excess power sold from rooftop solar installations under the state's net metering rules, from the retail rate to the wholesale rate (i.e., by approximately 2 cents per kilowatt hour), and increase the base service charge paid by solar customers by approximately $5 per month.[25] The new rates became effective on January 1, 2016, and since the PUCN decision was issued, several solar companies have ceased operations or laid off employees in Nevada.[26] It remains to be seen whether customers who have already acquired roof-top solar installations in reliance on the net metering programs may be grandfathered into higher rates.[27]

However, it wasn't all gloomy in 2015, as several states' public utility commissions proposed to maintain or expand net metering programs, including Colorado and California, which both voted to maintain compensation for net metered solar customers at retail rates.[28] In addition, the NYPSC initiated a REV-related proceeding in

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[21]Decision and Order No. 33258, Instituting a Proceeding to Investigate Distributed Energy Resource Policies, No. 2014-0192 (Haw. Pub. Utilities Comm'n Oct. 12, 2015) [hereinafter HPUC Order]; *see also* Haw. Pub. Utilities Comm'n, *PUC Reforms Energy Programs to Support Future Sustainable Growth in Hawaii Rooftop Solar Market*, *available at* http://puc.hawaii.gov/wp-content/uploads/2015/10/DER-Phase-1-DO-Summary.pdf [hereinafter HPUC Summary].

[22]HPUC Order, *supra* note 21, at Exhibit B, Exhibit C. *See also* HPUC Summary, *supra* note 20.

[23]HPUC Summary, *supra* note 21.

[24]*Id.*

[25]Order, Nos. 15-07041, 15-07042 (Nev. Pub. Utilities Comm'n Dec. 23, 2015); *see also* Michelle Rindels, *Regulators to Consider Pausing New Rooftop Solar Rates*, LAS VEGAS SUN (Jan. 4, 2016, 2:00 AM), http://lasvegassun.com/news/2016/jan/04/regulators-to-consider-pausing-new-rooftop-solar-r/.

[26]Rindels, *supra* note 25.

[27]*Id.*

[28]*See* Shay Castle, *PUC Ruling: No Changes on Net Metering in Colorado*, DAILYCAMERA (Aug. 26, 2015, 5:27 PM), http://www.dailycamera.com/boulder-business/ci_28708810/puc-ruling-no-changes-net-metering-colorado; Press Release, Cal. Pub. Utilities Comm'n, CPUC Ensures Customers Continue to Benefit from Going Solar by Approving New Net Metering Guidelines (Jan. 28, 2016). The California PUC in January 2016 affirmed, with some modifications, a draft order that it issued in December 2015.

December 2015 to address distributed energy resource compensation and net metering subsidies, which is expected to be concluded by the end of 2016.[29]

V. "STEEL IN THE WATER" OFF-SHORE THE OCEAN STATE

The year's big news in the off-shore wind space was that the first "steel in the water" was placed off the coast of Rhode Island in the summer of 2015. DeepWater Wind's Block Island Wind Farm, a 30 megawatt, five turbine wind farm began construction in July 2015 and completed its first phase of construction in November 2015.[30] It is expected to come online in 2016,[31] when it will likely be the first off-shore wind farm to come online in the United States. In other offshore wind news, the Bureau of Ocean Energy Management issued leases for offshore wind development areas off the coast of Massachusetts to DONG Energy Massachusetts (by assignment) and OffshoreMW, as well as for areas off the coast of New Jersey to RES America Development, Inc. and US Wind Inc.[32] These leases are in addition to leases issued in prior years for areas off the coasts of Delaware, Rhode Island, Virginia, and Maryland.[33]

VI. U.S. DEPARTMENT OF ENERGY (DOE) INITIATIVES

The DOE Office of Energy Efficiency and Renewable Energy (EERE) invests in projects to advance the development and adoption of clean energy technologies, including collaboration with the private solar industry through its SunShot Initiative. In 2015, EERE awarded almost $75 million to new projects aimed at making solar energy more affordable and accessible, including projects to improve the reliability and predictability of solar technology performance, as well as projects to address technical challenges in concentrating solar power technology.[34] In addition, EERE awarded $14 million to new projects to help communities develop multi-year solar deployment plans.[35] EERE also awarded more than $30 million to projects including low environmental impact hydropower technologies, marine, and hydrokinetic systems,[36] as well as projects

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[29]In the Matter of the Value of Distributed Energy Resources, Notice Soliciting Comments and Proposals on an Interim Successor to Net Energy Metering and of a Preliminary Conference (N.Y. Pub. Serv. Comm'n Dec. 23, 2015).

[30]Press Release, DeepwaterWind, Block Island Wind Farm Caps Off Successful First Offshore Construction Season (Dec. 8, 2015).

[31]*See Block Island Windfarm*, DEEPWATERWIND, http://dwwind.com/project/block-island-wind-farm/ (last visited Mar. 7, 2016).

[32]AARON SMITH, TYLER STEHLY & WALTER MUSIAL, NAT'L RENEWABLE ENERGY LABORATORY, 2014-2015 OFFSHORE WIND TECHNOLOGIES MARKET REPORT at 30 (Sept. 2015).

[33]*Id.*

[34]*See* Press Release, Office of Energy Efficiency & Renewable Energy, Energy Department Announces Nearly $23 Million in Awards to Bring New Solar Technologies to Market (Nov. 16, 2015); Press Release, Dep't of Energy, Energy Department Announces $102 Million to Tackle Solar Challenges, Expand Access to Clean Electricity (Sept. 16, 2015).

[35]*See* Press Release, Dep't of Energy, Energy Department Announces More Than $59 Million Investment in Solar (Jan. 29, 2015).

[36]*See* Press Release, Office of Energy Efficiency & Renewable Energy, Energy Department Awards $10.5 Million for Next-Generation Marine Energy Systems (Dec. 28, 2015); Press Release, Office of Energy Efficiency & Renewable Energy, Energy Department Awards $6.5 Million to Advance Low Environmental Impact Hydropower

focused on wind technologies.[37] EERE's Fuel Cell Technologies Office (FCTO) reported that as of the end of 2015, 580 granted patents, 45 commercial technologies, and 65 emerging technologies can be tied back to EERE FCTO funding.[38]

In December 2015, the DOE Advanced Research Projects Agency-Energy (ARPA-E) announced $33 million in funding for twelve innovative projects as part of ARPA-E's newest program Network Optimized Distributed Energy Systems (NODES). NODES project teams will use this funding to develop technologies that will create a virtual energy storage system by coordinating load and generation on the grid in order to alleviate periods of costly peak demand, reduce wasted energy, and increase renewables penetration on the grid.[39] Also, in August 2015, ARPA-E awarded $24 million in funding for eleven new solar technologies as part of a new ARPA-E program, Micro-Scale Optimized Solar-Cell Arrays with Integrated Concentration (MOSAIC), which seeks to develop a new class of cost-effective, high-performance solar energy modules. [40]

VII. MICROGRID MOVEMENT

Significant moves were made in 2015 to support significant integration of microgrid and other distributed generation systems across the United States. The February REV Order that the NYPSC issued as part of the REV proceeding included, inter alia, a specific focus on integrating microgrids through a distributed energy resource-centric framework.[41]Although microgrids already maintained a significant presence in New York,[42] prior to 2015 the NYPSC recognized only two classes of microgrids: small cogenerating facilities serving tenants located nearby and contractual service agreements between generating systems and business customers.[43] The February REV Order recognized a third model, the "community microgrid" model, and explained that the community microgrid model

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Technologies (Sept. 14, 2015); and Press Release, Office of Energy Efficiency & Renewable Energy, Energy Department Awards $7.4 Million to Develop Advanced Components for Wave and Tidal Energy Systems (Aug. 6, 2015).

[37]*See* Press Release, Office of Energy Efficiency & Renewable Energy, Energy Department Awards $1.8 Million to Develop Wind Turbine Blades to Access Better Wind Resources and Reduce Costs (Sept. 15, 2015); Press Release, Office of Energy Efficiency & Renewable Energy, Energy Department Announces New Projects to Help Protect Wildlife at Wind Energy Plants (April 14, 2015); Press Release, Office of Energy Efficiency & Renewable Energy, Energy Department Announces $2.5 Million to Improve Wind Forecasting (Jan. 8, 2015).

[38]*Fuel Cell Technologies Office: 2015 Recap and the Year Ahead*, U.S. DEP'T OF ENERGY OFFICE OF ENERGY EFFICIENCY & RENEWABLE ENERGY, http://energy.gov/eere/fuelcells/articles/fuel-cell-technologies-office-2015-recap-and-year-ahead (last updated Jan. 13, 2016).

[39]*See* Press Release, ARPA-E, Department of Energy Announces 12 New Projects to Accelerate Technologies that Improve the Efficiency and Reliability of the U.S. Electrical Grid (Dec. 11, 2015).

[40]*See*, Press Release, ARPA-E, 11 Projects Funded for High-Performance Solar Power (Aug. 24, 2015).

[41]February REV Order, *supra* note 8, at 109-11.

[42]*Id.* (current New York microgrid models qualify as either small cogenerating facilities or business customer service facilities).

[43]*Id.*

> [I]nvolves multiple customers that may range from large institutions to single dwellings, operates in parallel with the grid but is capable of operating as an island during a grid outage, and is powered by one or more distributed generation sources supplemented by storage and/or a load management system that provides resilience in case of grid outage and optimal efficiency during normal operations.[44]

To support microgrids, the New York State Energy Research and Development Authority has an ongoing $40 million N.Y. Prize competition to help communities create microgrids.[45]

In October, the Pennsylvania Public Utility Commission approved a $50 to $100 million microgrid pilot program planned by PECO Energy,[46] and in November, Xcel Energy subsidiary Public Service Company of Colorado applied for approval from the Colorado Public Utilities Commission for a plan with Panasonic and the Denver International Airport to build a $10.3 million dollar solar microgrid project near the Denver airport that would implement the use of batteries in the microgrid.[47]

In addition, S&C Electric Company, Schneider Electric, and Oncor completed an innovative microgrid near Lancaster, Texas. The Oncor microgrid is comprised of four interconnected microgrids, which are able to operate either independently or with each other and which can disconnect from and reconnect to the main utility grid. The Oncor microgrid makes use of nine distributed energy resources: two solar photovoltaic arrays, one microturbine, two energy storage systems, and four batteries.[48] The industry trade press has referred to this microgrid as a "first-of-a-kind" microgrid,[49] and Schneider Electric and S&C Electric have developed a "demonstration center" to simulate and explain this new microgrid system.[50]

VIII. REGIONAL GREENHOUSE GAS INITIATIVE (RGGI)

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[44] *Id.* at 110.

[45] *NY Prize*, N.Y. STATE ENERGY RESEARCH AND DEV. AUTHORITY, http://www.nyserda.ny.gov/All-Programs/Programs/NY-Prize (last visited Apr. 7, 2016).

[46] Elisa Wood, *PECO Gets Okay for $50 to $100 M Microgrid Pilot in Pennsylvania*, MICROGRID KNOWLEDGE (Oct. 23, 2015), http://microgridknowledge.com/peco-gets-okay-for-50-to-100m-microgrid-pilot-in-pennsylvania/.

[47] Elisa Wood, *Xcel, Panasonic and Denver Airport to Team on $10.3M Solar Microgrid*, MICROGRID KNOWLEDGE (Nov. 3, 2015), http://microgridknowledge.com/xcel-panasonic-and-denver-airport-to-team-on-10-3m-solar-microgrid/. The application was approved by the Colorado Public Utilities Commission just prior to publication. *See* In the Matter of the Application of Pub. Serv. Co. of Colo. for the Approval of Two Innovative Clean Technology Projects, Decision No. C16-0196, Decision Granting Motion and Approving Settlement Agreement (Colo. Pub. Utilities Comm'n Mar. 2, 2016); Press Release, Colo. Dep't of Regulatory Agencies, Colorado PUC Approves Xcel Energy Request for Two Clean Technology Demonstration Projects (Mar. 8, 2016).

[48] Elisa Wood, *Rumor is True. Oncor Unveils First-of-a-Kind Microgrid*, MICROGRID KNOWLEDGE (Apr. 7, 2015), http://microgridknowledge.com/rumor-is-true-oncor-unveils-first-of-a-kind-microgrid/; Schneider Electric, *Innovative Microgrid Improves Utility's Reliability and Optimizes Distributed Energy Resources* (Apr. 2015), *available at* http://microgrids.schneider-electric.us/wp-content/uploads/Oncor-case-study-vF-4.13.15-2.pdf.

[49] Wood, *supra* note 47.

[50] Schneider Electric, *supra* note 48.

The year 2015 was the beginning of RGGI's third three-year control period (2015-2018), so RGGI began the process of implementing the 2016 RGGI Program Review, which is designed to seek stakeholder input on RGGI program design, including EPA Clean Power Plan-related compliance issues.[51] The first regional stakeholder meeting associated with RGGI's 2016 Program Review was held on November 17, 2015. In addition, a study performed by the Analysis Group concluded that RGGI's second control period (2012-2014) is creating $1.3 billion in net economic benefits for the RGGI region.[52] And last but not least, in June, the RGGI states reported that 96% of RGGI compliance entities met compliance obligations for the second control period (2012-2014) compliance obligations.[53]

[51] *2016 Program Review*, REG'L GREENHOUSE GAS INITIATIVE, http://www.rggi.org/design/2016-program-review (last visited Apr. 7, 2016).

[52] PAUL J. HIBBARD, ET. AL., ANALYSIS GROUP, THE ECONOMIC IMPACTS OF THE REG'L GREENHOUSE GAS INITIATIVE ON NINE NORTHEAST AND MID-ATLANTIC STATES at 8 (July 14, 2015).

[53] Press Release, Reg'l Greenhouse Gas Initiative, Inc., 96 Percent of RGGI Power Plants Meet Compliance Obligations (June 2, 2015).

Chapter 23 • WATER RESOURCES
2015 Annual Report[1]

I. FEDERAL DEVELOPMENTS

A. Alaska

In the 2014 case of *Sturgeon v. Masica*,[2] the United States Court of Appeals for the Ninth Circuit upheld and denied rehearing of the federal district court's rejection of challenges by John Sturgeon and the State of Alaska to National Park Service regulations prohibiting the operation or use of hovercraft within the boundaries of NPS administered lands. Sturgeon appealed to the United States Supreme Court and the Court granted certiorari review. The Court heard oral argument on January 20, 2016.

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[2]768 F.3d 1066 (9th Cir. 2014), *cert. granted* 136 S. Ct. 27 (U.S. Oct. 1, 2015). *See also Sturgeon v. Frost*, SCOTUSblog, http://www.scotusblog.com/case-files/cases/sturgeon-v-masica/ (last visited Mar. 14, 2016).

B. California

In *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*,[3] the U.S. District Court for the Central District of California addressed the issue of whether federal reserved water rights arising under the doctrine of *Winters v. United States*[4] extended to groundwater beneath the plaintiff Indian tribe's reservation. The court found that the reservation impliedly reserved the right to at least some appurtenant water, and that the federal government impliedly reserved groundwater (and surface water) for the tribe when it created the reservation.

C. Kansas

Colorado, Kansas, and Nebraska reached an agreement that provides additional flexibility for Nebraska to achieve its obligations under the Republican River Compact.[5] The agreement is contingent on Nebraska reaching agreement with two irrigation districts and the United States Bureau of Reclamation.

D. Montana v. Wyoming

In *Montana v. Wyoming*,[6] the Special Master issued a memorandum opinion on December 29, 2014, to address the remaining issues in the liability phase of Montana's case against Wyoming involving the 1950 Yellowstone River Compact. Specifically, the Special Master recommended that the Court: (1) grant Wyoming summary judgment for the years 1982, 1985, 1992, 1994, and 1998; (2) find that Wyoming is not liable to Montana for the years 1981, 1987, 1988, 1989, 2000, 2001, 2002, and 2003; (3) find that Wyoming is liable to Montana in the amount of 1,300 acre-feet for 2004 shortages for Wyoming's post-1950 uses and storage during the 2004 notice period on the flow of the Tongue River at the state line; (4) find that Wyoming is liable to Montana in the amount of fifty-six acre-feet for 2006 shortages for Wyoming's post-1950 uses during the 2006 notice period on the flow of the Tongue River at the state line; and (5) remand the case to determine damages and other appropriate relief.[7] Notably, the Special Master also found that Montana's model was unreliable to show impacts to the stream flow of the Montana portion of the Tongue River resulting from groundwater extracted during coal bed methane production in 2004 and 2006.[8]

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[3]No. EDCV 13-883-JGB, 2015 WL 1600065 (C.D. Cal. Mar. 20, 2015), *appeal docketed* No. 15-55896 (9th Cir. June 10, 2015).
[4]207 U.S. 564 (1908).
[5]*Republican River Compact*, Kan. Dep't of Agric., http://agriculture.ks.gov/divisions-programs/dwr/interstate-rivers-and-compacts/republican-river-compact (last visited Mar. 14, 2016). Press Release, Kan. Dep't of Agric., Colorado, Kansas & Nebraska Water Agreement Further Helps Water Users.
[6]*See* Montana v. Wyoming, No. 137 (U.S. filed Jan. 31, 2007). *See also Special Master Docket Sheet*, STANFORD LAW SCHOOL, http://web.stanford.edu/dept/law/mvn/ (last visited Mar. 14, 2016). North Dakota is also named as a defendant because it is a signatory to the Compact, but Montana seeks no relief against North Dakota in this current litigation.
[7]Second Interim Report of the Special Master (Liability Issues) at 230-31, Mont. v. Wyo., No. 137 (U.S. Dec. 29, 2014).
[8]*Id.* at 39.

In April, Montana filed its Exception and Brief asking the Court to remand the case to the Special Master to recommend a full determination of Montana's Tongue River rights.[9] Wyoming replied, asking the Court not to remand the matter, as the Special Master decided the questions presented by Montana and went no further than necessary to decide the case.[10] Montana responded, disputing Wyoming's claim that no controversies remain in the case and noting that both Montana and Wyoming urged the Special Master to determine Montana's storage right in the Tongue River Reservoir during the liability phase of the case.[11]

Also in April, Wyoming filed its Exception, asking the Court to adopt all but that portion of the Second Interim Report recommending that the matter return to the Special Master for a remedies phase.[12] Specifically, Montana replied, asking the Court to reject Wyoming's position, as it denies Montana's claims for injunctive relief and costs without affording Montana the opportunity to be heard in a remedies phase, and it ignores Montana's claim for declaratory relief.[13] Wyoming responded that further proceedings do "not serve the interests of justice and judicial economy[,] [as] Montana has obtained a complete and fair adjudication of the claims it brought before the Court."[14]

On September 2, 2015, Montana filed its Motion to Defer, asking the Court to defer consideration of the case for three months for purposes of allowing the parties to "meaningfully continue settlement negotiations that are currently under way,"[15] which Wyoming opposed."[16] Montana responded, averring that settlement discussions, if successful, would resolve all pending questions before the Court and obviate the need for a remedies phase.[17] The parties are awaiting rulings on their exceptions and Montana's Motion to Defer.

E. Nevada

On May 28, 2015, in *United States v. Walker River Irrigation District*[18] the U.S. District Court for the District of Nevada, issued separate orders dismissing the claims of the United States, the Walker River Paiute Tribe, and Mineral County to allow additional water use from the Walker River. In its first order the court dismissed the claims of the United States and Walker River Paiute Tribe for lack of subject matter jurisdiction due to

[9]Montana's Exception and Brief at 13, Mont. v. Wyo., No. 137 (U.S. Apr. 9, 2015).
[10]Wyoming's Reply to Montana's Exception at 5, Mont. v. Wyo., No. 137 (U.S. May 7, 2015).
[11]Montana's Surreply Brief in Support of its Exception at 15, Mont. v. Wyo., No. 137 (U.S. May 10, 2015).
[12]Wyoming's Exception to the Second Interim Report of the Special Master (Liability Issues) and Brief in Support of Exception at 20-21, Mont. v. Wyo., No. 137 (U.S. Apr. 9, 2015).
[13]Montana's Reply Brief Opposing the Exception of Wyo. at 19-20, Mont. v. Wyo., No. 137 (U.S. May 11, 2015).
[14]Wyoming's Sur-reply in Support of Exception at 7, Mont. v. Wyo., No. 137 (U.S. June 3, 2015).
[15]Montana's Motion to Defer at 1, Mont. v. Wyo., No. 137 (U.S. Sept. 2, 2015).
[16]Wyoming's Response in Opposition to Montana's Motion to Defer at 2, Mont. v. Wyo., No. 137 (U.S. Sept. 14, 2015).
[17]Montana's Reply to Wyoming's Response in Opposition to Montana's Motion to Defer at 1, Mont. v. Wyo., No. 137 (U.S. Sept. 16, 2015).
[18]No. 3:73-cv-00125-RCJ-WGC (D. Nev. May 28, 2015).

claim preclusion.[19] The court determined the sub-proceeding was akin to a new case, with new claims being asserted to Walker River water, and that the decree prevents claims for additional water rights beyond those originally adjudicated. In its second order,[20] the court found that Mineral County lacked standing to claim water under the public trust doctrine, reasoning that the County held no statutory authority to do so. The court also commented that the Takings Clause of the United States Constitution prohibits it from granting Mineral County relief. Both of the court's orders are pending appeal before the Ninth Circuit Court of Appeals.

F. Great Lakes

Both the United States Senate and United States House of Representatives have pending legislation that would prohibit the sale or distributing of cosmetics containing synthetic plastic microbeads.[21] This would be accomplished by amending the United States Federal Food, Drug, and Cosmetic Act to include products containing synthetic plastic microbeads to the list of cosmetics deemed to be adulterated, and thus prohibited.

II. STATE DEVELOPMENTS

A. Alaska

1. Judicial

In *Nunamta Aulukestai v. State, Department of Natural Resources*,[22] a non-profit corporation representing nine Native Village Corporations brought a declaratory judgment action in state court challenging a denial by the Alaska State Department of Natural Resources (DNR) of their request to stay land and water use permits allowing intensive mineral exploration on state land. Specifically, plaintiffs challenged whether the DNR had to give public notice before issuing the permits because the Alaska Constitution requires public notice when interests in land are transferred. The trial court held that notice was not required because the permits were nominally and functionally revocable and therefore did not transfer an interest in land. On appeal, the court agreed that the water use permits were nominally and functionally revocable, but disagreed as to the land use permits and reversed and remanded for further proceedings.

2. Administrative

The DNR issued a decision[23] on the Chuitna Citizens Coalition Inc.'s three applications for instream flow reservations for a tributary of the Chuitna River. The applications requested protection of flows for the purpose of protection of fish and wildlife habitat, migration, and propagation, in anticipation of the proposed Chuitna Coal project. Two of the applications were for segments of the stream located within the

[19]United States v. Walker River Irrigation Dist., 3:73-cv-00127-RCJ-WGC, 2015 U.S. Dist. LEXIS 69159 (D. Nev. May 28, 2015) (Order) (Sub-file B).
[20]United States v. Walker River Irrigation Dist., 3:73-cv-00128-RCJ-WGC, 2015 U.S. Dist. LEXIS 69160, (D. Nev. May 28, 2015) (Order) (Sub-file C).
[21]S. 1424, 114th Cong. (2015); H.R. 1321, 114th Cong. (2015).
[22]351 P.3d 1041 (Alaska 2015).
[23]Findings of Fact, Conclusions of Law, and Decisions on Applications by the Chuitna Citizens Coal., Inc. for the Reservation of Water, Under AS 46.15, the Alaska Water Use Act, LAS 27340, 37436 & 27437, Alaska Dep't of Nat. Res. (Oct. 6, 2015).

footprint of the proposed coal project. DNR granted the Chuitna Citizen Coalition's application for the lower reach of the creek but did not grant its applications for the creek's main and middle reaches, where the proposed mine would be operating. This decision was unique in that it was the first time that the State of Alaska awarded a water reservation on state waters to a private entity.

B. Arizona

1. Judicial

In *Arizona Department of Water Resources v. McClennen*,[24] the Arizona Supreme Court held that Mohave County was not an "interested person" entitled to object to proposed water rights transfers under Arizona's surface water rights severance and transfer statute.[25] The court held that the statute identifies the only grounds on which the Arizona Department of Water Resources can deny a properly filed application to sever and transfer a water right.[26] Mohave County lodged an objection to proposed water rights transfer applications, alleging the transfers might negatively affect an already strained water supply, would increase tax burdens on County residents, and would be against the public interest.[27] The court found the County's objections were not protected by the statute, which primarily protects those with vested or existing water rights, which the County lacked.[28]

2. Administrative

During 2015, some irrigation users of groundwater within the San Simon Valley sub-basin petitioned the director of the Arizona Department of Water Resources to establish an irrigation non-expansion area, which would restrict new irrigation in the area. The petitioners argued that current rates of withdrawal and projected future rates of withdrawal threatened the economic feasibility of groundwater irrigation in approximately thirty to forty years. In a formal decision,[29] the director denied the petition, finding instead that there was a reasonably safe supply of irrigation water for cultivated lands at current rates of withdrawal for at least 100 years. A request for rehearing was denied.[30]

C. California

1. Legislative

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[24]360 P.3d 1023, 1024 (Ariz. 2015).
[25]ARIZ. REV. STAT. ANN. § 45-172 (2015).
[26]*Ariz. Dep't of Water Res.*, 360 P.3d at 1024.
[27]*Id.* at 1025.
[28]*Id.* at 1028.
[29]Findings, Decision and Order, In the Matter of the Petition to Designate the San Simon Valley Sub-Basin of the Safford Groundwater Basin as a Subsequent Irrigation Non-Expansion Area at 13 (Ariz. Dep't of Water Res. Aug. 12, 2015)).
[30]Decision and Order Denying Farmer's Inv. Co.'s Motion for Rehearing or Review, In the Matter of the Petition to Designate the San Simon Valley Sub-Basin of the Safford Groundwater Basin as a Subsequent Irrigation Non-Expansion Area (Ariz. Dep't of Water Res. (Oct. 9, 2015)).

On June 24, 2015, California Governor Jerry Brown signed Senate Bill 88.[31] The bill authorizes the California State Water Resources Control Board (SWRCB) to order the consolidation of certain drinking water systems which consistently fail to provide an adequate supply of safe drinking water. The bill exempts certain groundwater replenishment projects from the California Environmental Quality Act (CEQA). The bill also imposes additional water diversion measurement and reporting requirements for certain surface water diverter, and authorizes the SWRCB to adopt regulations relating to the new requirements. Senate Bill 88 expands the potential liability against a person for violating a water conservation ordinance or resolution or certain emergency regulations passed by the SWRCB.

On September 3, 2015, Governor Brown signed Senate Bill 13,[32] making changes to California's Sustainable Groundwater Management Act (SGMA), which took effect January 1, 2015. The bill authorizes a mutual water company to participate in a groundwater sustainability agency (GSA) through a joint powers or other agreement. Senate Bill 13, with certain exceptions, also provides that the California Administrative Procedure Act does not apply to a guideline, criterion, bulletin, or other technical or procedural analysis or guidance prepared by the Department of Water Resources (DWR) pursuant to SGMA.

On October 9, 2015, Assembly Bill 1390[33] and Senate Bill 226[34] were signed into law, establishing special procedures for groundwater adjudications and addressing the intersection between groundwater adjudications and SGMA implementation. Assembly Bill 1390 also authorizes a court, upon a showing that the basin is in long term overdraft, to issue a preliminary injunction that could include a moratorium on new or increased water appropriations. Senate Bill 226 requires a court overseeing an adjudication to minimize interference with the timely completion of a groundwater sustainability plan and to maximize efficiencies between the adjudication and SGMA processes in the development of technical information or a physical solution. The bill also prohibits a court from approving a judgment in a basin required to have a groundwater sustainability plan unless the court first finds that the judgment will not impair the ability of a GSA, the board, or DWR to achieve sustainable groundwater management.

On October 9, 2015, Governor Brown signed Senate Bill 555,[35] requiring urban retail water suppliers to submit to DWR a complete and validated water loss audit report for the prior year. The bill requires DWR (on or before January 1, 2017) to adopt rules for, among other things, conducting standardized water loss audits and validating water loss audit reports. Senate Bill 555 requires the SWRCB to adopt rules requiring urban retail water suppliers to meet performance standards for water losses. Pursuant to the bill, DWR is required to make validated water loss audit reports available for public viewing and to post all such reports on its website in a manner allowing for comparison among suppliers.

2. Judicial

In *Siskiyou County Farm Bureau v. Department of Fish and Wildlife*,[36] the California Court of Appeals for the Third Appellate District addressed a challenge to the California Department of Fish and Wildlife's (DFW) position that California Fish and

[31]S.B. 88, 2015-2016 Reg. Sess. (Cal. 2015).
[32]S.B. 13, 2015-2016 Reg. Sess. (Cal. 2015).
[33]A.B. 1390, 2015-2016 Reg. Sess. (Cal. 2015).
[34]S.B. 226, 2015-2016 Reg. Sess. (Cal. 2015).
[35]S.B. 555, 2015-2016 Reg. Sess. (Cal. 2015).
[36]188 Cal. Rptr. 3d 141 (Cal. Ct. App. 2015).

Game Code section 1602 requires a water diverter to notify DFW of plans to "substantially divert" water from a stream regardless of whether the diversion will alter the streambed. The court held that section 1602 is unambiguous and supported DFW's interpretation.

In *Capistrano Taxpayers Association, Inc. v. City of San Juan Capistrano*,[37] Division Three of the California Court of Appeals for the Fourth District struck down tiered water rates for a violation of the cost of service requirement of Article XIII D of the California Constitution, or Proposition (Prop) 218, but upheld the charges for costs of recycled water. The court emphasized that tiered water rates are compatible with Prop 218 and that determining the cost of service to a specific parcel is ascertainable.

On February 18, 2015, the California Supreme Court in the matter of *County of Siskiyou v. Superior Court (Environmental Law Foundation)*[38] summarily denied a petition for review of the trial court order ruling that the public trust doctrine applies to groundwater extractions that adversely impact navigable waterways. This decision leaves in place the trial court's ruling in *Environmental Law Foundation v. State Water Resources Control Board*,[39] which relied on *National Audubon Society v. Superior Court*[40] to hold that the public trust doctrine applies to the extraction of groundwater that adversely impacts a navigable waterway to which the public trust doctrine applies.

On September 15, 2015, the United States Department of Justice (DOJ) and Westlands Water District (Westlands) approved a settlement agreement[41] regarding the United States Bureau of Reclamation's responsibility to provide drainage to lands served by the San Luis Unit of the Central Valley Project within Westlands service area. Pursuant to the settlement agreement, Westlands will dismiss the breach of contract litigation, join the DOJ in petitioning for vacatur of the 2000 Order, intervene in the takings case, indemnify the DOJ, and pay all claims arising out of failure to provide drainage. Under the settlement terms, Westlands will assume responsibility for managing drainage within Westlands, be relieved of its existing repayment obligation, and obtain a permanent water supply contract with deliveries capped at 75%. Westlands agreed to permanently retire 100,000 acres of land for drain management, restoration, renewable energy or other uses with DOJ consent. Implementation of the settlement agreement is contingent upon congressional authorization of enabling legislation.

3. Administrative

On April 1, 2015, California Governor Jerry Brown issued Executive Order B-29-15 (EO).[42] The EO included a number of directives focused on saving water, increasing enforcement against water waste, investing in new technologies, and streamlining the governmental response to drought related issues. The EO directed the SWRCB to impose water use restrictions to achieve a statewide 25% reduction in potable urban water use through February 2016, and to prohibit potable water irrigation outside of newly constructed homes and buildings unless delivered by drip or microspray systems. The EO further required the SWRCB to direct urban water suppliers to develop rate structures and programs to maximize water conservation. The EO directs the SWRCB to require urban water suppliers to report certain water related information on a monthly basis, as well as

[37]186 Cal. Rptr. 3d 362 (Cal. Ct. App. 2015).
[38]Disposition, No. S220764 (Cal. Feb. 18, 2015) (mandate/prohibition petition denied).
[39]Order After Hearing On Cross Motions For Judgment On the Pleadings, No. 34-2010-80000583 (Cal. App. Dep't Super. Ct. July 14, 2014).
[40]658 P.2d 709 (Cal. 1983).
[41]Agreement between the United States and Westlands Water District (Sept. 15, 2015).
[42]Exec. Order B-29-15 (Cal. Apr. 1, 2015).

to require water right holders to more frequently report water diversion and use information. The EO directs state permitting agencies to prioritize the review and approval of water infrastructure projects and increase local water supplies. The EO also exempts many of its directives from compliance with CEQA.

As directed by the EO, the SWRCB adopted emergency conservation regulations on May 5, 2015.[43] The regulations included restrictions on outdoor water use for all end-users of water, required restaurants, and the hospitality industry to implement certain water conservation measures, as well as required water suppliers to achieve a conservation standard of between 4%−36%, depending on the classification of each supplier.

Entering the fourth year of drought, the SWRCB issued a statewide notice of potential future curtailment on January 23, 2015.[44] In March, the SWRCB adopted emergency regulations[45] authorizing the Deputy Director to issue informational orders. In April, SWRCB began issuing curtailment notices[46] to post-1914 appropriative right holders in several watersheds. On May 22, the SWRCB approved a proposal[47] from Delta riparian right holders to voluntarily reduce water diversions to avoid future curtailment. On June 12, the SWRCB issued a curtailment notice[48] to senior water right holders in the Sacramento and San Joaquin River and Delta watersheds. This curtailment was challenged by right holders in the Delta and on July 10, the court, in *West Side Irrigation District v. California State Water Resources Control Board*,[49] granted a temporary restraining order, finding that the notice language was coercive and not merely informational in violation of due process. In response, the SWRCB withdrew the language the court found coercive; however, the merits of the SWRCB's authority to curtail senior rights were not reached and the SWRCB proceeded forward with enforcement actions for unauthorized diversions. Starting in mid-September through November, the SWRCB began issuing notices that water is again available for diversion in certain watersheds.

Since the passage of SGMA in 2014, DWR has taken a number of actions to begin implementing the law. In late 2014, DWR concluded that its prior groundwater basin and sub-basin prioritization under the California Statewide Groundwater Elevation

[43]Res. No. 2015-0032, To Adopt an Emergency Regulation for Statewide Urban Water Conservation (Cal. State Water Res. Control Bd. May 5, 2015).

[44]Cal. State Water Res. Control Bd., Notice of Surface Water Shortage and Potential for Curtailment of Water Right Diversions for 2015 (Jan. 23, 2015).

[45]Res. No. 2015-0015, Amending and Readopting a Drought Emergency Regulation Regarding Informational Orders (Cal. State Water Res. Control Bd. May 5, 2015).

[46]*Notices of Water Availability (Curtailment and Emergency Regulations)*, CAL. STATE WATER RES. CONTROL BD. (last updated Jan. 8, 2016).

[47]Press Release, Cal. State Water Res. Control Bd., State Water Board Approves Voluntary Cutback Program for Delta Riparian Water Rights (May 22, 2015).

[48]Cal. State Water Res. Control Bd., Notice of Unavailability of Water and Need for Immediate Curtailment for Those Diverting Water in the Sacramento-San Joaquin Watersheds and Delta with a Pre-1914 Appropriative Claim Commencing During or After 1902 (June 12, 2015).

[49]Order After Hearing on Ex Parte Application for Temporary Stay re: Enforcement of Curtailment Notice or in the Alternative Temporary Restraining Order and/or for Order to Show Cause re: Preliminary Injunction, No. 34-2015-800002121 (Cal. App. Dep't Super. Ct. July 10, 2015).

Monitoring Program would serve as the initial basin prioritization under SGMA.[50] This identifies 125 of California's 515 groundwater basins and sub-basins as being medium and high priority and thus subject to SGMA. DWR also adopted emergency regulations for groundwater basin and sub-basin boundary revisions.[51] DWR is also in the process of developing emergency regulations for evaluating and implementing groundwater sustainability plans under SGMA.[52] Additionally, DWR is in the process of identifying basins and sub-basins in critical overdraft.[53] DWR's draft list of critically overdrafted basins and sub-basins includes twenty-one basins and sub-basins, with many in the San Joaquin Valley.[54]

This summer, due to the diminished outflow through the San Francisco-Sacramento Bay Delta (Delta) from the ongoing drought, DWR installed a barrier across West False River in the Delta to repel the tidal push of saltwater and prevent contamination of water supplies for local residents and all who rely on the state and federal water projects.[55] DWR is seeking permits to plan for future emergency salinity barriers.

On April 30, 2015, state and federal agencies announced[56] a new proposal[57] to replace the Bay Delta Conservation Plan that would separate the conveyance facility and habitat restoration measures into projects called California Water Fix and California EcoRestore.

D. Colorado

1. Legislative

Colorado Revised Statutes (C.R.S.) section 37-60-115(10)[58] was added to implement the first recommendation of the South Platte River Alluvial Aquifer study authorized by House Bill 12-1278. The measure directs that two pilot projects be implemented to provide data to evaluate methods to lower the water table in areas along the lower South Platte River that are experiencing damaging high groundwater levels. In conjunction with this measure, section 18 was added to C.R.S. section 37-92-305 that

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[50] *Initial Groundwater Basin Prioritization under the SGM Act*, CAL. DEP'T OF WATER RES., http://www.water.ca.gov/groundwater/sgm/SGM_BasinPriority.cfm (last updated Jan. 15, 2015).

[51] CAL. CODE REGS. tit. 23, §§ 340−346.6 (2015).

[52] *Groundwater Sustainability Plan Regulations*, CAL. DEP'T OF WATER RES., http://www.water.ca.gov/groundwater/sgm/gsp.cfm (last updated Apr. 7, 2016).

[53] *Critically Overdrafted Basins*, CAL. DEP'T OF WATER RES., http://www.water.ca.gov/groundwater/sgm/cod.cfm (last visited Mar. 14, 2015).

[54] Cal. Dep't of Water Res., *Draft List of Critically Overdrafted Basins*, *available at* http://www.water.ca.gov/groundwater/sgm/pdfs/Draft%20COD%20Basins%20short%20Table.pdf (Aug. 6, 2015).

[55] *Emergency Drought Barrier*, CAL. DEP'T OF WATER RES., http://www.water.ca.gov/waterconditions/emergencybarriers.cfm (last updated Nov. 18, 2015).

[56] Press Release, Office of Gov. Brown, State of Cal., State, Federal Leaders to Accelerate Delta Habitat Restoration, Proceed with Water Infrastructure Fix (Apr. 30, 2015).

[57] CAL. ECO RESTORE, RESTORING THE SACRAMENTO-SAN JOAQUIN DELTA ECOSYSTEM (Apr. 2015).

[58] H.B. 15-1013, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2015) (adding COLO. REV. STAT. §§ 37-60-115(10), 37-92-305(18)); H.B. 12-1278, 68th Gen. Assemb. 2d Reg. Sess. (Colo. 2012).

directs the Division Engineer to analyze new augmentation plan applications that include recharge structures to consider the effect of the recharge structure on local groundwater levels.

C.R.S. section 37-60-115(6)[59] was amended to provide incentives for applicants for new residential subdivisions and planned unit developments to sponsor precipitation harvesting pilot projects by simplifying the determination of the amount of out of priority precipitation that must be replaced under a substitute water supply plan.

C.R.S. section 37-80-122[60] was added to create and operate a tributary groundwater monitoring network in the South Platte River alluvial aquifer to collect groundwater level data to assist the State Engineer's water planning and decision-making objectives.

High groundwater levels near the towns of Gilcrest and Sterling, Colorado, are flooding basements and septic systems, as well as damaging crops. To mitigate the damage, C.R.S. section 37-60-121(10)[61] was added to allow emergency pumping of wells to lower groundwater levels in those areas and to provide a grant to fund the program.

C.R.S. section 37-60-126(4)[62] was amended to promote water conservation practices in the land use planning process.

The augmentation requirements for wells withdrawing water from the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers were revised by repealing section 9(c) and amending section 9(c.5) of C.R.S. section 37-90-137.[63]

C.R.S. section 37-84-108[64] was amended to change the way irrigation tailwater ditches are administered by the State Engineer.

C.R.S. section 37-92-305(3)(d) and (e)[65] were added to clarify the way in which the historical consumptive use of a water right is quantified and to prohibit the re-quantification of historical consumptive use of water rights that have been previously quantified.

C.R.S. section 37-60-115(8)[66] was amended to modify and expand the Colorado Water Conservation Board's fallowing pilot program to allow an agricultural water right owner to lease an agricultural water right for temporary agriculture, environmental, industrial, or recreational use.

C.R.S. section 37-92-602(8)[67] was added to exempt certain storm water detention and infiltration facilities and post-wildland fire facilities from water rights administration

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[59]H.B. 15-1016, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2015) (amending COLO. REV. STAT. § 37-60-115(6)).

[60]H.B. 15-1166, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2015) (adding COLO. REV. STAT. § 37-80-122).

[61]H.B. 15-1178, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2015) (adding COLO. REV. STAT. § 37-60-121(10)).

[62]S.B. 15-008, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2015) (amending COLO. REV. STAT. § 37-60-126(4)).

[63]S.B. 15-010, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2015) (amending COLO. REV. STAT. § 37-90-137(9)(c.5) and repealing COLO. REV. STAT. § 37-90-137(9)(c)).

[64]S.B. 15-055, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2015) (amending COLO. REV. STAT. § 37-84-108).

[65]S.B. 15-183, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2015) (adding COLO. REV. STAT. § 37-92-305(3)(d), (e)).

[66]S.B. 15-198, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2015) (amending COLO. REV. STAT. § 37-60-115(8)).

[67]S.B. 15-212, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2015) (adding COLO. REV. STAT. § 37-92-602(8)).

as they are designed to quickly and effectively mitigate the adverse effects of storm water runoff without injuring water rights.

2. Judicial

The Colorado Supreme Court had a full plate of water cases before it in 2015. In *Tucker v. Town of Minturn*,[68] the court held that a non-attorney trustee cannot proceed *pro se* on behalf of the trust in opposing an application for reasonable diligence for a conditional water right.

In *San Antonio, Los Pinos and Conejos River Acequia Preservation Association v. Special Improvement District No. 1 of the Rio Grande Water Conservation District*,[69] the Colorado Supreme Court affirmed the water court's pre-trial orders and its judgment and decree upholding the annual replacement plan filed by the Special Improvement District No. 1. The court held that the objectors impermissively sought to resurrect issues previously decided by the court, that an annual replacement plan need not be stayed pending resolution of objections, that the Closed Basin Project water was a suitable and adequate source of replacement water, and that the plan's failure to include a separate list of augmentation plan wells did not render it invalid.

In a 5-2 decision in *St. Jude's Company v. Roaring Fork Club, L.L.C.*,[70] the court held that a direct flow right cannot be appropriated for aesthetic, recreational, and piscatorial purposes because they do not qualify as beneficial uses under Colorado law. The majority of the court likened the claimed uses as instream flow rights that could not be quantified to ensure the uses would be reasonably efficient as required by Colorado law.

In *Upper Black Squirrel Creek Ground Water Management District v. Cherokee Metropolitan District*,[71] a majority of the court affirmed the water court's interpretation of a stipulation between the parties that required Cherokee to use its best efforts to deliver waste water returns back into the designated basin for recharge to the aquifer. The court found that the stipulation upon its face did not prohibit Cherokee from attempting to derive some benefit from the reuse of foreign water it has developed, and that it was premature to interpret the stipulation as prohibiting such reuse.

A divided court in *Frees v. Tidd*[72] affirmed a water court judgment granting the Frees a conditional water right for a non-consumptive hydropower water right diverted from the same ditch in which the Tidds held a previously decreed direct flow water right. The court ruled that Colorado law favors multiple uses of water where no injury to senior water rights will occur. The dissent argued that the Tidds should not be permitted to appropriate the same water that had been previously appropriated and diverted by the Frees.

In the procedural decision of *East Cherry Creek Valley Water and Sanitation District v. Greeley Irrigation Company*,[73] the court held that this appeal was not properly before it under Colorado Rule of Civil Procedure 54(b) because the water court had not entered a final judgment on any discrete claim for relief in the litigation. In this change of water rights case, the court found that the determination of the amount of consumptive use water available to the applicant was a threshold inquiry, but did not constitute a decision on the entire claim, as the court has not yet made any determination on the

[68]359 P.3d 29 (Colo. 2015).
[69]351 P.3d 1112, 1120 (Colo. 2015).
[70]351 P.3d 442, 449-51 (Colo. 2015).
[71]351 P.3d 408, 413-14 (Colo. 2015).
[72]349 P.3d 259, 262, 267, 270 (Colo. 2015).
[73]348 P.3d 434, 442-43 (Colo. 2015).

conditions necessary to avoid injury to other decreed water rights from the change of use. Accordingly, the court found that the trial court erred in certifying under Rule 54(b) its determination of question of law under Rule 56(h).

In *Meridian Service Metropolitan District v. Ground Water Commission*,[74] the court rejected the district's attempts to appropriate new surface water rights within a designated groundwater basin. In rejecting the district's claims, the court found that the surface water was comprised of developed storm water which met the statutory definition of "designated groundwater" and was not subject to appropriation free from administration to benefit the groundwater users within the designated basin.

In *Colorado Water Conservation Board v. Farmers Water Development Company*,[75] the court held that the Colorado Water Conservation Board's decision to appropriate an instream flow water right is a quasi-legislative act as opposed to an adjudication of rights and therefore, due-process-based procedures did not apply.

In *Wolfe v. Jim Hutton Educational Foundation*,[76] the Colorado Supreme Court held that when the state proves that a water right holder has not used the decreed point of diversion for ten years or more, a rebuttable presumption of abandonment is established under C.R.S. section 37-92-402(11). Once the presumption is triggered, the burden shifts to the water right holder to demonstrate a lack of intent to abandon. In another abandonment case, *McKenna v. Witte*,[77] the court rejected the appellant's challenge to the water court's jurisdiction to enter a judgment of abandonment, holding that the division engineer's six-day delay in preparing the decennial abandonment list was not a jurisdictional mandate under C.R.S. section 37-92-401(1)(a). The court also affirmed the water court's determination of abandonment.

In *State Engineer v. Sedalia Water and Sanitation District*,[78] the court held that a prior change decree which quantified the historical consumptive use of a water right did not prevent the water court from considering the use of the water rights subsequent to the prior determination and that the water court was empowered to determine whether there had been a prolonged unjustified non-use of the water right that would warrant the selection of a revised representative period of time for calculating average annual consumptive use. The court's holding was effectively reversed by the Colorado legislature.[79] In *Widefield Water & Sanitation District v. Witte*,[80] the court, in considering another change application, held that a consumptive use analysis must be performed on the acreage described in the original decree for the water right. Here, a subsequent decree based its consumptive use determination on irrigation of 462 acres, whereas the original decree specifically found that the water right was appropriated to irrigate 350 acres. The court disregarded the effect of the subsequent decree because, under its terms, it never became effective.

3. Administrative

The Rules and Regulations Governing the Measurement of Ground Water Diversions located in the Republican River Basin within Water Division 1[81] (the Rules) were amended to: 1) modify the inclusion boundary to incorporate wells affecting the

[74]361 P.3d 392, 396-97 (Colo. 2015).
[75]346 P.3d 52 (Colo. 2015).
[76]344 P.3d 855, 857-58 (Colo. 2015).
[77]346 P.3d 35, 40-42 (Colo. 2015).
[78]343 P.3d 16 (Colo. 2015).
[79]S.B. 15-183, *supra* note 65.
[80]40 P.3d 1118, 1121, 1125 (Colo. 2014).
[81]COLO. CODE REGS. § 402-16 (2015).

Republican River Compact, primarily by extending the inclusion boundary to the southern boundary of Kit Carson County, including wells in the southern portions of the Plains Ground Water Management District; 2) provide standards regarding the minimum accuracy and application of the Power Conversion Coefficient as an alternate method of measurement; and 3) include additional definitions and language to clarify the Rules. The amended Rules became effective November 15, 2015, and wells within the new inclusion boundary must comply no later than April 1, 2016.

The final version of the first Colorado State Water Plan[82] (the Plan) was unveiled November 19, 2015. The Plan: (1) sets specific goals for conservation and additional water storage; (2) discourages "buy and dry" transactions that permanently take land out of agricultural production, favoring instances where farmers and ranchers sell their water to municipal utilities for a specific length of time that allows them to resume using the water themselves; (3) encourages local governments to combine their water planning and land use planning to reduce outdoor uses and encourage water recycling; and (4) encourages management plans for rivers and streams to keep their ecosystems healthy. Implementation of the Plan depends on the voluntary cooperation of local governments, water utilities and farmers and ranchers and on the cooperation between the eastern and western portions of the state, which are often at odds over water use.

E. Idaho

1. Legislative

House Bill 94 amended Idaho Code section 6-202 "to clarify that the provisions of Title 42 govern the actions taken by those who are required by law to maintain water delivery systems in safe operating condition and to prevent flooding."[83] In other words, the bill clarifies that water entities which "continue to face liability lawsuits for flooding events caused by old growth trees that fall over into waterways," cannot be "sued under the timber trespass statute, which was enacted for purposes other than governing water management."[84]

Senate Bill 1344 amended the Flood Control District Act "to clarify and further define a flood control district's authority to protect life and property from injury or damage resulting from flooding."[85] This legislation resolves questions that arose recently regarding the scope of work a flood control district is authorized to undertake.

2. Judicial

The Idaho Supreme Court decided *Mullinix v. Killgore's Salmon River Fruit Co.*,[86] a case involving the use of a pipeline across another's property to delivery water. The owners of Killgore acquired certain property in the 1960s, about twenty acres of which was subsequently conveyed to Mullinix (Killgore-Mullinix parcel). The court held "that Mullinix obtained a ditch right and a portion of the Joe Creek water right as appurtenances to the property when Mullinix was conveyed the Killgore-Mullinix parcel."[87] The court stated that "Mullinix's right to use the ditch extends to the

[82]COLO. WATER CONSERVATION BD., COLORADO'S WATER PLAN (2015).
[83]H.R. 94, 63d Leg., 1st Reg. Sess. (Idaho 2015) (Statement of Purpose).
[84]*Id.*
[85]S. 94, 62d Leg., 2d Reg. Sess. (Idaho 2014) (Statement of Purpose).
[86]346 P.3d 286 (Idaho 2015).
[87]*Id.* at 294.

pipeline."[88] Therefore, the court affirmed the district court's determination that Mullinix could tap Killgore's pipeline as it crossed the Killgore-Mullinix parcel to convey water from Joe Creek.

3. Administrative

In response to the Idaho Supreme Court case *In re SRBA, Case No. 39576, Subcase 00-91017*,[89] which held that the question of how a water right is filled or satisfied is a determination within the discretion of the Director of the Idaho Department of Water Resources (Director), the Director reinstated a previously stayed contested case to address objections to how water is counted or credited toward the fill of water rights for the federal on-stream reservoirs in Water District 63.[90] Numerous water users argued that federal reservoirs should be entitled to refill space vacated for flood control releases ahead of other water users even if the water right was previously filled or satisfied. The Director affirmed the current method of accounting for water rights and rejected the argument that federal reservoirs are entitled to refill space vacated for flood control purposes in priority if the water right was previously filled or satisfied.[91]

F. Kansas

1. Legislative

In Senate Bill 156, the Legislature enacted a new provision permitting water right owners to enter into an agreement with the Chief Engineer to establish "Water Conservation Areas" (WCA).[92] An owner or group of owners in an area where groundwater levels have declined or where the rate of withdrawal exceeds recharge can submit a "management plan" that includes voluntary goals and corrective control provisions, specific geographic boundaries, the proposed duration, and provisions allowing owners to be added or removed from the WCA. Unlike Intensive Groundwater Use Control Areas[93] and Local Enhanced Management Areas,[94] all water right owners within a WCA must consent.

2. Judicial

In *Garetson Bros. v. American Warrior, Inc.*, the Kansas Court of Appeals affirmed the district court's temporary injunction ordering a junior water right holder to stop pumping groundwater from the Ogallala aquifer in southwest Kansas.[95] Holding that the term "impair" is not ambiguous, the court used the dictionary definition to hold that injunctive relief is available to the senior if the junior right does or would diminish,

[88] *Id.* at 295.
[89] 336 P.3d 792 (Idaho 2014).
[90] In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63, Notice of Contested Case and Formal Proceedings, and Notice of Status Conference (Idaho Dep't of Water Res. Oct. 22, 2013).
[91] In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63, Amended Final Order (Idaho Dep't of Water Res. Oct. 20, 2015).
[92] S.B. 156, 86th Leg., Reg. Sess. (Kan. 2015).
[93] KAN. STAT. ANN. §§ 82a-1036 to -1040.
[94] KAN. STAT. ANN. § 82a-1041.
[95] 347 P.3d 687 (Kan. Ct. App. 2015).

"weaken, or injure the prior right."[96] A petition seeking review by the Kansas Supreme Court was denied January 25, 2016.[97]

3. Administrative

Staff from the Kansas Water Office and the Department of Agriculture, including the Division of Water Resources, published a *Long-Term Vision for the Future of Water Supply in Kansas* (Long-Term Vision) in January 2015.[98] The Division of Water Resources has increased its enforcement of overpumping and is preparing new enforcement regulations. It is also considering changes to regulations to implement portions of the Long-Term Vision.

G. Montana

1. Legislative

House Bill 36[99] allows the Montana Department of Natural Resources and Conservation (MDNRC) to reinstate an expired permit. The application to reinstate must be filed within two years of the expiration date and must provide clear and convincing evidence of excusable neglect. The reinstated permit is limited to the amount actually put to beneficial use prior to the permit's expiration.

House Bill 168[100] provides that the MDNRC rule defining a combined appropriation as two or more ground water developments that are physically manifold into the same system applies retroactively to any project, development, or subdivision in existence on or before October 17, 2014.

Senate Bill 57[101] revises the water adjudication account and the MDNRC's performance benchmarks.

Senate Bill 58[102] eliminates the statutory provision allowing the MDNRC to waive public notice of certain permit and change applications.

Senate Bill 262[103] ratifies the water right compact between the State of Montana, the Confederated Salish & Kootenai Tribes, and the United States. The Compact grants the Tribes' water rights both on and off of the Flathead Indian Reservation.

Senate Bill 330[104] amends the provisions relating to state water reservations and requires the MDNRC to review any state water reservation that has not been reviewed within the last ten years.

Senate Bill 361[105] clarifies that any a person with an ownership interest in an existing water right, permit, certificate, state water reservation, or a right to receive water through an irrigation project that has been affected by a water court decree has standing to file an objection in the statewide water adjudication.

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[96] *Id.* at 699.
[97] *See* Petition for Review, Garetson Bros. v. Am. Warrior, Inc., No. 111975 (Kan. filed May 1, 2015).
[98] KAN. WATER OFFICE AND KAN. DEP'T OF AGRIC., A LONG-TERM VISION FOR THE FUTURE OF WATER SUPPLY IN KAN. (Jan. 2015).
[99] H.B. 36, 64th Leg. 2015 Reg. Sess. (Mont. 2015).
[100] H.B. 168, 64th Leg., 2015 Reg. Sess. (Mont. 2015).
[101] H.B. 57, 64th Leg., 2015 Reg. Sess. (Mont. 2015).
[102] H.B. 58, 64th Leg., 2015 Reg. Sess. (Mont. 2015).
[103] S.B. 262, 64th Leg., 2015 Reg. Sess. (Mont. 2015).
[104] S.B. 330, 64th Leg., 2015 Reg. Sess. (Mont. 2015).
[105] S.B. 361, 64th Leg., 2015 Reg. Sess. (Mont. 2015).

2. Judicial

In *In re Crow Water Compact*,[106] the Montana Supreme Court ruled the water court did not exceed its jurisdiction by dismissing the allottees' objections to the Crow Tribe Compact. The court ruled the water court properly applied federal law when determining the allottees have water rights derived from the reserved rights of the Crow Tribe and are entitled to a just and equitable share of the Tribe's rights.

In *Teton Cooperative Reservoir Company v. Farmers Cooperative Canal Company*,[107] the Montana Supreme Court ruled that prior to July 1, 1973, storage may be added to direct flow water rights as long as other appropriations are not harmed, water is not stored at a rate exceeding the volumetric flow rate allowed by the direct flow right, and water is not stored outside of the diversion period allowed by the direct flow right.

3. Administrative

The MDNRC amended rules[108] regarding the state water reservations.

H. Nebraska

1. Legislative

Nebraska's unique one chamber legislature, the Unicameral, adopted few bills relating to water resources. Significantly, it modified the funding process for the Water Sustainability Fund (WSF) it created in 2014. In Legislative Bill 661,[109] the legislature transferred from the WSF to the old Resources Development Fund, $3 million in 2015 and $3 million in 2016 for previously approved projects.

The legislature also adopted Legislative Bill 561,[110] which updated the statutes governing irrigation districts by, among other things, authorizing the election of irrigation district board members through voting by mail.

2. Judicial

In *In re Appropriation A-7603*,[111] the Department of Natural Resources began a case against the holder of an irrigation right on the basis that the right had not been used for its authorized purpose for more than five consecutive years. The land served by the right and the right itself were owned by a trust. The trust sought to maximize its net income by leasing the land for a cattle operation and argued that its obligation under the Uniform Trust Code prevented it from entering into a lease that would have required the use of the irrigation right for the production of crops. The court rejected this argument. The trust also argued that based upon good husbandry, it was not expected to use the water because of the cattle operation. The court rejected this argument, finding that a cattle operation is not a beneficial use of a water right issued for irrigation purposes.

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[106]354 P.3d 1217, 1222-23 (Mont. 2015).
[107]354 P.3d 579 (Mont. 2015).
[108]Notice of Amendment and Repeal, 20 MONT. ADMIN. REG. 36-22-181 (Mont. Sec'y of State Oct. 29, 2015).
[109]L.B. 661, 104th Leg., 1st Reg. Sess. (Neb. 2015).
[110]L.B. 561, 104th Leg., 1st Reg. Sess. (Neb. 2015).
[111]868 N.W.2d 314 (Neb. 2015).

I. Nevada

1. Legislative

Passed during the 2015 Nevada Legislative Session, Assembly Bill 435[112] split the judicial districts presiding over Northern Nevada's Humboldt River Decree. Assembly Bill 435 adds a new judicial district to Nevada and reorganizes the counties making up certain judicial districts. The reorganization called into question which court will preside over the Humboldt River Decree. Assembly Bill 435 was updated to specifically address this issue. The law provides that cases falling under the jurisdiction of the Humboldt River Decree Court will alternate between the Sixth and Eleventh Judicial Districts, and between the sitting judges in each district.

2. Judicial

On September 18, 2015, in *Eureka County v. State Engineer*,[113] the Nevada Supreme Court issued a ruling regarding a district court's denial of judicial review. The appeal involved the State Engineer's post final order development of a Monitoring, Management, and Mitigation Plan (3M Plan) as a way to alleviate impacts to existing water rights of a mine's water use applications approved by the State Engineer. The Nevada Supreme Court reversed the district court, finding the mine would deplete certain spring sources and stated there is not merely an "impact" but a "conflict" with existing rights, something the State Engineer failed to properly consider. The court ruled that while a 3M Plan may be a way to remedy potential "impacts" to existing rights, there was no evidence before the State Engineer or the district court that the mine had obtained a substitute water supply or mitigation rights because no complete 3M Plan was developed. The court ruled that allowing the State Engineer to grant applications conditioned upon development of a future 3M Plan, when the resulting water appropriations would otherwise conflict with existing rights, violates ones' rights to a full and fair hearing on the matter. The matter was remanded back to the district court for further proceedings.

On September 24, 2015, in *Benson v. State Engineer*,[114] the Nevada Supreme Court issued an opinion re-defining the futility exception under the administrative exhaustion doctrine as applied to Nev. Rev. Stat. § 533.395 and water right permit cancellation. The appellant's water use was cancelled for failure to timely file an application for extension of time to file proof of beneficial use. The district court dismissed the appeal for failure to exhaust administrative remedies pursuant to section 533.395. The Nevada Supreme Court affirmed the district court's decision dismissing the petition. The court adopted a new, much narrower view of futility than previously defined and determined that although the State Engineer could only have issued a new permit with a new priority date, this was an adequate remedy.

J. New Mexico

1. Legislative

The New Mexico Legislature amended the Water Code to require that hearings be conducted "in the county in which the water right at issue is located."[115] Before the

[112] A.B. 435, 2015 Leg., 78th Sess. (Nev. 2015).
[113] 359 P.3d 1114 (Nev. 2015).
[114] 358 P.3d 221 (Nev. 2015).
[115] S.B. 276, 52d Leg., 1st Reg. Sess. (N.M. 2015).

amendment, the State Engineer frequently ordered hearings in the capital, Santa Fe, which required significant travel for many applicants, opponents, and witnesses for hearings. The hearing still can be set in Santa Fe, but only if the parties and the State Engineer stipulate to that location.

K. North Dakota

1. Judicial

For the past several years, North Dakota has been litigating various issues related to mineral title under navigable waterways. Since the decision in *Reep v. State*,[116] which affirmed the state's position that it owned the minerals up to the ordinary high watermark (OHWM), the Land Board has asked the State Engineer for an OHWM delineation "for parts of the Missouri River affected by or reasonably anticipated to be affected by pending sovereign lands litigation."[117]

In *Wilkinson v. Board of University & School Lands*,[118] the legal issue is whether the state's claim to sovereign lands is limited to the historic OHWM of the Missouri River before inundation of Lake Sakakawea due to construction of Garrison Dam or whether sovereign title extends to the current OHWM. The Wilkinson property is located in the twenty-five-mile study overlap area, but the state claims title to the current OHWM. This suit was initially filed in state court as a quiet title action, but the complaint was amended in 2014 to add claims of unconstitutional takings, conversion, constructive trust, unjust enrichment, civil conspiracy, and a 42 U.S.C. § 1983 claim. The main cause of action in the amended complaint is a request for declaratory relief in which the plaintiffs request the court find that the state does not own the minerals above the historical OHWM. The case is scheduled for trial in 2016.

In *EEE Minerals, LLC v. Continental Resources, Inc.*,[119] with a nearly identical complaint as *Wilkinson*, the owner of the parcel across the river from the Wilkinson tract filed a class action with a proposed class of all the owners in the twenty-five-mile study overlap area. This issue—the effect of Lake Sakakawea on the state's claim to the minerals under the Missouri River—is central to several other district court cases, including: *Whitetail Wave LLC v. XTO Energy, Inc.*;[120] *Statoil Oil & Gas, LP v. Abaco Energy, LLC*;[121] and *Starin v. Schmidt*.[122]

L. Oklahoma

1. Judicial

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[116]841 N.W.2d 664 (N.D. 2013).
[117]Minutes of the Meeting of the Bd. of University and School Lands at 1048 (Oct. 29, 2015) (on file with the N.D. State Water Comm'n).
[118]Amended Complaint, Wilkinson v. Bd. of Univ. & Sch. Lands, No. 53-2012-CV-00038 (N.D. Dist. Ct. filed July 1, 2014) (on file with the author).
[119]No. 27-2014-CV-00282 (N.D. Dist. Ct. filed July 29, 2014) (on file with the author).
[120]Complaint and Demand for Jury Trial, Whitetail Wave LLC v. XTO Energy Inc., No. 27-2015-CV-00164 (N.D. Dist. Ct. June 4, 2015) (on file with the author).
[121]Complaint, Statoil Oil & Gas, LP v. Abaco Energy, LLC, No. 53-2015-CV-00744 (N.D. Dist. filed June 23, 2015) (on file with the author).
[122]Amended Complaint, Starin v. Schmidt, No. 53-2015-CV-00986 (N.D. Dist. filed Aug. 18 2015) (on file with the author).

The District Court of Oklahoma County affirmed an order of the Oklahoma Water Resources Board (OWRB) in *Oklahoma Farm Bureau Legal Foundation v. Oklahoma Water Resources Board*,[123] which embodied the state's first implementation of Senate Bill 288,[124] enacted in 2003. Here, the OWRB's order set the maximum amount of groundwater which may be withdrawn annually under permits from the Arbuckle-Simpson, a sensitive sole source groundwater basin as defined in Oklahoma Statutes section 1020.9A.[125] Where temporary permits had previously authorized the withdrawal of up to two acre-feet per acre of land overlying the aquifer,[126] the OWRB's order limited that amount to 0.2 acre-feet per acre. Those challenging the order argued that such a restriction on the use of groundwater was a de facto "taking" that required compensation under the Oklahoma and United States constitutions. The district court disagreed. Appeal has been taken to the Oklahoma Supreme Court.

In *Sharp Drilling Co. v. Oklahoma Water Resources Board*,[127] a water well drilling company challenged an administrative rule defining "fresh water" in the context of groundwater as water containing less than 5,000 parts per million total dissolved solids (TDS).[128] The drilling company challenged the rule after the OWRB directed it to abandon and plug a newly-drilled drinking water well which tested at more than 8,000 parts per million TDS. The drilling company argued that fresh groundwater was defined elsewhere in state regulations, including in the OWRB's Groundwater Quality Standards, as water containing less than 10,000 parts per million total dissolved solids.[129]

The OWRB argued that its authority to regulate commercial drilling of groundwater wells was derived from the Oklahoma Groundwater Law,[130] which also defined fresh groundwater as water containing less than 5,000 parts per million TDS.[131] The OWRB further argued that the regulations cited by the drilling company were intended to govern different commercial activities, such as oil and gas drilling and power plant operation, and did not permit groundwater with more than 5,000 parts per million TDS to be used for drinking water supply.[132] The District Court of Oklahoma County upheld the OWRB's rule. The decision was not appealed.

M. Oregon

1. Legislative

Senate Bill 266[133] allows the Oregon Water Resources Department (OWRD) to issue grants to facilitate preparation of place-based integrated water resources strategies

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[123]No. CV-2013-2414 (Okla. Dist. Ct. Oct. 7, 2015) (judgment) (on file with the author).
[124]S.B. 288, 2003 Leg. (Okla. 2003) (codified at OKLA. STAT. tit. 82, §§ 1020.9A, 1020.9B, 1020.9(A)(1)(d)).
[125]OKLA. STAT. tit. 82, § 1020.9A (2015).
[126]*See* OKLA. STAT. tit. 82, § 1020.11(B)(2) (2015) ("[T]he water allocated by a temporary permit shall not be less than two (2) acre-feet annually for each acre of land owned or leased by the applicant in the basin or subbasin.").
[127]No. CS-2015-5468 (Okla. Dist. Ct. Oct. 29, 2015) (order) (on file with the author).
[128]OKLA. ADMIN. CODE § 785:30-1-2 (2015).
[129]*See* OKLA. ADMIN. CODE § 785:45-1-2 (2015) (definition of "fresh groundwater").
[130]OKLA. STAT. tit. 82, §§ 1020.1-1020.22 (2015).
[131]OKLA. STAT. tit. 82, § 1020.1(7) (2015).
[132]*See* OKLA. ADMIN. CODE § 785:45-7-3(b)(2)(B) (2015) (list of beneficial use designations for groundwater with 5,000 to 10,000 parts per million TDS does not include drinking water supply).
[133]S.B. 266, 78th Leg. Assemb., 2015 Reg. Sess. (Or. 2015).

to fund communities' work toward meeting their in-stream and out-of-stream water resources needs. House Bills 5005[134] and 5030[135] provide funding for the grants authorized in Senate Bill 266.

Senate Bill 267[136] extends the irrigation district pilot program that allows districts to change the place of use for water use rights within district boundaries for one season without applying for a transfer. It adds a public notice requirement and sunsets January 2022.

Senate Bill 206[137] allows for temporary lease or transfer of upper Klamath Basin water use rights as preliminarily determined by the OWRD's Findings of Fact and Order of Determination in the Klamath Basin Adjudication while judicial review is pending in Klamath County Circuit Court. This transfer authority will expire in 2026.

Senate Bill 264[138] authorizes the OWRD to participate in activities related to a joint management entity to carry out the Upper Klamath Basin Comprehensive Agreement.[139] The Upper Klamath Basin Comprehensive Agreement has not been approved or funded by Congress to date, and therefore it is not currently in effect.

Senate Bill 319[140] requires authorization from the Department of State Lands to construct or operate renewable energy facilities in Oregon's territorial sea. The bill removes the requirement that wave energy projects undergo OWRD hydroelectric permit and licensing except in certain instances.

House Bill 2400[141] clarifies that the OWRD may condition existing water right permits for seasonally varying flows for certain storage projects funded by the Senate Bill 839[142] Water Supply Development Account.

House Bill 3400[143] modifies Measure 91 (legalizing recreational marijuana) and establishes a task force to study Environmental Best Practices for the use of electricity, water, and study of agricultural practices associated with growing cannabis. The task force will include a member of the OWRD.

2. Judicial

On December 31, 2014, in *WaterWatch of Oregon, Inc. v. Water Resources Department*,[144] the Oregon Court of Appeals issued a ruling on WaterWatch's appeal of OWRD's final orders granting municipal permit extensions on the Clackamas River. The court ruled that the OWRD's permit conditions (included to satisfy Or. Rev. Stat. § 537.230(2)) were not supported by substantial evidence or reason. Section 537.230(2) requires the undeveloped portions of municipal water use permits be conditioned to "maintain, in the portions of waterways affected by water use under the permit, the persistence of fish species listed as sensitive, threatened or endangered under state or federal law."[145] The court determined the OWRD's conditions allowed short-term

[134]H.B. 5005, 78th Leg. Assemb., 2015 Reg. Sess. (Or. 2015).
[135]H.B. 5030, 78th Leg. Assemb., 2015 Reg. Sess. (Or. 2015).
[136]S.B. 267, 78th Leg. Assemb., 2015 Reg. Sess. (Or. 2015).
[137]S.B. 206, 78th Leg. Assemb., 2015 Reg. Sess. (Or. 2015).
[138]S.B. 264, 78th Leg. Assemb., 2015 Reg. Sess. (Or. 2015).
[139]KLAMATH TRIBES, UPPER KLAMATH BASIN COMPREHENSIVE AGREEMENT (Apr. 18, 2014).
[140]S.B 319, 78th Leg. Assemb., 2015 Reg. Sess. (Or. 2015).
[141]H.B. 2400, 78th Leg. Assemb., 2015 Reg. Sess. (Or. 2015).
[142]S.B. 839, 77th Leg. Assemb., 2013 Reg. Sess. (Or. 2013).
[143]H.B. 3400, 78th Leg. Assemb., 2015 Reg. Sess. (Or. 2015).
[144]342 P.3d 712 (2014).
[145]OR. REV. STAT. § 537.230(2)(c) (2015).

deviations from the recommended flows to maintain the persistence of identified fish species, and substantial evidence in the record did not support a finding that those conditions would maintain long-term fish persistence.[146] The court reversed and remanded the final orders to the OWRD for further consideration of the fish persistence conditions.[147]

On February 5, 2015, the Oregon Supreme Court dismissed the City of Cottage Grove's appeal of the December 31, 2014 Court of Appeals ruling stating only that "[t]he petition for review is dismissed as improvidently allowed."[148] In the underlying decision issued on December 11, 2013,[149] the Oregon Court of Appeals found the OWRD erred by granting the City of Cottage Grove an extension to perfect its water use permit because the OWRD did not condition the permit extension under section 537.230 to maintain the persistence of certain fish species and to develop a water management and conservation plan. The OWRD has revoked the certificate previously issued to the City in accordance with the Oregon Court of Appeal's opinion.

3. Administrative

On July 27, 2015, Governor Kate Brown issued Executive Order 15-09,[150] directing state agencies to plan for resilience to drought in order to meet the challenges of a changing climate.

Oregon Administrative Rules 690-093-0010 to 690-093-0200 establish rulemaking to implement Senate Bill 839 and became effective on July 2, 2015. The rules establish a process for applicants to receive a grant or loan from the OWRD for a water development project under Senate Bill 839.[151]

Oregon Administrative Rule 690-025-0010 implements sections 3.11.3 through 3.11.9 of the Upper Klamath Basin Comprehensive Agreement. The agreement has not been approved or funded by Congress to date, and therefore it is not in effect. However, the Water Resources Commission enacted rules that create a new process for determining how water use from a groundwater well could cause substantial interference with surface water uses and provides the OWRD authority to control well use if it is determined that use has the potential to cause substantial interference with surface water.[152]

N. South Dakota

No significant state developments were reported for South Dakota in 2015.

O. Texas

1. Legislative

The Texas Legislature held its 84th regular session in 2015, which produced several important pieces of legislation relating to groundwater resources and regulation

[146] *WaterWatch of Or.*, 342 P.3d at 727-32.
[147] *Id.* at 737.
[148] Order of Dismissal, WaterWatch of Or., Inc. v. Water Res. Dep't, No. S062036 (Or. Feb. 5, 2015).
[149] WaterWatch of Or., Inc. v. Water Res. Dep't, 316 P.3d 330, 332 (Or. Ct. App. 2013).
[150] Office of the Gov., State of Or., Exec. Order No. 15-09 (July 27, 2015).
[151] OR. ADMIN. R. 690-093-0010 to 690-093-0200 (2015); S.B. 839, *supra* note 142.
[152] OR. ADMIN. R. 690-025-0010.

and the desalination of marine seawater. House Bill 30[153] (H.B. 30) requires the Texas Water Development Board (TWDB) to study the development of brackish groundwater, including the identification and designation of brackish groundwater production zones that can be used to significantly reduce the use of fresh groundwater. The TWDB must determine amounts of brackish groundwater that may be produced in a zone over a thirty- and fifty-year period. H.B. 30 also requires regional planning groups to identify opportunities for, and the benefits of, developing large-scale desalination facilities for seawater or brackish groundwater in designated zones.

House Bill 200[154] amends the chapter of the Texas Water Code governing local groundwater conservation districts to define "best available science" and to require that districts use it to protect property rights and balance the development and conservation of groundwater to meet the needs of the state. It also establishes a new contested case hearing process for the administrative appeal of a "Desired Future Conditions" (DFC) for an aquifer (adopted by groundwater districts through required joint planning) and also allows the judicial appeal of an order of a district adopting a DFC.

House Bill 655[155] amends the Texas Water Code to authorize a surface water right holder to undertake an "aquifer storage and recovery project" (ASR) without the need for an additional surface water right amendment. It also amends the Texas Water Code to give the Texas Commission on Environmental Quality (TCEQ) exclusive jurisdiction over the regulation and permitting of ASR injection wells (at the expense of the jurisdiction of local groundwater conservation districts) and to establish the technical standards and the processes for review of these projects.

House Bill 2031 (H.B. 2031)[156] and House Bill 4097 (H.B. 4097)[157] both relate to the development of marine seawater desalination. H.B. 2031 amends the Texas Water Code to exempt the diversion and use of marine seawater with a Total Dissolved Solids (TDS) of less than 20,000 mg/l from permitting requirements. H.B. 2031 directs the TCEQ to allow bed and banks authorizations for the movement of marine seawater by notice and an opportunity to be heard. H.B. 2031 also amends the Texas Water Code and the Texas Health and Safety Code to further encourage marine seawater desalination projects by providing authorization to political subdivisions for marine seawater projects, to further define the jurisdiction of state agencies over these projects, and to require streamlined permitting processes for them.

H.B. 4097 amends the Health and Safety Code to require TCEQ to adopt rules for the use of desalinated seawater for non-potable uses. It also amends the Texas Utilities Code to require a study of infrastructure needs for the transmission of desalinated seawater and the demand response potential of seawater desalination projects. H.B. 4097 further amends the Texas Water Code to authorize diversions of water from the Gulf of Mexico for industrial purposes without notice or an opportunity for a contested case hearing. Under H.B. 4097, water availability requirements are waived, and the TCEQ must evaluate whether any proposed diversion is consistent with environmental flow standards. Chapter 26 of the Texas Water Code is amended to establish procedures for the issuance of permits to dispose of brine into the Gulf of Mexico from the desalination of seawater as part of an industrial process. Chapter 27 of the Texas Water Code is amended to authorize a general permit for an injection well for the disposal of brine produced by the desalination of seawater.

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[153]H.B. 30, 84th Leg., Reg. Sess. (Tex. 2015).
[154]H.B. 200, 84th Leg., Reg. Sess. (Tex. 2015).
[155]H.B. 655, 84th Leg., Reg. Sess. (Tex. 2015).
[156]H.B. 2031, 84th Leg., Reg. Sess. (Tex. 2015).
[157]H.B. 4097, 84th Leg., Reg. Sess. (Tex. 2015).

Senate Bill 854[158] amends the chapter of the Texas Water Code governing groundwater conservation districts to require that such districts automatically renew a production permit, provided that prescribed conditions are met.

2. Judicial

Texas Commission on Environmental Quality v. Texas Farm Bureau[159] involved the TCEQ's Drought Rules to implement Tex. Water Code Ann. § 11.053. Under the Drought Rules, the TCEQ could enforce priority calls by senior water rights holders by curtailing junior rights to make water available for seniors. However, the Drought Rules also allow the TCEQ to not "suspend the use of certain [junior] water rights designated for use as municipal water supplies or for electric power generation, based on public health, safety and welfare concerns."[160] The district court declared the TCEQ's Drought Rules invalid, and the court of appeals agreed, holding the TCEQ exceeded its statutory authority when it adopted rules allowing the agency to exempt certain preferred junior water rights from priority calls. The court of appeals held that any curtailment of water rights in times of drought must be accomplished in accordance with the statutory provision establishing the priority of water rights as between appropriators which is "first in time, first in right."[161] The court of appeals also held the TCEQ's "police power and general authority does not allow TCEQ to exempt junior preferred water rights from suspension based on public health, safety, and welfare concerns."[162] The TCEQ has sought discretionary review with the Texas Supreme Court, which has asked for briefing on the merits.

Environmental Processing Systems, L.C. v. FPL Farming Ltd.[163] concerned a lawsuit brought by rice farmer FPL Farming, Ltd. (FPL Farming) against Environmental Processing Systems (EPS), alleging that wastewater from EPS's deep subsurface injection well had "possibly contaminat[ed] the briny groundwater beneath" the FPL Farming's property.[164] One question presented was "whether deep subsurface wastewater migration is actionable as a common law trespass in Texas."[165] The court held that lack of consent is an element of a property owner's trespass claim, rather than an affirmative defense, and thus the FPL Farming had the burden to prove its lack of consent to the alleged intrusion. The court then reasoned that because the jury charge included lack of consent as an element of the cause of action and resulted in a jury verdict and judgment in favor of EPS, any error in submitting the trespass question about a possible deep subsurface water migration was harmless. Thus, the court sidestepped for now the issue of whether Texas law recognizes a trespass cause of action for deep subsurface wastewater migration.

3. Administrative

[158]S.B. 854, 84th Leg., Reg. Sess. (Tex. 2015).
[159]460 S.W.3d 264 (Tex. Ct. App. 2015).
[160]*Id.* at 267.
[161]*Id.* at 272-73.
[162]*Id.* at 273.
[163]457 S.W.3d 414 (Tex. 2015).
[164]*Id.* at 417.
[165]*Id.* at 416.

In July 2015, the TWDB approved the inaugural round of funding from the State Water Implementation Fund for Texas (SWIFT) financial assistance program.[166] To date, the Board has approved requests from twenty-one applicants for approximately $1 billion in projects in the first year and totaling approximately $3.9 billion over the next decade. The types of projects include transmission pipelines, canal linings, capacity expansions, seawater desalination, leak detection systems, water meter replacements, reservoirs, and include conservation, agricultural, and rural projects.

P. Utah

1. Legislative

House Bill 25[167] (H.B. 25) modifies the change application procedure. This bill is in response to the 2011 Utah Supreme Court decision, *Jensen v. Jones*,[168] which concluded that the state engineer did not have the authority to consider prior non-use of a water right as a justification for denying a change application. H.B. 25 now gives the state engineer specific statutory authority to do so. The bill allows a water right holder to begin the change application process by requesting a consultation with the state engineer or his designee for a non-binding discussion about potential issues, including potential forfeiture issues, which are encompassed within the newly defined term "quantity impairment." If the state engineer or another party alleges a quantity impairment issue, the applicant has the burden of proving that there is not any quantity impairment. The bill also allows a change to be approved even if other vested water rights are impaired in certain circumstances, including adequate mitigation or just compensation.

House Bill 43[169] modifies the rules by which a shareholder in a mutual water company may file a change application without the company's permission. This bill was meant to deal with the concern that a water company could simply ignore a shareholder's request for approval to file a change application. Previously, a failure to respond was presumed under the statute to be a denial. This bill changes that presumption, so that a failure to respond is considered to be consent that the shareholder may file the change application. The bill also holds that the shareholder and the company may negotiate for a buyout of the individual's pro rata share of the company's water right.

House Bill 58[170] provides a more coherent definition of who may file a change application by defining "a person entitled to the use of water," as used in statute. The definition includes: (1) "the holder of an approved but unperfected application to appropriate water;" (2) "the record owner of a perfected water right;" (3) a person who has written authorization from one of the foregoing two types of people, or (4) "a shareholder in a water company who is authorized to file a change application in accordance with [Utah Code Ann.] [§] 73-3-3.5" (the shareholder change application statute). This bill was passed in response to the 2011 Utah Supreme Court decision, *Salt Lake City Corp. v. Big Ditch Irrigation Co.*,[171] which held that an entity that merely had a

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[166]*State Water Implementation Fund for Texas (SWIFT)**, TEX. WATER DEV. BD., http://www.twdb.texas.gov/financial/programs/swift/index.asp (last visited Mar. 5, 2016).
[167]H.B. 25, 61st Leg., 2015 Gen. Sess. (Utah 2015) (amending UTAH CODE ANN. §§ 73-2-27, 73-3-3, 73-3-8 (2015)).
[168]270 P.3d 425 (Ut. 2011).
[169]H.B. 43, 61st Leg., 2015 Gen. Sess. (Utah 2015) (amending UTAH CODE ANN. §§ 73-1-4, 73-2-27, 73-3-3, 73-3-3.5 (2015)).
[170]H.B. 58, 61st Leg., 2015 Gen. Sess. (Utah 2015) (amending UTAH CODE ANN. § 73-3-3 (2015)).
[171]258 P.3d 539 (Utah 2011).

contractual right to *use* the water may, in certain instances, be entitled to file a change application. Under this new law, such an entity would have to either first obtain written authorization from the record owner of the water right or the holder of the approved but unperfected application to appropriate water.

Senate Bill 15[172] clarifies that, if the owner of a water right is diligently pursuing certification of an approved change application, the period of nonuse of the water during this time does not count against the owner for purposes of abandonment and forfeiture of water rights under Utah Code Ann. § 73-1-4.

Senate Bill 40[173] amends a provision of the water appropriation statutes to allow an applicant to withdraw an unperfected application for the right to use water or to change the use of water by notifying the state engineer in writing. The withdrawing applicant is not entitled to a refund of fees. Upon receipt of the application withdrawal, the state engineer must promptly update the records to reflect the withdrawal and that the application "is of no further force or effect."[174]

Senate Concurrent Resolution 2[175] is a concurrent resolution of the legislature and the governor that declares support for the negotiated settlement of federal reserve water rights, particularly the state of Utah/Navajo Nation Reserved Water Rights Settlement. It was proposed by a negotiating committee composed of Navajo Nation and Utah representatives which, at the time of passage, was being considered by a United States negotiating team.

Q. Washington

1. Judicial

Washington state appellate courts issued three significant water law decisions this year. In *Cornelius v. Washington State Department of Ecology*,[176] the Washington Supreme Court rejected an "as-applied" constitutional challenge to Washington's 2003 Municipal Water Law (MWL). The legislature adopted the MWL in 2003 to resolve ambiguity in Washington statutes over what rights qualify as "municipal" water rights that are exempt from statutory relinquishment for non-use.[177] In *Cornelius*, the appellant asserted that the MWL violated his due process rights and the separation of powers by purportedly re-defining water rights held by Washington State University (WSU) as "municipal" water rights that were exempt from statutory relinquishment. The appellant argued that these legislative amendments operated to the detriment of his junior water rights because they retroactively revived WSU's water rights that had not been put to full beneficial use for several decades.

The court concluded that the MWL did not violate separation of powers, even when applied retroactively, because it merely confirmed existing rights and did not disturb previously litigated adjudicative facts. Similarly, the court rejected the due process claims, holding that "it is the legislature's prerogative to categorize water uses and decide which categories will be relinquished by nonuse."[178] The court also found that

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[172]S.B. 15, 61st Leg., 2015 Gen. Sess. (Utah 2015) (amending UTAH CODE ANN. § 73-1-4 (2015)).
[173]S.B. 40, 61st Leg., 2015 Gen. Sess. (Utah 2015) (amending UTAH CODE ANN. § 73-3-6 (2015)).
[174]UTAH CODE ANN. § 73-3-6(3)(b) (2015).
[175]S. Con. Res. 2, 61st Leg., 2015 Gen. Sess. (Utah 2015).
[176]344 P.3d 199 (Wash. 2015).
[177]WASH. REV. CODE § 90.03.015 (2015).
[178]*Cornelius*, 344 P.3d at 209.

WSU should not be barred from using inchoate portions of its rights because WSU prosecuted its water right with reasonable diligence because of its unique situation as a large public institution and based on the development of its rights throughout the decades.

In *Foster v. Washington State Department of Ecology*,[179] the Washington Supreme Court held that the Washington State Department of Ecology (Department) exceeded its authority when it issued a new municipal water right to the City of Yelm that impaired minimum in-stream flows. In issuing the challenged permit, the Department relied on a statutory exception that allows new withdrawals to impair in-stream flows when there are "overriding considerations of public interest" (OCPI). The court rejected the Department's rationale, concluding that the OCPI exception does not allow for permanent impairment of in-stream flows by the newly-granted water right and instead only allows for impairment by temporary withdrawals. In addition the court rejected the Department's conclusion that the application of the OCPI exception was supported by "extraordinary circumstances." At the time of publication, the court is still considering motions for reconsideration.

Finally, in *Whatcom County v. Western Washington Growth Management Hearings Board*,[180] the Washington Court of Appeals addressed a growing legal and policy dilemma over small domestic wells ("permit-exempt groundwater withdrawals") that are exempt from the water rights permitting process, including the Department's standard pre-approval impairment analysis. Several interest groups seeking to protect in-stream resources in Whatcom County from permit-exempt withdrawals argued that a state land use statute known as the Growth Management Act requires counties to restrict or prohibit development relying on permit-exempt withdrawals in areas where in-stream flows are not met, as it directs counties to adopt "measures that apply to rural development and protect the rural character" by protecting "surface water and groundwater resources," among other things.[181] The petitioners prevailed before the Growth Management Hearings Board, but the court of appeals reversed. The case is on appeal before the supreme court, which heard oral argument on October 20, 2015, and a decision is forthcoming.[182]

2. Administrative

In response to record low snow pack and precipitation in 2015, Governor Jay Inslee authorized the Department to declare a drought emergency statewide on May 15, 2015. The Department's director issued an Order[183] authorizing the Department to issue emergency permits for water, approve temporary transfers of water rights, provide funding assistance to public agencies to alleviate drought conditions, and take other actions. The Order expanded an earlier regional drought declaration. While fall and winter rains have improved reservoir storage at the end of 2015, snowpack is anticipated to remain below normal and the drought is predicted to extend into a second year. Accordingly, the Department is preparing to continue drought relief efforts in 2016.

R. Wyoming

[179]362 P.3d 959, 962, 969-70 (Wash. 2015).
[180]344 P.3d 1256 (Wash. Ct. App. 2015).
[181]*Id.* at 1262, 1277.
[182]Oral Argument, Whatcom Cnty. v. W. Washington Growth Mgmt. Hearings Bd., *available at* http://www.tvw.org/watch/?customID=2015100005.
[183]Maia D. Bellon, Dir., Wash. Dept. of Ecology, Order and Determination By the Director (May 21, 2015).

1. Legislative

During its 2015 session, the Wyoming State Legislature passed two Omnibus water bills—a water planning bill[184] and a bill relating to water development projects approved for final construction.[185]

A Wyoming water development program statute was amended to grant authority, with the governor's approval, to allow the state to enter into contracts and agreements with the federal government to accept federal funds through grants or matching funds for project costs related to utilization of Wyoming's water resources.[186]

Additionally, Senate Files 12[187] and 80[188] created laws and penalties for trespass on private property to collect resource data without landowner permission, including water resource data. Resource data collected in violation of this law in the possession of any governmental entity must be expunged from all agency files and databases, and cannot be considered in any agency action.[189]

2. Judicial

In re the General Adjudication of all Rights to Use Water in the Big Horn River System[190] involved ongoing general adjudication of water rights in the river system, which began in 1977. Following a hearing on an objection from a neighboring landowner, the Special Master recommended the district court adjudicate the right to irrigate 52 of 207 acres covered by a permit for lands owned by Hat Bar Cattle Company. The district court adopted the Special Master's Report and Recommendation and adjudicated Hat Bar's water rights. The neighbor appealed. The Wyoming Supreme Court held that "[t]he evidence as a whole and the reasonable inferences taken from it provide[d] sufficient support for the Special Master's finding that the Hat Bar [land] was 'continuously irrigated' over the years" and that the Special Master correctly imposed the burden of proof on Hat Bar, despite the Special Master's misstated conclusions of law in the Report and Recommendation.[191]

Platt v. Platt involved an action for partition of a family ranch property.[192] At issue was the trial court's order requiring construction of a new ditch on lands not subject to the partition proceedings to carry water to appellant's partitioned parcel of land.[193] The Wyoming Supreme Court held, among other things, that even if the trial court had the power to order landowners of the partitioned property to obtain an easement for construction of a ditch to carry water to one portion of the property, the evidence was insufficient to support a finding that an adequate easement could be obtained and that partition would not result in a manifest injury to the value of the property.[194] The court further found the trial court was required to determine whether the landowners could obtain approval to change the means of conveyance for the water received in partition before it could order that a particular proposed ditch easement could be built.

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[184]2015 Wyo. Sess. Laws 547.
[185]2015 Wyo. Sess. Laws 64 (creating WYO. STAT. ANN. §§ 99-3-2001 to 99-3-2005).
[186]2015 Wyo. Sess. Laws 543 (amending WYO. STAT. ANN. § 41-2-118(a)).
[187]2015 Wyo. Sess. Laws 593 (creating WYO. STAT. ANN. § 40-26-101).
[188]2015 Wyo. Sess. Laws 507 (creating WYO. STAT. ANN. § 6-3-414).
[189]WYO. STAT. ANN. § 6-3-414(f).
[190]358 P.3d 1265 (Wyo. 2015).
[191]*Id.* at 1271.
[192]337 P.3d 431 (Wyo. 2014).
[193]*Id.* at 434.
[194]*Id.* at 446.

3. Administrative

On April 1, 2015, the state engineer issued an Order concerning future use of underground water resources in the Laramie County Control Area (LCCA), located in Southeastern Wyoming.[195] The Order was issued in response to mounting concerns over increased development and groundwater use in the LCCA. The Order sets forth well spacing requirements for new wells, except the "Unaffected Area" located north of Horse Creek. Beginning in 2017, meters will be required for all wells in the LCCA except small stock and domestic wells, and metered amounts must be reported annually. The Order closes the "Drawdown Area," located in eastern Laramie County, to permitting large capacity wells in the High Plains Aquifer. Provided spacing requirements are met, larger wells may be permitted in the designated "Conservation Area" in central and western parts of the LCCA. However, water levels must be reported and drawdowns are limited to 20% of available water in the well. The Order is in effect for 5 years, but results will be reviewed in late 2019.

S. Eastern States

1. Pennsylvania's Treated Mine Water Act Encourages Use of Mine Water in Drilling

On October 8, 2015, Pennsylvania Governor Tom Wolf signed into law a new bill that would encourage the use of treated mine water in natural gas drilling operations. The Treated Mine Water Act[196] protects mine operators from liability for any costs, injury, or damage arising out of the use of treated mine water they provide where the treated mine water is used (1) outside the boundaries of the mine site, (2) for oil and gas development, and (3) by someone other than the mine operator. The bill further protects anyone who acquires treated mine water for use in natural gas drilling operations from liability associated with the treatment or abatement of the mine drainage. Finally, the legislation expressly exempts treated mine water from the Pennsylvania Solid Waste Management Act.[197] Supporters of the bill say it is a safe and innovative way to reduce the use of fresh water in natural gas drilling operations. A number of national and regional environmental groups have spoken out against the legislation, expressing concern over the safety of using treated mine water in drilling and the scope of the liability protections provided.[198]

2. Georgia Moves to Dismiss Supreme Court Suit on Necessary Party Grounds

In a tri-state water war[199] among Florida, Georgia, and Alabama, Georgia moved to dismiss the suit because Florida did not name the United States as a party, or more

[195]Wyo. State Engineer's Office, Laramie Cnty. Control Area, Order of the State Engineer (Apr. 10, 2015).
[196]2015 Act 47, Pub. L. 186, No. 47 (2015).
[197]2015 Act 45, Pub. L. 182, No. 45 (2015).
[198]*See* Susan Phillips, *Senate Bill Would Encourage Use of Coal Mine Water to Frack*, StateImpact (June 22, 2015, 5:52 PM), https://stateimpact.npr.org/pennsylvania/2015/06/22/senate-bill-would-encourage-use-of-acid-mine-drainage-to-frack/.
[199]Florida's Motion for Leave to File a Complaint, Complaint, and Brief in Support of Motion, Fla. v. Ga., No. 22O142 (U.S. Oct. 1, 2013).

specifically, the United States Army Corps of Engineers (Corps), and it is not permitted to do so because the United States is immune from suit.[200] Georgia believes the Corps is a necessary party because Florida's alleged injuries spawn from the water flow from the Woodruff Dam, which is controlled by the Corps. Thus, the Court cannot accord the relief requested among the parties without involving the Corps. According to the United States' amicus brief, the Corps regulates the flow of the Chattahoochee and Apalachicola Rivers through the operation of five dams, which were constructed for specific purposes, "including navigation, hydroelectric power, national defense, commercial value of riparian lands, recreation, and industrial and municipal water supply."[201] Thus, the United States has an interest in the action since the regulation of flow could impact the volume or rate of flow through the Corps' projects.

In its brief, the United States contends the parties will not be prejudiced by a judgment without the presence of the United States as a party because the Corps does not directly control the disposition of water among the states (*i.e.*, unlike the Bureau of Reclamation on the Colorado River, it does not contract with each state to deliver particular amounts of water)[202] and the relief requested by Florida may not prejudice the Corps if the judgment is shaped in the form of simply imposing a consumption cap on Georgia.[203] Yet, if the judgment cannot be shaped to avoid prejudice to the United States' interests after the facts of the case are developed, the United States argues that dismissal may then be appropriate.[204] The motion was argued in June and is pending before the special master appointed by the United States Supreme Court.

T. Great Lakes States

1. Indiana—Legislative

Indiana enacted its state microbead ban on July 1, 2015. The law bans the manufacture for sale of and the acceptance for sale of personal care products and over the counter drugs containing synthetic plastic microbeads.[205] Synthetic plastic microbeads are small pieces of plastic less than five millimeters in diameter that are non-biodegradable and are added to many personal care products as exfoliants.[206] The complete ban will take effect by December 31, 2019.[207] Violations will be met with potential imprisonment and fines.[208]

2. Wisconsin—Legislative

Wisconsin enacted microbead legislation on July 3, 2015, which bans production or manufacture and acceptance for sale of personal care products and over the counter drugs that contain synthetic plastic microbeads.[209] Wisconsin defines synthetic plastic

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[200]State of Georgia's Motion to Dismiss for Failure to Join a Required Party, Fla. v. Ga., No. 142 (U.S. Feb. 16, 2015).
[201]United States' Brief as Amicus Curiae in Opposition to Georgia's Motion to Dismiss for Failure to Join a Required Party at 9, Fla. v. Ga., No. 142 (U.S. Mar. 11, 2015).
[202]*Id.* at 13.
[203]*Id.* at 11.
[204]*Id.* at 22.
[205]IND. CODE § 13-18-24-5 (2015).
[206]*Id.* § 13-18-24-4.
[207]*Id.* § 13-18-24-8.
[208]*Id.* § 13-18-24-9.
[209]WIS. STAT. § 299.50 (2015).

microbeads as "any intentionally added non-biodegradable, solid plastic particle measuring less than 5 millimeters at its largest dimension that is used to exfoliate or cleanse in a product that is intended to be rinsed off."[210] Wisconsin also provides for fines and injunctive relief against violators.[211]

[210] *Id.* § 299.50(1)(e).
[211] *Id.* § 299.50(3).

Chapter 24 • ALTERNATIVE DISPUTE RESOLUTION
2015 Annual Report[1]

Alternative dispute resolution (ADR) processes resolved a number of environmental disputes in 2015. This chapter summarizes cases related to ADR and environmental issues, general ADR cases and regulations, case studies of multi-party environmental disputes, and recent news on environmental mediations.

I. DEVELOPMENTS IN MEDIATION AND OTHER ADR PROCESSES

A. Court Evaluation of Environmental and Natural Resource Disputes Resolved Through Mediation or Other ADR Processes

Federal district courts in California recognized mediated agreements as being settled in good faith in three superfund cases. In *Whitehurst v. Heinl*, the owner of a property contaminated by hazardous substances and the seller of this property disputed the liability of site remediation under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[2] After multiple mediation sessions, the parties agreed to jointly fund a remediation project. Under Cal. Civ. Proc. Code §§ 877 and 877.6, the U.S. District Court for the Northern District of California approved the agreement by finding that it was entered in good faith.[3] In a similar case, *City of San Diego v. National Steel & Shipbuilding Co.*, the U.S. District Court for the Southern District of California approved a settlement agreement between multiple parties to remediate a shipyard site under CERCLA after a multi-year, court-ordered mediation.[4] Finally, in *California Department of Toxic Substances Control v. Jim Dobbas, Inc.*, the U.S. District Court for the Eastern District of California approved an agreement to settle claims brought by the California Department of Toxic Substances Control (DTSC) under CERCLA to recover costs for remediation of a site contaminated by wood preserving operations run by the defendant's predecessors.[5] The parties later entered into settlement negotiations, including mediation.[6] Under the settlement agreement, the DTSC agreed not to bring suit in exchange for payment of $350,000.[7]

The Texas Supreme Court held that in CERCLA enforcement proceedings an insurer has a duty under a general liability insurance policy that requires an insurer to defend in "any suit against the insured seeking damages."[8] In *McGinnes Industrial Maintenance Corp. v. Phoenix Ins. Co.*, the court reasoned that CERCLA authorized the Environmental Protection Agency (EPA) to resolve superfund claims through administrative proceedings, which resemble "suits" in a general sense.[9] In this case, the letter to potentially responsible parties who initiated the CERCLA enforcement

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[1]Xiaoxin Shi, Nathan Bracken, and Lara B. Fowler authored this chapter. This chapter highlights some cases and events of relevance from late 2014 to January 2016; however, it does not provide exhaustive coverage of all dispute resolution-related cases and events

[2]No. 09-cv-04808-MEJ, 2015 U.S. Dist. LEXIS 49147, at *3 (N.D. Cal. Apr. 14, 2015).

[3]*Id.* at *9, *15-16.

[4]No. 09cv2275 WQH (BGS), 2015 U.S. Dist. LEXIS 53078, at *7-9, *41-45 (S.D. Cal. Apr. 21, 2015).

[5]No. 2:14-595 WBS EFB, 2015 U.S. Dist. LEXIS 112973, at *2-4, *16 (E.D. Cal. Aug. 24, 2015).

[6]*Id.* at *7.

[7]*Id.* at *5-6.

[8]No. 14-0465, 2015 Tex. LEXIS 624, at *2 (Tex. June 26, 2015).

[9]*Id.* at *7-9.

proceeding required the insured to "make a good-faith offer to settle with the EPA within [sixty] days."[10] Thus, insurers have a duty to defend in CERCLA settlement meetings.

A Massachusetts court also addressed mediated settlement agreements. In *Dandreo v. Kornitsky*, the plaintiff sued the local zoning board for issuing a permit for a nearby development that would adversely affect water infrastructure and traffic.[11] The parties reached a mediated agreement setting out interim obligations before negotiating a final settlement; the Massachusetts Land Court found this agreement enforceable.[12]

B. Decisions Regarding Alternative Dispute Resolution Processes in General

Absent a statute requiring mediation in "good faith," the U.S. District Court for the Southern District of Florida held in *Procaps S.A., v. Patheon Inc.* that one party's "failure" to provide a settlement demand "without a specific requirement to do so" does not constitute failure to mediate in good faith and was not good cause for canceling mediation.[13]

Several federal courts addressed issues of confidentiality and mediation privilege. The U.S. District Court for the Eastern District of Pennsylvania addressed a bad faith insurance claim in *Dietz & Watson, Inc. v. Liberty Mutual Insurance Co.*, noting that there is a "strong policy . . . for keeping mediation communications and documents confidential," including communications with insurance company representatives.[14] In *Doublevision Entertainment LLC v. Navigators Specialty Insurance Co.*, the U.S. District Court for the Northern District of California interpreted California's mediation privilege (California Evidence Code, section 1119) as allowing communications prepared for mediation to be privileged, as well as some prepared both before and after mediation.[15] The court also held that admitting information otherwise privileged under the mediation statute requires a complete waiver by all parties.[16] In *Haskins v. Employers Insurance of Wausau*, an environmental contamination case, the U.S. District Court for the Northern District of California held that the parties could agree to waive their own mediation statements under California's mediation privilege if the waiver is express.[17] Finally, in *Babcock & Wilcox Power Generation Group, Inc. v. Cormetech, Inc.*, a contract indemnity dispute, the U.S. District Court for the Northern District of Ohio held that a federal common law settlement privilege did not apply, but that Ohio's Uniform Mediation Act protected mediation communications absent an exemption or a complete waiver by all parties.[18]

Several state courts have also examined statutory provisions related to mediation privilege and/or confidentiality. In *Billhartz v. Billhartz*, the Illinois Court of Appeals held that when an agreement to mediate required a signed written agreement under the Uniform Mediation Act, "oral agreements and draft provisions created during and after

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[10] *Id.* at *6, *10.
[11] No. 13 MISC 479144, 2015 Mass. LCR LEXIS 98, at *1-2 (Mass. Land Ct. June 30, 2015).
[12] *Id.* at *24-25, *40-41.
[13] No. 12-24356-CIV-GOODMAN, 2015 U.S. Dist. LEXIS 72464, at *6 (S.D. Fla. June 4, 2015).
[14] No. 14-4082, 2015 U.S. Dist. LEXIS 9815, at *11 (E.D. Pa. Jan. 28, 2015).
[15] No. C 14-02848 WHA, 2015 U.S. Dist. LEXIS 10425, at *7, *10-11 (N.D. Cal. Jan. 28, 2015).
[16] *Id.* at *19.
[17] No. C 14-01671 JST (LB), 2015 U.S. Dist. LEXIS 10645, at *10-11 (N.D. Cal. Jan. 28, 2015).
[18] 81 F. Supp. 3d 632, 642 (N.D. Ohio 2015).

mediation will not constitute the formation of a binding contract."[19] In *Alfieri v. Solomon*, a legal malpractice case, the Oregon Supreme Court examined the scope of Oregon's mediation statute and determined that the mediation process "refers only to those aspects . . . in which the mediator is directly involved."[20] After determining that "[s]eparate interactions between parties and their counsel that occur outside of the mediator's presence and without the mediator's direct involvement are not part of the mediation, even if they are related to it," the court remanded the case for further review.[21] In another case related to legal malpractice decided before Alfieri, the Oregon Court of Appeals held in *Yoshida's Inc. v. Dunn Carney Allen Higgins & Tongue LLP* that "mediation communications generally are not admissible evidence in any later adjudicatory proceeding, even if that proceeding is not the same proceeding in which the mediation occurred."[22] In *Grubaugh v. Blomo*, the Arizona Court of Appeals construed the state's mediation statute broadly and prevented a lawyer from revealing advice given to a client during mediation to defend a legal malpractice claim; the attorney-client privileged information was not listed under Arizona's list of statutory exceptions for mediation communications.[23]

Confidentiality can also be an issue in other kinds of settlement processes. For example, in *Castaneda v. Superior Court*, a California appellate court held that where an attorney volunteered as part of a settlement panel and received confidential information, and the defendant was later represented by a different attorney in the same firm, screening was insufficient to prevent vicarious disqualification of the entire law firm given the need "to preserve the public's trust and confidence in the judicial process."[24]

Attorney's fees can also be an issue in mediation-related cases. For example, after losing a Family Medical Leave Act claim in *Gressett v. Central Arizona Water Conservation District*, the Central Arizona Water Conservation District sought to reduce attorneys' fees and allowable expenses related to two failed mediations, claiming the fees to be unreasonable.[25] However, the court upheld the attorneys' fees and expenses because the mediation sessions were "reasonably in furtherance of resolving the dispute."[26] In *Marin v. Constitution Realty, LLC*, the New York Appellate Court held that an attorney's fee agreement was binding; because the agreement referenced to a single mediation session rather than mediation as an on-going process, the attorney was entitled to higher fees.[27]

Finally, the issue of ex parte communications related to mediation/arbitration recently came up in *Risco, Inc. v. N.J. Natural Gas. Co.* New Jersey Natural Gas sought to enter Risco's property to perform remediation pursuant to an administrative consent order with the New Jersey Department of Environmental Protection; Risco sued to stop this.[28] The parties entered into mediation, then under their dispute resolution agreement, submitted their claims to binding arbitration and selected the mediator to serve as the arbitrator.[29] Risco challenged the arbitrator's neutrality after the arbitrator had ex parte

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[19]No. 5-13-0580, 2015 Ill. App. Unpub. LEXIS 940, 827 (Ill. App. Ct. 2015).
[20]No. CC 1203-02980, 2015 WL 8539065 (Or. Dec. 10, 2015).
[21]*Id.* at *8, *17.
[22]356 P.3d 121, 128 (Or. Ct. App. 2015).
[23]359 P.3d 1008, 1012-13 (Ariz. Ct. App. 2015).
[24]237 Cal. App. 4th 1434, 1438, 1146-47 (Cal. Ct. App. 2015).
[25]No. CV-12-00185-PHX-JAT, 2015 U.S. Dist. LEXIS 124975, at *4-5 (D. Ariz. Sept. 18, 2015).
[26]*Id.* at *7.
[27]128 A.D.3d 505, 509-11 (N.Y. App. Div. 2015).
[28]2015 N.J. Super. Unpub. LEXIS 1785, at *2 (N.J. Super. Ct. App. Div. July 24, 2015).
[29]*Id.* at *3.

conversations with opposing counsel on late submission of papers.[30] In an unpublished opinion, the court held the record did not show that the arbitrator's decision was unfairly influenced by these ex parte conversations on non-substantive matters.[31]

C. Regulation of Mediators

In August 2015, the Arizona Supreme Court amended Rule 31 "Regulation of the Practice of Law." Effective on January 1, 2016, the Rule includes significant changes: (1) it modifies the definition of "mediator" to clarify that "[s]erving as a mediator is not the practice of law"; (2) it deletes "facilitating a mediation between parties" from the list of activities where the mediator is required to be employed, appointed by a court, directed by government entities, or participating in non-profit programs; and (3) it requires that a mediator who is not an active member of the state bar must be a certified legal document preparer when preparing a mediation agreement without attorney supervision.[32]

II. ADR CASE STUDIES

A. Montana—Confederated Salish and Kootenai Tribes (CSKT) of the Flathead Reservation Water Rights Settlement

In April 2015, Montana Gov. Steve Bullock (D) signed the CSKT Water Compact to resolve the Tribes' reserved water rights claims in northwest Montana.[33] The Tribes' claims date to their so-called 1855 "Hell Gate" Treaty with the United States, which created their reservation and, absent a settlement, could displace non-Indian water uses in the region. The treaty includes provisions that secure the Tribes' hunting and fishing rights on *and off* the Flathead Reservation. The Compact seeks to honor these treaty rights while also protecting agricultural water use in the area, resolving decades of litigation that have created significant uncertainty regarding water rights in and around the Flathead Reservation. The Compact will make water available for commercial and irrigation use, provide for water administration on the Reservation, and support economic development on and off the Reservation. It requires final approval from Congress and the CSKT's Council. Of note, the Compact is the eighteenth and final agreement for Montana to resolve all of its federal and tribal reserved water rights claims.

B. California—North Yuba River

In May 2015, the Yuba Salmon Partnership Initiative released a framework, or term sheet, that will guide negotiations "to develop a program to reintroduce spring-run Chinook salmon, and perhaps steelhead [trout], to the North Yuba River[,]" along with a related program to improve salmon habitat in the region.[34] For over fifteen years, the Initiative has worked collaboratively to avoid controversial regulations or litigation. The Initiative is a collaboration between the California Department of Fish and Wildlife, the National Marine Fisheries Service, the Yuba County Water Agency, American Rivers,

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[30] *Id.* at *8-11.
[31] *Id.* at *25-26.
[32] *In re* Rules 31, 34, 38, 39 & 42, Rules of the Supreme Court, No. R-15-0018 (Ariz. Aug. 27, 2015).
[33] Press Release, State of Montana, Governor Steve Bullock Signs CSKT Water Compact into Law (Apr. 24, 2015). Treaty with the Flatheads, Etc., July 16, 1855, 12 Stat. 975.
[34] *Yuba Salmon Partnership Initiative*, CAL. DEP'T OF FISH AND WILDLIFE, http://www.dfg.ca.gov/fish/Resources/Chinook/YSPI/ (last visited Mar. 14, 2016).

the California Sportfishing Protection Alliance, and Trout Unlimited. "In signing the non-binding term sheet, the [Initiative's] partners commit to negotiating a more in-depth and binding settlement agreement over the course of the next year."[35] The term sheet describes fiscal responsibilities, funding, and addresses various legal and regulatory requirements.

C. Apalachicola-Chattahoochee-Flint (ACF) River Basin

Also in May 2015, stakeholders in Alabama, Georgia, and Florida approved a sustainable water management plan to manage water in the ACF Basin—a major source of water in the Southeast that supplies the Atlanta metro area and Florida's Apalachicola Bay.[36] The plan is intended to guide the three states in resolving decades of litigation over water management in the Basin. The plan specifically recommends the creation of a transboundary water management institution "to serve as a data clearinghouse[,] facilitate coordination[,] consensus building and conflict resolution[,] and support development of basin-level water management plans."[37] The plan also proposes state efforts to develop sustainable water use and return policies, as well as recommendations for the U.S. Army Corps of Engineers to utilize storage more efficiently in the Basin, the creation of drought management plans, and more consistent information to support better decision-making.

D. Gulf of Mexico—BP Oil Spill

In October 2015, the U.S. Department of Justice (DOJ) and five Gulf States announced a global $20.8 billion settlement to resolve civil claims against BP stemming from the 2010 Gulf Oil Spill. It is the largest settlement with a single entity in DOJ's history. Among other things, it includes a $5.5 billion federal Clean Water Act penalty—the largest civil penalty in the history of environmental law—to support restoration efforts in the Gulf and $8.1 billion in natural resource damages. Another $4.9 billion will fund separate payments to the Gulf States and up to $1 billion to resolve the economic damage claims of several hundred local governments. About $600 million will address other claims, "including claims for reimbursement of federal and state natural resource damage assessment costs and other unreimbursed federal expenses[,]" in addition to costs associated with resolving a False Claims Act investigation.[38] Two notable mediators—Kenneth Feinberg and Pat Juneau—served as claims administrators over the course of the dispute.[39]

E. California and Nevada—Truckee River Operating Agreement

In December 2015, federal water masters began implementing the Truckee River Operating Agreement (Agreement) after decades of negotiations, environmental impact

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[35] *Id.*

[36] Press Release, ACF Stakeholders, ACF Stakeholders Agree on Sustainable Water Management Plan (May 13, 2015).

[37] *Id.*

[38] Press Release, Dep't of Justice, U.S. and Five Gulf States Reach Historic Settlement with BP to Resolve Civil Lawsuit Over Deepwater Horizon Oil Spill (Oct. 5, 2015).

[39] David Hammer, *Louisiana Lawyer Set to Take Kenneth Feinberg's Role in BP Oil Spill Claims Process*, THE TIMES-PICAYUNE (Mar. 9, 2012), http://www.nola.com/news/gulf-oil-spill/index.ssf/2012/03/louisiana_lawyer_set_to_take_k.html.

assessment, and litigation.[40] The United States, California, Nevada, Pyramid Lake Paiute Tribe, several cities, and water districts signed the Agreement in 2008, but additional conditions had to be met before implementation began. Under the Agreement, reservoir operation in the Lake Tahoe and Truckee River basins will enhance conditions for water quality and recreational uses. These operations will also improve conditions for endangered and threatened fish that are critical to the Pyramid Lake Paiute Tribe and the Pyramid Lake fishery in Nevada. To do this, the Agreement enables the exchange of water credits in lieu of physically diverting water between the reservoirs to increase operational flexibility and efficiency in water allocation.

F. California and Oregon—Klamath River Basin

In the Klamath Basin, which straddles the Oregon/California border, stakeholders agreed to three settlement agreements, known collectively as the Klamath Basin Restoration Agreements. The Agreements resulted from years of negotiation and mediation between multiple farmers and ranchers, tribes, commercial fishermen, conservation organizations, several governmental entities, and a power company. They also address a host of interconnected issues in the Basin related to Indian water rights, local water rights, the Endangered Species Act, dam removal, irrigation, and federal land. In January 2015, Senator Ron Wyden of Oregon introduced the Klamath Basin Water Recovery and Economic Restoration Act of 2015 (S. 133) to authorize the Agreements.[41] Although the bill had been reviewed in the Committee on Energy and Natural Resources, Congress failed to take action on it in 2015, thereby triggering a sunset clause that required one of the Agreements to sunset because it did not obtain Congressional authorization by December 31, 2015.[42] Notwithstanding key stakeholder support for the Agreements, S. 133 faced significant opposition from segments of the local community and House Republicans over the Agreements' dam removal provisions and concerns about the precedent those provisions could set.[43] Nevertheless, the U.S. Department of the Interior, the U.S. Department of Commerce, Oregon, California, and PacifiCorp, the owner of the dams, entered into an agreement in principle in early 2016 to work with other signatories to pursue an administrative Federal Energy Regulatory Commission process that would seek to preserve the benefits of the expired agreement without the need for Congressional action.[44] The Agreements highlight the need to bring multiple issues to the table, but also the challenges posed by sunset clauses reliant on Congressional action, particularly in light of current divisions in Congress over environmental policy.

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[40] Press Release, U.S. Bureau of Reclamation, Truckee River Operating Agreement Implementation to Provide Multiple Benefits for California and Nevada (Jan. 5, 2016).

[41] S. 133, 114th Cong. (2015-2016).

[42] Press Release, PR Newswire, Klamath Settlement Parties Urge Congress to Implement Negotiated Agreements (Dec. 7, 2015).

[43] Jeff Mapes, *Klamath Basin: Water Pact Crumbles in Congress after Years of Work*, THE OREGONIAN (Dec. 19, 2015), http://www.oregonlive.com/mapes/index.ssf/2015/12/klamath_basin_water_pact_crumb.html; Jacques Leslie, *How a Stunning Klamath Basin Water Agreement Has Been Doomed by Lawmakers*, L.A. TIMES (Dec. 18, 2015), http://www.latimes.com/opinion/op-ed/la-oe-leslie-klamath-river-agreement-20151218-story.html.

[44] Press Release, Dep't of the Interior, Parties Agree to New Path to Advance Klamath Agreement (Feb. 2, 2016).

The State of Vermont and EPA are developing a Total Maximum Daily Load to address sediment, nutrients, and phosphorus pollution in Lake Champlain. To support this process, the Environmental Mediation Center and the Consensus Building Institute facilitated workshops to assess the effectiveness of existing programs to address phosphorous pollution with the State of Vermont, EPA, and other stakeholders.[45]

The Texas Water Development Board voted unanimously in September that a years-long conflict over the proposed, $3 billion Marvin Nichols Reservoir in the Dallas-Fort Worth area qualifies as an "interregional conflict," requiring third-party mediation.[46]

Environmental groups entered into mediation and reached an agreement in July to mitigate the impacts of a solar farm intended to power Apple's operations in California. Under the agreement, made with support from the governor's office, the project will implement several conservation measures to protect threatened and rare wildlife.[47]

[45]*Lake Champlain Phosphorus Pollution Initiative*, ENVT'L MEDIATION CTR., http://www.emcenter.org/lake-champlain-phosphorous-pollution-initiative/ (last visited Mar. 14, 2016); *Restoring Lake Champlain*, WATERSHED MGMT. DIV., http://www.watershedmanagement.vt.gov/erp/champlain/ (last visited Mar. 14, 2016).

[46]Kiah Collier, *State Turns to Mediation to Resolve Marvin Nichols Question*, TEXAS TRIBUNE (Sept. 10, 2015), http://ketr.org/post/state-turns-mediation-resolve-marvin-nichols-question#stream/0.

[47]*Audubon California Helps Improve Apple's Solar Farm*, AUDUBON (July 22, 2015), https://www.audubon.org/news/audubon-california-helps-improve-apples-solar-farm.

Chapter 25 • CLIMATE CHANGE, SUSTAINABLE DEVELOPMENT, AND ECOSYSTEMS
2015 Annual Report[1]

I. CLIMATE CHANGE

A. Mitigation

1. International Activities

a. United Nations Framework Convention on Climate Change (UNFCCC)

During the years leading up to the Twenty-First Session of the Conference of the Parties (COP 21) to the UNFCCC in Paris, France, party countries (Parties or countries) adopted a "bottom up" approach, in which each country picked its own greenhouse gas (GHG) reduction target. Pursuant to Decision 1/CP.20 (The Lima Call for Climate Action) at COP 20 in Lima, Peru, in 2014, Parties had to submit their individually chosen GHG emission reduction targets, known as "Intended Nationally Determined Contributions" (INDCs), by October 2015.[2]

In the months preceding COP 21, almost all countries submitted these pledges. China agreed to increase its share of renewable energy to 20% and achieve peaking of CO_2 emissions by around 2030, while making best efforts to peak early.[3] The United

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[1]This report was compiled, reviewed, and edited by: Shannon Martin Dilley (California Air Resources Board); Andrew Schatz (Conservation International); and Jill H. Van Noord (Holland & Hart, LLP), and prepared by Committee Chairs: Shannon E. Broome (Katten Muchin Rosenman, LLP); and Emily Fisher (Edison Electric Institute). The following authors contributed: Vicki Arroyo (Georgetown Climate Center); Jared Babula (California Energy Commission); L. Margaret Barry (Arnold & Porter); William Blackburn (William Blackburn Consulting, Ltd.); Shannon E. Broome; Jack Coop (Osler, Hoskin & Harcourt, LLP); Marcia Cleveland (Interfaith Moral Action on Climate); Melissa Deas (Georgetown Climate Center); Shannon Martin Dilley; Jennifer Fairfax (Osler, Hoskin & Harcourt, LLP); Andrew Falk (Sagamore Institute); Ira Feldman (Greentrack); Emily Fisher; Michael Gerrard (Columbia Law School); Matthew Goetz (Georgetown Climate Center); Jessica Grannis (Georgetown Climate Center); Brett Grosko (U.S. Department of Justice); Rebecca Hall-McGuire (Osler, Hoskin & Harcourt, LLP), Richard King (Osler, Hoskin & Harcourt, LLP); Chuck Knauss (Katten Muchin Rosenman, LLP); Robert McKinstry, Jr. (Ballard Spahr, LLP); Gabe Pacyniak (Georgetown Climate Center); James Rizk (Texas Commission on Environmental Quality); Matthew Sanders (Jeffer Mangels Butler & Mitchell LLP); Andrew Schatz; Alicia Thesing (Stanford Environmental Law Clinic); Johanna Thibault (Hankerson Law Group, PLLC); and Patrick Welsh (Osler, Hoskin & Harcourt, LLP).

[2]*INDCs as Communicated by Parties*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx (last visited Feb. 14, 2016). *See also* COP 20 to the UNFCCC, Decision 1/CP.20, Lima Call for Climate Action, FCCC/CP/2014/10/Add.1 (Feb. 2, 2015).

[3]*Enhanced Actions on Climate Change: China's Intended Nationally Determined Contributions*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE (June 30, 2015), *available at*

States (U.S.) agreed to reduce emissions by 26%-28%below 2005 levels by 2025.[4] The European Union agreed to a binding target to reduce domestic emissions by at least 40% below 1990 levels by 2030.[5] India specified it would reduce emissions intensity of GDP by 33%-35%below 2005 by 2030.[6]

After two weeks of negotiating, on December 12, 2015, 195 participating countries reached the "Paris Agreement,"[7] which many hailed as a diplomatic triumph, while others criticized it for being too weak. The Paris Agreement contains several key elements. First, Article 2 of the Agreement sets an objective to limit global average temperatures to 2°C above pre-industrial levels, with an effort to keep to 1.5°C. However, even if all countries fully implement their INDCs, global average temperatures would likely still rise about 2.7°C above pre-industrial levels.[8] Second, to achieve the temperature goal, developed countries will take the lead by setting economy-wide emissions targets, while developing nations are encouraged to do so over time. Under this framework, global GHG emissions should peak as soon as possible, but there is no specific deadline. During the second half of the century, there should be a balance between anthropogenic GHG emissions from sources and removals by carbon sinks.[9] This implies that, unless there are major advances in carbon sequestration or air capture technology, fossil fuel use should virtually cease. Third, the Paris Agreement provides that each Party shall submit a nationally determined contribution (NDC) every five years, and that "each Party's successive [NDC] will represent a progression beyond the Party's then current [NDC] and reflect its highest possible ambition . . . ."[10] The Agreement also provides for an interim review in 2018 assessing the Parties' progress in meeting the objective and then every five years starting in 2023 (a "global stocktake").[11]

Fourth, to assist developing countries in their climate mitigation and adaptation measures, developed countries will collectively mobilize at least $100 billion per year starting in 2020 and some larger number starting in 2025, but the contribution of

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http://www4.unfccc.int/submissions/INDC/Published%20Documents/China/1/China's%20INDC%20-%20on%2030%20June%202015.pdf.

[4]UNFCCC, *United States' Intended Nationally Determined Contribution* (Mar. 31, 2015), *available at* http://www4.unfccc.int/submissions/INDC/Published%20Documents/United%20States%20of%20America/1/U.S.%20Cover%20Note%20INDC%20and%20Accompanying%20Information.pdf.

[5]UNFCCC, *European Union's Intended Nationally Determined Contribution* (Mar. 6, 2015), *available at* http://www4.unfccc.int/submissions/INDC/Published%20Documents/Latvia/1/LV-03-06-EU%20INDC.pdf.

[6]UNFCCC, *India's Intended Nationally Determined Contributions* (Oct. 1, 2015), *available at* http://www4.unfccc.int/submissions/INDC/Published%20Documents/India/1/INDIA%20INDC%20TO%20UNFCCC.pdf.

[7]Conference of the Parties on its Twenty-first Session, Paris, France, Nov. 30-Dec. 11, 2015, *Adoption of the Paris Agreement*, Draft Decision -/CP.21, UN Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015) [hereinafter Paris Agreement].

[8]*Paris Agreement: Stage Set to Ramp up Climate Action*, CLIMATE ACTION TRACKER (Dec. 12, 2015), http://climateactiontracker.org/news/257/Paris-Agreement-stage-set-to-ramp-up-climate-action.html (last visited Mar. 15, 2016).

[9]Paris Agreement, *supra* note 7, at annex art. 4, ¶ 1.

[10]*Id.* at annex art. 4, ¶ 3.

[11]*Id.* at art. 14, ¶ 2.

particular countries is not specified.[12] Fifth, Article 13 establishes a transparency regime, requiring countries to submit and post reports regarding their emissions data and progress in meeting their INDCs using a uniform accounting method. There is no legal penalty for not achieving the INDC, and countries can withdraw from the agreement if they wish.[13]

The Paris Agreement will go into force when it is formally ratified by fifty-five countries that together are responsible for 55% of global GHG emissions and will take effect in 2020. The next COP will be in Marrakesh, Morocco, from November 7-18, 2016.[14]

b. International Climate Change Litigation

Two countries have set legal precedent allowing citizens to hold the state responsible for inaction in fighting and adapting to climate change.[15] On June 24, 2015, the Hague District Court ordered the Netherlands to regulate and lower GHG emissions to 25% of 1990 levels by 2020 in the case of *Urgenda Foundation v. the State of the Netherlands*.[16] The Hague District Court considered the March 2, 2015, *Oslo Principles on Global Obligations to Reduce Climate Change*, which outlines existing obligations to constrain climate change based on interpretation of international law, human rights law, environmental law, and tort law.[17] The Dutch government plans to appeal the decision. Similarly, on September 14, 2015, the Lahore High Court ordered the Pakistan federal government to start implementing its climate change policies in the case of *Ashgar Leghari v. Federation of Pakistan*.[18] The Lahore High Court ordered the creation of the "climate council" to force Pakistan to uphold its commitments.

c. Hydrofluorocarbons (HFCs)

An increasing number of countries put forward proposed HFC amendments to the Montreal Protocol in 2015. The following countries or regions have offered proposals to phase down HFCs: India (avoiding 4.2 gigatonnes (Gt) CO_2 equivalent GHG by 2050);[19] the European Union (avoiding 79 Gt CO_2 equivalent GHG by 2050);[20] North America

[12] *Id.* ¶ 54, annex art. 9, ¶ 3.
[13] *Id.* at annex art. 13, art. 28.
[14] *Calendar*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, https://unfccc.int/meetings/unfccc_calendar/items/2655.php?year=2016 (last visited Mar. 15, 2016).
[15] Julien Bouissou, *First the Netherlands, Now Pakistan's High Court Comes to Defence of Climate*, THE GUARDIAN (Oct. 7, 2015), http://www.theguardian.com/environment/2015/oct/07/pakistan-high-court-comes-to-defence-of-climate.
[16] Rechtbank Den Haag 24 Juni 2015, C/09/456689/HA ZA 13-1396 m.nt (Urgenda Foundation/the State of the Netherlands) (Neth.) (English Translation).
[17] *Oslo Principles on Global Climate Change Obligations*, YALE GLOBAL JUSTICE PROGRAM, http://globaljustice.macmillan.yale.edu/oslo-principles-global-climate-change-obligations (last visited Mar. 15, 2016).
[18] 2015 W.P. No. 25501/2015 (Pak.).
[19] *India's Proposal on Hydrofluorocarbons Will Reduce Emissions by 64% by 2050*, THE ECONOMIC TIMES (May 28, 2015), http://articles.economictimes.indiatimes.com/2015-05-28/news/62765869_1_montreal-protocol-hfcs-ozone-layer (last visited Mar. 15, 2016).
[20] Open-ended Working Group of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, Thirty-sixth meeting, Paris, Fr., July 20–24, 2015, *Proposed*

(Canada, Mexico, and the U.S.) (avoiding 77–98 Gt CO_2e through 2050 and roughly 102–128 $GtCO_2e$ for forty years thereafter);[21] and the South Pacific Island States.[22] On March 6, 2015, all fifty-four African countries formally endorsed the phase down of HFCs under the Montreal Protocol.[23]

On November 6, 2015, at the Twenty-seventh Meeting of the Parties (MOP27), after extensive negotiations in Dubai, parties to the Montreal Protocol failed to reach agreement on inclusion of HFCs under that protocol. They agreed instead on a "Dubai Pathway" to work within the Montreal Protocol and amend it in 2016 to control HFCs. They committed to work together to resolve challenges, while recognizing the need for further progress regarding conversion costs, technology transfer, and intellectual property rights.[24]

d. Cap-and-Trade Programs

On April 13, 2015, the Provincial Government of Ontario, Canada announced that Ontario will unveil a cap-and-trade system linked to other jurisdictions, including Quebec and California.[25] *See infra* Sec. I.A.3.a. This system will set GHG emissions limits on a

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Amendment to the Montreal Protocol Submitted by the European Union and its Member States, UNEP/OzL.Pro.WG.1/36/5 (Apr. 30, 2015), *available at* http://conf.montreal-protocol.org/meeting/oewg/oewg-36/presession/English/OEWG-36-5E.pdf.

[21]Open-ended Working Group of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, Thirty-sixth meeting, Paris, Fr., July, 20–24 2015, *Proposed Amendment to the Montreal Protocol Submitted by Canada, Mexico and the United States of America*, UNEP/OzL.Pro.WG.1/36/3 (Apr. 30, 2015), *available at* http://conf.montreal-protocol.org/meeting/oewg/oewg-36/presession/English/OEWG-36-3E.pdf.

[22]Open-ended Working Group of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, Thirty-sixth meeting, Paris, Fr., July 20–24 2015, *Proposed Amendment to the Montreal Protocol Submitted by Kiribati, Marshall Islands, Mauritius, Micronesia (Federated States of), Palau, Philippines, Samoa and Solomon Islands*, UNEP/OzL.Pro.WG.1/36/6 (May 4, 2015), *available at* http://conf.montreal-protocol.org/meeting/oewg/oewg-36/presession/English/OEWG-36-6E.pdf.

[23]African Ministers of the Environment, *Cairo Declaration on Managing Africa's Natural Capital for Sustainable Development and Poverty Eradication* (Mar. 6, 2015) [hereinafter *Cairo Declaration*] *available at* http://www.un.org/en/africa/osaa/pdf/au/cap_naturalcapital_2015.pdf. *See also* Open-ended Working Group of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, Thirty-fifth meeting, Bangkok, Thai., Apr. 22-24, 2015, *Process to Regulate the Production and Consumption of Hydrofluorocarbons*, UNEP/OzL.Pro.WG.1/35/INF/3 (Apr. 13, 2015), *available at* http://conf.montreal-protocol.org/meeting/oewg/oewg-35/presession/Information%20Documents%20are%20available%20in%20English%20onl/OEWG-35-INF3E.pdf.

[24]Twenty-Seventh Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, Dubai, U.A.E., Nov. 1-5 2015, *Report of the Twenty-Seventh Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, UNEP/OzL.Pro.27/13 (Nov. 30, 2015), *available at* http://conf.montreal-protocol.org/meeting/mop/mop-27/report/English/MOP-27-13E.pdf.

[25]Canadian Press & Ashley Csanady, *Ontario Joins Quebec Carbon Cap-and-Trade Plan, But at What Cost? Don't Ask, Says Wynne*, NAT'L POST (Apr. 13, 2015, 2:44 PM)

sector-by-sector basis and allow businesses to sell unused portions of their GHG quotas.[26]

In September 2015, Chinese President Xi Jinping announced that China plans to launch the world's largest emissions trading program in 2017, creating a carbon market for industries producing GHG emissions. The program aims to slash carbon emissions from electric power plants by 32% below 2005 levels by 2030.[27] China has already implemented seven pilot programs in provinces.

e. Subnational Global Climate Leadership Memorandum Of Understanding (Under 2° MOU)

The Under 2° MOU brings together 123 signatory states and regions willing to commit to reducing their GHG emissions.[28] Each signatory jurisdiction commits to limit emissions to below 80%-90% below 1990 levels, or below two metric tons per capita, by 2050, which is the level of emission reduction believed necessary to limit global warming to less than 2°C by the end of this century.[29]

f. Papal Encyclical

On Thursday, June 18, 2015, the Vatican formally released Pope Francis' 184-page encyclical on climate change and the environment.[30] In the Encyclical Letter, Pope Francis stated that climate change is a global problem with grave implications and is one of the principal challenges facing humanity in our day. The letter went on to say that a "very solid scientific consensus indicates that we are presently witnessing a disturbing warming of the climatic system."[31] It invoked "humanity . . . to recognize the need for changes of lifestyle, production and consumption, in order to combat this warming or at least the human causes which produce or aggravate it."[32] President Obama hosted Pope Francis in September 2015, who, in appearances at the White House and in Congress, spoke about the urgent need to address climate change and environmental disruption.[33]

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http://news.nationalpost.com/news/canada/ontario-and-quebec-to-sign-cap-and-trade-deal-today-to-let-polluters-buy-credits-for-emissions.

[26]Press Release, Gov't of Ontario, Ministry of the Envtl. and Climate Change, *How Cap and Trade Works* (Apr. 13, 2015); *see also* Press Release, Gov't of Ontario, Office of the Premier, *Cap and Trade System to Limit Greenhouse Gas Pollution in Ontario* (Apr. 13, 2015).

[27]Bobby Magill, *China Announces World's Largest Cap and Trade Program*, CLIMATE CENTRAL (Sept. 25, 2015), http://www.climatecentral.org/news/china-announces-cap-and-trade-program-19496.

[28]Subnational Global Climate Leadership Memorandum of Understanding (May 19, 2015), *available at* http://under2mou.org/wp-content/uploads/2015/04/Under-2-MOU-English.pdf.

[29]*Id.* at 1-2.

[30]Encyclical Letter, *Laudato Si' of the Holy Father Francis on Care for Our Common Home* (June 18, 2015).

[31]*Id.* at 7, ¶ 23.

[32]*Id.*

[33]Dan Roberts & Stephanie Kirchgaessner, *Pope Francis Calls for Urgent Action on Climate Change in White House Speech*, THE GUARDIAN (Sept. 23, 2015), http://www.theguardian.com/world/2015/sep/23/pope-francis-climate-change-white-house-speech; *Pope Francis Address to Congress (as prepared for delivery)*,

2. National Activities

a. U.S. Environmental Protection Agency (EPA)

i. New Source Performance Standards (NSPS) for Electric Generating Units (EGUs)

On October 23, 2015, EPA issued final CO_2 emission performance standards for new, modified, and reconstructed EGUs under section 111(b) of the Clean Air Act (CAA).[34] EPA established separate standards for electric utility steam generating units (generally coal-fired) and stationary combustion turbines (generally natural gas-fired).[35] For *new* steam EGUs, EPA set a final standard of 1,400 lbs CO_2/MWh, which reflects EPA's determination that the best system of emission reduction (BSER) for these units is a highly efficient coal unit implementing partial carbon capture and storage (CCS).[36]

In contrast, the emission limits for modified or reconstructed sources do not consider implementation of CCS.[37] For *modified* steam EGUs that commence modification after June 18, 2014, EPA established emission standards for large modifications (modifications that result in an hourly increase in CO_2 emissions, measured in terms of mass per hour, of more than 10%), but deferred setting standards for small modifications.[38] For large modified steam EGUs, the final standards require a unit-specific emission limit that reflects each modified unit's best one-year historical performance (measured from 2002 to the time of modification).[39] Standards for *reconstructed* coal-fired EGUs are based on the most efficient generating technology.[40] Accordingly, EPA determined that the standard for reconstructed utility boilers and integrated gasification combined cycle units is 1,800 lbs CO_2/MWh for sources with a heat input rating of greater than 2,000 MMBtu/h and 2,000 lbs CO_2/MWh for sources with a heat input rating of 2,000 MMBtu/h or less.[41]

For stationary combustion turbines, EPA set emission standards for new and reconstructed sources only, withdrawing the proposed standards for modified sources.[42] EPA divided the new and reconstructed stationary combustion turbines into three subcategories, determining the BSER and setting an emission standard for each.[43] For baseload natural gas-fired combustion turbines, EPA determined that Natural Gas Combined Cycle is the BSER for these EGUs and set an emission standard of 1,000 lbs

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CNNPOLITICS (Sept. 24, 2015, 11:01 AM), http://www.cnn.com/2015/09/24/politics/pope-francis-congress-speech/index.html.

[34]Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 70, 71, and 98).

[35]*Id.* at 64,511-13.

[36]*Id.* at 64,545.

[37]*Id.* at 64,546.

[38]*Id.* at 64,546, 64,597.

[39]Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources, 80 Fed. Reg. at 64,546. These standards are measured in terms of gross output.

[40]*Id.*

[41]*Id.* at 64,600. These standards are measured in terms of gross output.

[42]*Id.* at 64,601.

[43]*Id.* at 64,601-02.

CO_2/MWh.[44] Whether a unit is considered baseload depends on a unit-specific analysis of the unit's design efficiency and percentage of electric sales to the grid.[45] For non-baseload natural gas-fired units and multi-fuel-fired units, EPA determined that the BSER is the use of clean fuels and set an input-based standard requires non-baseload units to burn fuels with an average emission rate of 120 lbs CO_2/MMBtu (natural gas-fired) or 120 to 160 lbs CO_2/MMBTu (multi-fuel-fired).[46]

The NSPS have been challenged in the D.C. Circuit by several parties, including more than twenty states, industry groups, and corporations. The challenges are consolidated in *North Dakota v. EPA*.[47]

ii. Clean Power Plan (CPP) – Emission Guidelines for EGUs

The heart of EPA's climate regulations is the Clean Power Plan—Emission Guidelines for Electric Utility Generating Units (EGUs) under the CAA section 111(d). The CPP establishes national limits on CO_2 emissions from existing power plants and is projected to reduce CO_2 emissions from the sector by 32% below 2005 levels by 2030.[48] The rule sets nationwide performance standards for two subcategories of fossil fuel-fired EGUs: fossil fuel-fired steam generating units (generally coal or oil) and stationary combustion turbines (generally natural gas combined cycle (NGCC) units).[49]

The final rule establishes a performance rate of 1,305 lbs CO_2/MWh for all affected steam EGUs and 771 lbs CO_2/MWh for all affected stationary combustion turbines.[50] EPA based these performance rates on its determination of the BSER for each subcategory.[51] For existing sources, EPA determined that the BSER consists of three building blocks: (1) improving efficiency at coal-fired steam EGUs; (2) shifting generation to lower-emitting, existing NGCC units; and (3) shifting generation to renewable energy sources.[52] EPA had proposed a fourth building block, demand side energy efficiency measures, but dropped it from the final rule. EPA explained that "[w]hile building blocks 1, 2, and 3 fall squarely within [EPA's traditional NSPS rulemaking] paradigm, the proposed building block 4 does not."[53] Even so, states and utilities may rely on demand side energy efficiency to meet the emission reduction requirements.

Based on the performance rate and each state's power generation mix, EPA calculated final rate-based state goals (expressed in pounds of CO_2 per megawatt hour of electricity produced).[54] The rate-based goals represent targeted reductions from 2012 baseline levels ranging from 7% in Connecticut to 47% in Montana, depending on the

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[44]80 Fed. Reg. at 64,618. These standards are measured in terms of gross output, but unit owners and operators can elect to satisfy a net output-based standard of 1,030 lb CO_2/MWh. *See id.* at 64,536.
[45]*Id.* at 64,601; 40 C.F.R. pt. 60, subpt. TTTT, tbl. 2 (Oct. 23, 2015).
[46]80 Fed. Reg. at 64,601-02.
[47]Petition for Review, North Dakota v. EPA, No. 15-1381 (D.C. Cir. filed Oct. 23, 2015).
[48]Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).
[49]*Id.*
[50]*Id.* at 64,667.
[51]*Id.*
[52]*Id.*
[53] 80 Fed. Reg. at 64,673.
[54]*Id.* at 64,824; 40 C.F.R. pt. 60, subpt. UUUU, tbl.2.

scale of achievable reductions in a state's power fleet.[55] EPA translated the rate-based goals to mass-based goals (i.e., total emissions caps, expressed in short tons of CO_2), which EPA stated would provide greater flexibility for trading.[56] In either case, these state goals must be met by 2030, with interim reductions beginning in 2022.[57] The rule also established the Clean Energy Incentive Program (CEIP), an optional program that seeks to encourage early investment in renewable energy and energy efficiency projects in low-income communities that result in renewable energy generation or CO_2 emission reductions in 2020 and 2021.[58]

States have flexibility in how to meet the goals and do not have to implement the building blocks, but they can choose how to meet the goals through implementing both BSER and non-BSER measures.[59] State plans are allowed to take one of two forms: (1) "emission standards" plan; or (2) "state measures" plan.[60] State measures plans must contain "a mandatory contingent backstop of federally enforceable emission standards for affected EGUs" if the state does not meet its goal.[61] States must submit a final state or multi-state plan or an initial submittal with an extension request by September 6, 2016.[62] For states obtaining an extension, final state plans must be submitted by September 6, 2018.[63] If a state fails to submit an approvable state plan, EPA may step in and impose a potentially less flexible federal plan, directly regulating the sources' CO_2 emissions itself.[64] EPA proposed a federal plan that also serves as proposed model trading rules.[65]

The CPP is being challenged in the D.C. Circuit by many parties, including more than twenty states, various industry groups, utilities, and coal companies. The cases have been consolidated into *West Virginia v. EPA*.[66] Key legal challenges include (1) improper inclusion of beyond the fence line requirements, arguing section 111(d) of the CAA is limited to stationary sources of an air pollutant directly covered by the regulation; (2) preclusion by regulations promulgated under section 112 of the CAA, arguing air pollutants cannot be regulated twice; (3) lack of a viable NSPS predicate under section 111(b) of the CAA.

iii. Methane

In September 2015, EPA proposed regulations to reduce methane emissions from the oil and gas sector under section 111(b) of the CAA.[67] If finalized, the proposed rules

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[55]Jonathan L. Ramseur & James E. McCarthy, *EPA's Clean Power Plan: Highlights of the Final Rule*, CONG. RES. SERV., at app., tbl.A-I (Aug. 14, 2015), *available at* http://www.fas.org/sgp/crs/misc/R44145.pdf.
[56]80 Fed. Reg. at 64,840.
[57]*Id.* at 64,849.
[58]*Id.* at 64,829.
[59]*Id.* at 64,727.
[60]*Id.* at 64,832.
[61]80 Fed. Reg. at 64,832.
[62]*Id.* at 64,855.
[63]*Id.*
[64]*Id.*; *see also* 42. U.S.C. § 7411(d)(2)(A) (2012).
[65]Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations; Proposed Rule, 80 Fed. Reg. 64,966 (Oct. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 62, and 78).
[66]Petition for Review, West Virginia v. EPA, No. 15-1363 (D.C. Cir. filed Oct. 23, 2015).
[67]Oil and Natural Gas Sector: Emission Standards for New and Modified Sources, 80 Fed. Reg. 56,593 (Sept. 18, 2015) (to be codified at 40 C.F.R. pt. 60).

would establish a new subpart OOOOa of 40 C.F.R. part 60.[68] The centerpiece of the proposed rule is a leak detection and repair (LDAR) program, which requires sources to monitor equipment for fugitive emissions and repair leaks found.[69] The proposal would require use of optical gas imaging (OGI) to find leaks.[70] The proposal also extends the requirement for reduced emission completions (RECs) from hydraulically fractured natural gas wells to hydraulically fractured oil wells.[71] In a REC, special equipment separates gas and liquid hydrocarbons from the flowback that comes from the well as it is being prepared for production. The gas and hydrocarbons can then be treated and used or sold, avoiding the waste of natural resources that cannot be renewed.[72] Another important aspect of the proposal is the "next generation" compliance requirements, including proposals for OGI and use of third-party verification of compliance.[73]

iv. Mobile Source Standards

On June 13, 2015, EPA and the National Highway Traffic Safety Administration (NHTSA) proposed Phase 2 fuel efficiency standards for medium to heavy duty trucks.[74] The standards build on 2011 Phase 1 standards, which were the first efficiency standards for heavy-duty vehicles. The regulations also set standards for new trailers that require design improvements that can significantly improve fuel efficiency. The trailer standards apply to model years 2018-2027; the engine standards apply to model years 2021-2027. EPA projects the standards will reduce fuel consumption by 24% for tractor-trailers.[75] On July 1, 2015, EPA began the process of regulating CO_2 emissions from aircraft under section 231(a) of the CAA[76] by proposing an endangerment finding and issuing an advanced notice of rulemaking.[77]

b. Litigation

In *Michigan v. EPA*, the U.S. Supreme Court held that EPA's interpretation of the CAA section 112(n)(1)(A), which requires the agency to regulate emissions of hazardous air pollutants (mercury and other toxics) from power plants when "appropriate and

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[68] *Id.* at 56,609.
[69] *Id.* at 56,595-96.
[70] *Id.* at 56,596.
[71] *Id.* at 56,628.
[72] 80 Fed. Reg. at 56,629.
[73] *Id.* at 56,648.
[74] Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2, 80 Fed. Reg. 40,138 (June 13, 2015) (to be codified at 40 C.F.R. pts. 9, 22, 85, 86, 600, 1033, 1036, 1037, 1039, 1042, 1043, 1065, 1066, and 1068; 49 C.F.R. pts. 512, 523, 534, 535, 537, and 538).
[75] Cutting Carbon Pollution, Improving Fuel Efficiency, Saving Money and Supporting Innovation for Trucks, EPA-420-F-15-900, ENVTL. PROT. AGENCY (June 2015); Proposed EPA and NHTSA Regulation of Commercial Trailers Used With Combination Tractors, EPA-420-F-15-902, ENVTL. PROT. AGENCY (June 2015); EPA and NHTSA Propose Greenhouse Gas and Fuel Efficiency Standards for Medium- and Heavy-Duty Trucks: By the Numbers, EPA-420-F-15-903, ENVTL. PROT. AGENCY (June 2015).
[76] 42 U.S.C. §7571(a) (2013).
[77] Proposed Finding That Greenhouse Gas Emissions From Aircraft Cause or Contribute to Air Pollution That May Reasonably Be Anticipated to Endanger Public Health and Welfare and Advanced Notice of Proposed Rulemaking, 80 Fed. Reg. 37,758 (July 1, 2015) (to be codified at 40 C.F.R. pts. 87 and 1068).

necessary," was unreasonable because the Agency refused to consider cost.[78] The EPA argued that it only had to consider whether regulation was appropriate and necessary to protect public health and safety at the outset, while costs were assessed at a later stage when calculating what particular controls to impose on any given facility. The Court found the Agency's interpretation unreasonable and directed EPA to "consider cost[,] including the cost of compliance[,] before deciding whether regulation is appropriate and necessary."[79] The case was remanded back to the D.C. Circuit, which remanded it to EPA without vacatur. EPA subsequently issued a supplemental finding that the consideration of cost did not impact its finding that regulation was appropriate and necessary.[80] Practically speaking, the law has had much of its intended (and indirect GHG) effects—with nearly 70% of coal fired power plants attaining compliance (or retiring).[81] *Michigan* suggests (after *UARG v. EPA*)[82] that the Court may be less inclined to give EPA Chevron deference for far-reaching regulations, which may have implications for challenges to the CPP.

Litigation of the CPP began well before it was finalized. In 2014, when EPA published the *proposed* plan, Murray Energy Company, followed by other petitioners, brought suit challenging the proposed CPP in *In re Murray Energy Corp. v. EPA*.[83] These suits argued that prior regulation of the source category under section 112 of the CAA precluded regulation under section 111(d). Without addressing the merits of Murray's arguments, a three-judge panel rejected the challenges, stating that the court lacks jurisdiction to review the proposal because the rule was not final.[84]

EPA released the pre-publication version of the final CPP on August 3, 2015, but it was not published until October. On August 13, 2015, a group of fifteen states and Peabody Energy Corporation filed an Emergency Petition for Extraordinary Writ seeking to stay implementation of the CPP in *In re West Virginia*.[85] The petition asserted that the states are and will continue to be irreparably harmed by the displacement of sovereign priorities and the steps they must take to begin reordering the way their citizens receive and consume energy. The petition sought a stay of "all of the Rule's already-applicable deadlines, including all State Plan deadlines, until litigation of the Rule's legality is complete."[86] EPA countered that petitioners failed to establish irreparable harm and that the lawsuits and motions were premature.[87] On September 9, 2015, the D.C. Circuit denied the petitions stating in a per curiam order that the petitioners failed to satisfy the

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[78]Michigan v. EPA, 135 S. Ct. 2699 (2015).
[79]*Id.* at 2702.
[80]Supplemental Finding That It Is Appropriate and Necessary to Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Unit, 80 Fed. Reg. 75,025 (Dec. 1, 2015) (to be codified at 40 C.F.R. pt. 63).
[81]MJ Bradley & Associates, *MATS Compliance Extension Status Update* (June 24, 2015) *available at* http://www.mjbradley.com/sites/default/files/MATS%20Compliance%20Extension%20Update.pdf.
[82]Utility Air Reg. Group v. EPA, 134 S. Ct. 2427 (2014).
[83]*In re* Murray Energy Corp., 788 F.3d 330 (D.C. Cir. 2015); *see also* Petition for Review, West Virginia v. EPA, No. 14-1146 (D.C. Cir. filed Aug. 1, 2014).
[84]*Murray Energy Corp.*, 788 F.3d at 336.
[85]Emergency Petition for Extraordinary Writ, *In re* West Virginia, No. 15-1277 (D.C. Cir. filed Aug. 13, 2015).
[86]*Id.* at 3.
[87]EPA's Corrected Response in Opposition, *In re* West Virginia, No. 15-1277 (D.C. Cir. filed Aug. 31, 2015).

stringent standards that apply to petitions for extraordinary writs that seek to stay agency action.[88]

c. Executive Action

President Obama announced GHG emission targets for federal agencies on November 23, 2015, requiring a cut in emissions by 41.8% from 2008 levels by 2025.[89] To meet these targets, federal agencies will implement measures to save $18 billion in energy costs and increase the share of electricity the federal government consumes from renewable sources to 30%.[90]

d. Congressional Legislation

i. Keystone XL Pipeline

S.1, the Keystone XL Pipeline Approval Act, passed both houses in late February 2015.[91] The bill approved the Keystone XL Pipeline and also included energy efficiency measures, as well as a statement that Congress finds climate change to be real. President Obama vetoed the bill, stating that it interfered with the traditional executive authority over security and foreign affairs,[92] which was not overridden.[93] In any event, on November 6, 2015, Secretary of State John Kerry denied TransCanada a presidential permit for the Keystone XL pipeline, concluding it was not in the United States' national interest.

ii. Climate Science

H.R. 1971, the Climate Solutions Act of 2015, was introduced in April to reduce GHG emissions and protect the climate.[94] However, Congress continued to debate the reality and causes of climate change through resolutions. By a vote of 98-to-1,[95] the Senate approved an amendment[96] to the Keystone XL Pipeline Approval Act affirming the "sense of the [Congress] that climate change is real and not a hoax." Several resolutions were introduced by both the Senate and the House regarding the causes of climate change, responses to climate change, and funding for climate change science.[97]

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[88] Order, *In re* West Virginia, No. 15-1227 (D.C. Cir. filed Sept. 9, 2015).
[89] Press Release, The White House, Obama Admin. Announces 2016 Greenhouse Gas Targets and Sustainability Plans; Highlights Fed. Leadership on Climate Action (Nov. 23, 2015), https://www.whitehouse.gov/the-press-office/2015/11/23/obama-administration-announces-2016-greenhouse-gas-targets-and.
[90] *Id.*
[91] Keystone XL Pipeline Approval Act, S. 1, 114th Cong. (2015).
[92] Press Release, The White House, Veto Message to the Senate: S. 1, Keystone XL Pipeline Approval Act (Feb. 24, 2015).
[93] Keystone XL Pipeline Approval Act: Roll Vote No. 68, Congressional Record 62:37 (Mar. 4, 2015).
[94] Climate Solutions Act of 2015, H.R. 1971, 144th Cong. (2015).
[95] S. Amend. 29 to S. Amend. 2 to Keystone XL Pipeline Removal Act: Roll Call Vote No. 10. Congressional Record 98:1 (Jan. 21, 2015) (Senator Roger Wicker (R-MS) was the only dissenter).
[96] S. Amend. 29 to S. Amend. 2, 114th Cong. (2015) (amends S. 1).
[97] *See* S. Amend. 777 to S. Con. Res. 11, 114th Cong. (2015) (introduced by Sen. Bernie Sanders (D-VT) as an amendment to the budget resolution); S. Amend. 1014 to S. Con.

iii. GHG Standards for Power Plants

Congress passed resolutions[98] under the Congressional Review Act[99] disapproving the NSPS for EGUs[100] and the CPP.[101] President Obama vetoed them. Other bills were introduced to deprive EPA of authority to regulate GHGs either by amending the CAA to exclude GHGs from the definition of air pollutant[102] or by repealing EPA's power plant GHG regulations.[103] On December 1, 2015, the House passed a joint resolution disapproving of the final GHG rules for EGUs.[104]

3. Regional Activities

a. Western Climate Initiative

In 2014, California and Quebec linked their cap-and-trade programs into a single market through the Western Climate Initiative, Inc.[105] On December 7, 2015, the governments of Ontario, Manitoba, and Québec signed a memorandum of understanding agreeing to collaborate on the development of a cap-and-trade program that would be consistent with the design of the existing California and Quebec programs, with the intention of linking the two programs.[106]

b. Regional Greenhouse Gas Initiative

The cap-and-trade program covering the power sector in nine Northeast and Mid-Atlantic states entered into its third control period in 2015.[107] The participating states

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Res. 11, 114th Cong. (2015) (introduced by Sen. Michael Bennet (D-CO)); H. Res. 424, 114th Cong. (2015).

[98]S. J. Res. 23, 114th Cong. (2015) (New Source Performance Standards); S. J. Res. 24, 114th Cong. (2015) (Clean Power Plan).

[99]5 U.S.C. §§ 801-808 (2012).

[100]Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015) (direct final rule).

[101]Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015).

[102]S. 791, 114th Cong. (2015) (sponsored by Sen. Ted Cruz (R-TX)).

[103]S. 1324, 114th Cong. (2015); H.R. 4169, 114th Cong. (2015); H.R. 3880, 114th Cong. (2015).

[104]H.R. Res. 539, 114th Cong. (2015).

[105]WESTERN CLIMATE INITIATIVE, INC., http://www.wci-inc.org/ (last visited Mar. 15, 2016). The first joint auction was held in November 2014. *See Cap and Trade Program Auction and Reserve Sale Information*, CAL. AIR RES. BD., http://www.arb.ca.gov/cc/capandtrade/auction/auction.htm (last visited Mar. 15, 2016).

[106]Memorandum of Understanding Between the Governments of Ontario, Québec, and Manitoba Concerning Concerted Climate Change Actions and Market-Based Mechanisms (Dec. 7, 2015).

[107]Press Release, Reg'l Greenhouse Gas Initiative, Inc., CO_2 Allowances Sold for $5.41 in 27th RGGI Auction (Mar. 13, 2015) (describing that auction is first in third control period).

began a new program review, including considerations for compliance with EPA's CPP.[108] A previous review resulted in a 45% reduction of the cap for 2014.[109]

c. Transportation and Climate Initiative (TCI)

On November 24, 2015, Connecticut, Delaware, the District of Columbia, New York, Rhode Island, and Vermont announced their intention to work together through the TCI, a collaboration among eleven Northeast and Mid-Atlantic jurisdictions facilitated by Georgetown Climate Center to develop potential market-based policies targeted at achieving substantial reductions in GHG and other pollutant emissions from the transportation sector.[110] The announcement was accompanied by the release of a report finding that the region can reduce transportation sector emissions 29%-40% from 2011 levels by 2030.[111]

d. International ZEV Alliance

The International Zero-Emission Vehicle (ZEV) Alliance was launched in August 2015 to promote awareness and increase adoption of zero-emission vehicles.[112] Eight U.S. states—California, Connecticut, Maryland, Massachusetts, New York, Oregon, Rhode Island, and Vermont—joined the International ZEV Alliance, along with Germany, the Netherlands, Norway, the United Kingdom, and the Canadian provinces of British Columbia, and Québec. On December 3, 2015, at COP 21, the International ZEV Alliance members announced the goal of making all new passenger vehicles in their jurisdictions zero-emission vehicles by 2050.[113]

4. State Activities

Several states took actions to further reduce GHG emissions through new goals or policies. West Virginia repealed a clean energy law and others introduced legislation

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[108] *2016 Program Review*, REG'L GREENHOUSE GAS INITIATIVE, INC., http://www.rggi.org/design/2016-program-review (last visited Mar. 15, 2016).

[109] Press Release, Reg'l Greenhouse Gas Initiative, Inc., RGGI States Propose Lowering Regional CO_2 Emissions Cap 45%, Implementing a More Flexible Cost-Control Mechanism (Feb. 7, 2013).

[110] TRANSP. & CLIMATE INITIATIVE, http://www.transportationandclimate.org/ (last visited Mar. 15, 2016); *Five Northeast States and DC Announce They Will Work Together to Develop Potential Market-Based Policies to Cut Greenhouse Gas Emissions from Transportation*, GEORGETOWN CLIMATE CTR., http://www.georgetownclimate.org/five-northeast-states-and-dc-announce-they-will-work-together-to-develop-potential-market-based-poli (last visited Mar. 15, 2016).

[111] *Reducing Greenhouse Gas Emissions from Transportation: Opportunities in the Northeast and Mid-Atlantic*, GEORGETOWN CLIMATE CTR. (Nov. 24, 2015), http://www.georgetownclimate.org/reducing-greenhouse-gas-emissions-from-transportation-opportunities-in-the-northeast-and-mid-atlanti; *see also* Georgetown Climate Ctr., Reducing Greenhouse Gas Emissions from Transp.: Opportunities in the Northeast and Mid-Atlantic, at app. 3 (Nov. 2015).

[112] Press Release, Cal. Envtl. Prot. Agency, Global Alliance Accelerates Transition to Zero-Emission Vehicles (Sept. 29, 2015).

[113] *International ZEV Alliance Announcement*, THE INT'L ZERO-EMISSION VEHICLE ALLIANCE, (Dec. 3, 2015), *available at* http://zevalliance.org/content/cop21-2050-announcement.

aimed at keeping the business as usual scenario. Legislatures in thirty-one states introduced eighty-nine bills or resolutions related to the CPP. Of that number, twenty-four of those states introduced sixty bills, seven states enacted legislation, eleven adopted resolutions, and eighteen introduced twenty-nine non-binding resolutions.[114]

a. California

Governor Edmund G. Brown established a state-wide GHG reduction target of 40% below 1990 levels by 2030 in an April 29, 2015 executive order.[115] The target builds upon California's statutory target of reducing emissions to 1990 levels by 2020,[116] as well as a previous executive order aimed at achieving 80% reductions below 1990 levels by 2050.[117] In the 2015 legislative session, Senator Fran Pavley introduced Senate Bill 32, which would codify the 2030 and 2050 targets in statute.[118] The bill passed the Senate but failed to pass the state assembly; it may be reconsidered in 2016.[119]

On September 25, 2015, the California Air Resources Board (CARB) re-adopted the state's Low Carbon Fuel Standard (LCFS) regulations,[120] which have been implemented since January 1, 2013, to remedy procedural issues that a state court of appeals found violated the California Administrative Procedure Act and the California Environmental Quality Act (CEQA) in *Poet, LLC v. California Air Resources Board*.[121] The re-adopted regulations include several new provisions, including a cost containment provision, updated carbon-intensity calculation tools, and additional flexibilities for regulated entities. The re-adopted regulations did not change the LCFS target of a 10% improvement in carbon-intensity compared to 2010 levels by 2020.[122] A federal district court dismissed upon remand most of the remaining claims alleging that the LCFS violates the dormant Commerce Clause, although it has allowed litigation to proceed on the claim that the ethanol provisions discriminate in purpose or effect.[123]

In 2015, California's cap-and-trade program began requiring refiners and importers of transportation fuels to submit emissions allowances equal to the GHG

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[114]Melanie Condon & Jocelyn Durkay, *States' Reaction to EPA Greenhouse Gas Emissions Standards*, Nat'l Conference of State Legislatures, http://www.ncsl.org/research/energy/states-reactions-to-proposed-epa-greenhouse-gas-emissions-standards635333237.aspx (last visited Mar. 15, 2016).

[115]Cal. Exec. Order No. B-30-15 (Apr. 29, 2015), https://www.gov.ca.gov/news.php?id=18938.

[116]CAL. HEALTH & SAFETY CODE § 38550 (Deering 2015).

[117]Cal. Exec. Order No. S-3-05 (June 1, 2005), https://www.gov.ca.gov/news.php?id=1861.

[118]S.B. 32, 2015-2016 Sess. (Cal. 2014).

[119]Chris Megerian, *Gas Reduction Dropped from California Climate Change Bill*, L.A. TIMES (Sept. 9, 2015, 10:11 PM), http://www.latimes.com/local/political/la-me-ln-gasoline-reduction-dropped-from-climate-change-bill-20150909-story.html.

[120]Cal. Air Res. Bd., Notice of Decision, *Re-Adoption of the Low Carbon Fuel Standard* (Oct. 2, 2015), *available at* http://www.arb.ca.gov/regact/2015/lcfs2015/nodlcfs.pdf (effective Jan. 1, 2016).

[121]218 Cal. App. 4th 681 (Cal. Ct. App. 2013) (previously published at 217 Cal. App. 4th 1214).

[122]Cal. Air Res. Bd., Final Regulation Order (to be codified at Cal. Code Regs. tit. 17, §§ 95840-95497).

[123]Am. Fuels & Petrochemical Mfrs. Ass'n v. Corey, No. 1:09-cv-2234-LJO-BAM, 2015 U.S. Dist. LEXIS 106901 (E.D. Cal. Aug. 13, 2015).

content of the fuels distributed.[124] This expansion in scope accompanies the beginning of California's second compliance period.[125] The cap-and-trade program will play a central role in the state's plan to comply with the federal CPP.[126]

California enacted the Multifamily Affordable Housing Solar Roofs Program, which requires the state to spend up to $100 million per year from 2016 to 2020 on the installation of solar energy systems for low-income housing.[127] Because an increasing amount of end-of-life photovoltaic modules can be expected from 2020 onwards in California, on October 1, 2015, Senate Bill 489 was signed into law expressly allowing solar panels to be defined as universal waste.[128] The legislation acknowledges the pending waste solar panel concerns.[129] On October 7, 2015, Governor Brown also signed into law the Clean Energy and Pollution Reduction Act (S.B. 350), increasing the state's 2030 Renewable Portfolio Standards (RPS) target from 33% to 50%.[130] The Act also requires the state to double the energy efficiency of buildings by 2030.[131]

b. Hawaii

Governor David Ige signed House Bill 623 on June 10, 2015, establishing a 100% Renewable Portfolio Standard (RPS) target for 2045, making Hawaii the first state to set a 100% RPS target. The law also established additional incremental renewable energy targets for the state, including 30% renewable energy by 2020 and 70% by 2040.[132]

c. New York

On June 25, 2015, in its 2015 State Energy Plan, the New York State Energy Planning Board established a new state goal of achieving a 40% reduction in state-wide GHG emissions from 1990 levels by 2030.[133] On December 2, 2015, Governor Andrew Cuomo directed the state's Department of Public Service to establish in regulation a 50% clean energy standard for 2030,[134] a goal established earlier in the state's 2015 New York

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[124]CAL. CODE REGS. tit. 17, §§ 95811, 95840, 95851-52 (2015).
[125]CAL. CODE REGS. tit. 17, § 95840 (2015) (the compliance period runs from 2015 to 2017).
[126]*Clean Power Plan Compliance Discussion Paper*, CAL. AIR RES. BD. (Sept. 2015), *available at* http://www.arb.ca.gov/cc/powerplants/meetings/2015whitepaper.pdf.
[127]A.B. 693, 2015-2016 Sess. (Cal. 2015).
[128]S.B. 489, 2015-2016 Sess. (Cal. 2015) (an act to add Article 17 (commencing with section 25259) to Chapter 6.5 of Division 20 of the Health & Safety Code (Oct. 15, 2015)).
[129]*Id.*
[130]S.B. 350 §§ 2, 17, 2015-2016 Sess. (Cal. 2015) (to be codified at Cal. Pub. Util. Code § 399.11).
[131]*Id.* at §§ 2, 6 (to be codified at Cal. Pub. Res. Code § 25310).
[132]HAW. REV. STAT. § 269-92 (2015).
[133]NEW YORK STATE ENERGY PLANNING BOARD, THE ENERGY TO LEAD: 2015 NEW YORK STATE ENERGY PLAN at 112 (2015) [hereinafter 2015 N.Y. STATE ENERGY PLAN]; *see also* NEW YORK STATE ENERGY PLAN, http://energyplan.ny.gov/ (last visited Feb. 12, 2016).
[134]Letter from Andrew M. Cuomo, N.Y. Gov., to Audrey Zibelman, CEO, N.Y. State Dep't of Pub. Serv. (Dec. 2, 2015).

State Energy Plan.[135] The energy plan also set a goal of decreasing energy consumption by buildings 23% by 2030 from 2012 levels.[136]

d. Oregon

The Oregon Legislature authorized the state's Clean Fuels Program by passing Senate Bill 324, removing a 2015 sunset clause from previous legislation.[137] S.B. 324 requires a 10% reduction in fuel carbon intensity from 2010 levels by 2025, and it also authorizes a new cost containment mechanism.[138] On December 9, 2015, the state's Environmental Quality Commission amended implementing regulations in light of S.B. 324 and affirmed the January 1, 2016, program start date. The revised regulations postponed the first compliance demonstration requirement until 2017 and also incorporated an assessment of emissions from indirect land-use changes.[139] Three ballot measures that would repeal or scale back the program have also been proposed for the 2016 election.[140] In 2015, a federal district court dismissed challenges to the Oregon program in *American Fuel & Petrochemical Manufacturers v. O'Keeffe*, largely relying on Rocky Mountain Farmers Union.[141]

e. Vermont

Governor Peter Shumlin signed into law Act 56 on June 11, 2015, establishing the Renewable Energy Standard and Energy Transformation Program. The Act sets a 75% renewable energy standard for 2032, creates annual interim goals beginning with a 55% requirement for 2017, and creates distributed generation and energy efficiency investment requirements for utilities.[142]

f. West Virginia

In January 2015, West Virginia repealed the state's alternative and renewable energy portfolio standard in H.B. 2001.[143] These standards were originally enacted in 2009. The standards would have taken effect in 2015 and would have required certain utilities in the state to source 25% of electricity from renewable and alternative fuel sources by 2025.

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[135]2015 N.Y. STATE ENERGY PLAN, *supra* note 133, at 112.
[136]*Id.*
[137]S.B. 324, 2015 Reg. Sess. (Or. 2015); *Oregon Clean Fuels Program*, Oregon Dep't of Envtl. Quality, http://www.deq.state.or.us/aq/cleanFuel/index.htm (last visited Mar. 15, 2016).
[138]S.B. 324.
[139]Ian K. Kullgren, *Oregon Delays Clean-Fuels Enforcement Until 2017*, THE OREGONIAN (Dec. 11, 2015, 9:10 PM), http://www.oregonlive.com/politics/index.ssf/2015/12/oregon_delays_clean_fuels_enfo.html.
[140]*Id.*
[141]Am. Fuel & Petrochemical Mfrs. v. O'Keeffe, No. 3:15-CV-00467-AA, 2015 U.S. Dist. LEXIS 128277 (D. Or. Sept. 23, 2015); *see also* Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013).
[142]H. 40, 2015-2016 Sess. (Vt. 2015) (to be codified at VT. STAT. ANN. tit. 30, § 8005).
[143]H.B. 2001, 82nd Leg, First Reg. Sess. (W.V. 2015); *see* W. VA. CODE § 24-2F-5 (2015).

5. Corporate Liabilities and Responsibilities

a. Exxon Mobil/Peabody

In September 2015, Inside Climate News[144] reported that Exxon Mobil (Exxon) initially published reports discussing the potential role fossil fuels play in climate change in the 1970s and early 1980s, but then supported organizations questioning climate change.[145] The Union of Concerned Scientists (UCS) wrote on October 10, 2015, that senior Exxon executives "knew by 1978 that emissions of carbon dioxide from fossil fuels posed significant risks of disrupting the climate."[146] Environmental and civil rights groups asked the U.S. Department of Justice (DOJ) to investigate whether Exxon concealed information about global climate change from the public.[147]

On November 5, 2015, it was reported that the New York Attorney General (NY AG) subpoenaed records from Exxon related to the company's research regarding climate change.[148] The NY AG sought the records pursuant to New York's Martin Act, which allows the NY AG to bring fraud actions against a company without having to establish conspiracy to commit fraud.[149] The request came after several journalistic reports raised concerns that Exxon engaged in consumer and securities fraud.[150] Exxon asserted it reported the business risk of climate change in its annual 10-K securities filings and reports to shareholders.[151]

On November 8, 2015, Peabody Energy Corporation (Peabody) reached a settlement with the NY AG, under which the company agreed to revise its financial disclosures to reflect the potential impact of climate change regulations on future business.[152] The settlement followed an investigation beginning in 2013 concerning Peabody's disclosure of financial risks associated with climate change policies in filings

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[144]Neela Banerjee, David Hasemyer & Lisa Song, *Exxon Confirmed Global Warming Consensus in 1982 with In-House Climate Models*, INSIDE CLIMATE NEWS (Sept. 22, 2015).

[145]Lynn Cook, *Exxon Mobil Gets Subpoena From N.Y. Regarding Climate-Change Research*, WALL ST. J. (Nov. 5, 2015), http://www.wsj.com/articles/exxon-mobil-gets-subpoena-from-n-y-regarding-climate-change-research-1446760684 (subscription); *see also* Bob Simison, *New York Attorney General Subpoenas Exxon on Climate Research*, INSIDE CLIMATE NEWS (Nov. 5, 2015), http://insideclimatenews.org/news/05112015/new-york-attorney-general-eric-schneiderman-subpoena-Exxon-climate-documents.

[146]Peter Frumhoff, *Exxon's Early Knowledge of Climate Risks, Their Long Campaign of Climate Deception and Why It Matters*, UNION OF CONCERNED SCIENTISTS BLOG (Oct. 10, 2015, 8:53 AM), http://blog.ucsusa.org/peter-frumhoff/exxons-early-knowledge-of-climate-risks-their-long-campaign-of-climate-deception-and-why-it-matters?_ga=1.255480712.169573978.1449942621.

[147]Keith Goldberg, *Clinton, Enviros Urge DOJ to Probe Exxon Climate Work*, LAW360 (Oct. 30, 2015, 3:41 PM), http://www.law360.com/environmental/articles/721207?nl_pk=dc173fbd-3b29-482a-a263 (subscription).

[148]*Id.*; Cook, *supra* note 145; Simison, *supra* note 145.

[149]Simison, *supra* note 145.

[150]*Id.*

[151]*Id.*

[152]Keith Goldberg, *Peabody To Disclose Climate Risks To End NY AG Probe*, LAW360 (Nov. 9, 2015), http://www.law360.com/energy/articles/724797?nl_pk=120ac566-a842-465aa84e47dd35b478ff&utm_source=newsletter&utm_medium=email&utm_campaign=energy (subscription).

to the Securities and Exchange Commission (SEC). The NY AG alleged that Peabody repeatedly denied its ability to reasonably predict the potential impacts of climate change policies on future operations, financial conditions, and cash flows, while at the same time making market projections about the impact of future climate change policies, some of which concluded that regulatory actions could have a severe negative impact on Peabody's future financial condition. In exchange for assurances of the discontinuance of the investigation, Peabody agreed to add specific language on climate policy risks in its next quarterly report and to acknowledge the potential effects of climate regulation on demand for Peabody's products and securities.[153]

b. Volkswagen

Beginning in September 2015, EPA issued two notices of violation to Volkswagen, alleging that model years 2009 to 2015 Volkswagen and Audi diesel cars with 2.0 liter engines were equipped with software that circumvents EPA emission standards for nitrogen oxides, known as a "defeat device" under the CAA.[154] EPA alleged that the software could detect when the vehicle was undergoing emissions testing and turned on full emissions controls only during the test.[155] In November 2015, Volkswagen disclosed that a similar issue occurred for carbon dioxide emissions on several of its European models.[156]

B. Adaptation

1. International Adaptation Programs and Activities

The Paris Agreement strengthened international support to help countries adapt and cope with the adverse effects of climate change. The Paris Agreement: (1) established a global goal of enhancing the capacity of countries to adapt to climate change, strengthening resilience, and reducing vulnerability; (2) requires parties to plan and implement adaptation efforts; (3) encourages parties to report their adaptation efforts and needs; and (4) includes a review of progress through the global stocktake.[157] Article 9 of the Agreement requires developed nations to provide financial support to developing nations' adaptation efforts, and seeks to achieve parity in allocation of resources between mitigation and adaptation support. The Parties agreed to continue and strengthen the Warsaw International Mechanism (WIM) for Loss and Damage associated with the negative impacts of climate change, but they stopped short of creating a new mechanism.[158] At the behest of the U.S., the accompanying decision text provides that the WIM "does not involve or provide a basis for any liability or compensation."[159]

The Green Climate Fund (GCF), the financial mechanism for the UNFCCC, became fully operational in 2015, accrediting its first twenty implementing agencies and approving $168 million in funding prior to COP 21 for the first eight mitigation and

[153] Assurance of Discontinuance, *In re* Peabody Energy Corp, No. 15-242 (Nov. 8, 2015).
[154] Keith Goldberg, *EPA Says Volkswagen Cars Flouted Emissions Limits*, LAW360 (Sept. 18, 2015, 12:25 PM), http://www.law360.com/articles/704678 (subscription).
[155] Goldberg, *supra* note 152.
[156] *Volkswagen's new stunner: CO2 emissions were understated*, CNN MONEY (Nov. 3, 2015), http://money.cnn.com/2015/11/03/news/volkswagen-scandal-carbon-dioxide-fuel-consumption/.
[157] Paris Agreement, *supra* note 7, at art. 8.
[158] *Id.* at art. 8, ¶ 2.
[159] *Id.* ¶ 52.

adaptation projects in developing countries.[160] Developed countries also announced pledges totaling USD $10.1 billion during the initial resource mobilization of the GCF.[161]

2. National Adaptation Programs and Activities

In 2015, the Obama Administration made strides in implementing the 2013 President's Climate Action Plan[162] and the recommendations from the 2014 State, Local, and Tribal Leaders Task Force on Climate Preparedness and Resilience.[163] This involved revamping various federal programs to better support preparedness for climate change impacts at the state and local level, in addition to rethinking the design and management of federal assets to ensure their long-term resilience.

In January 2015, President Obama signed Executive Order 13690, issuing the Federal Flood Risk Management Standard, which directs federal agencies to consider climate change and sea-level rise when siting, designing, and building federal projects.[164] Also in January 2015, the Army Corps of Engineers released its North Atlantic Coast Comprehensive Study, which detailed strategies for reducing risks from coastal storms and flooding due to sea-level rise in the North Atlantic region.[165]

The Federal Highway Administration announced in February 2015 its proposed rules to require risk-based asset management plans for transportation infrastructure, which are required under the Moving Ahead for Progress in the 21st Century Act (MAP-21). Under this rule, state transportation agencies would be required to consider current and future conditions, including extreme weather and climate change.[166]

In March 2015, the Federal Emergency Management Agency (FEMA) released State Hazard Mitigation Plan Guidance, which will require updated state hazard mitigation plans to consider the long-term risks posed by future climate change and integrate consideration of climate change adaptation options.[167] This guidance is effective March 2016.

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[160] *The Green Climate Fund*, CLIMATE FUNDS UPDATE (Dec. 2015) *available at* http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/10066.pdf; *see also* GREEN CLIMATE FUND, http://www.greenclimate.fund/home (last visited Mar. 15, 2016).

[161] *List of Recent Climate Announcements*, UNFCCC, http://newsroom.unfccc.int/financial-flows/list-of-recent-climate-funding-announcements/ (last visited Mar. 15, 2016).

[162] EXEC. OFFICE OF THE PRESIDENT, THE PRESIDENT'S CLIMATE ACTION PLAN (June 2013).

[163] *Progress Report on Implementation of Recommendations from State, Local and Tribal Leaders Task Force*, GEORGETOWN CLIMATE CENTER (July 9, 2015) http://www.georgetownclimate.org/progress-report-on-implementation-of-recommendations-from-state-local-and-tribal-leaders-task-force.

[164] Exec. Order No. 13690, 80 Fed. Reg. 6425 (Jan. 30, 2015); *see also* FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA), GUIDELINES FOR IMPLEMENTING EXECUTIVE ORDER 13690, ESTABLISHING A FEDERAL FLOOD RISK MANAGEMENT STANDARD (Oct. 8, 2015), *available at* http://www.fema.gov/media-library/assets/documents/110377.

[165] U.S. ARMY CORPS OF ENG'RS, NORTH-ATLANTIC COAST COMPREHENSIVE STUDY (Jan. 2015) http://www.nad.usace.army.mil/CompStudy.aspx.

[166] Asset Management Plan, 80 Fed. Reg. 9231 (Feb. 20, 2015) (to be codified at 23 C.F.R. pt. 515).

[167] FED. EMERGENCY MGMT. AGENCY, STATE MITIGATION PLAN REVIEW GUIDE (Mar. 2015), *available at* http://www.fema.gov/media-library-data/1425915308555-

In June 2015, forty state and local jurisdictions were selected to compete in the second phase of the Department of Housing and Urban Development's (HUD) National Disaster Resilience Competition. These jurisdictions submitted their proposals for building resilience in their communities in October 2015, and in early 2016, HUD will select the winners of the $1 billion in federal disaster recovery assistance.[168] Also in June 2015, the Administration announced the Resilience AmeriCorps Pilot Program, which will place AmeriCorps volunteers in ten U.S. cities to help build local capacity to adapt to climate change.[169]

In July 2015, the Department of the Interior announced an award of $11.8 million to support adaptation planning in Alaskan native villages and communities vulnerable to the impacts of climate change through the Tribal Climate Resilience Program.[170] In November 2015, the Technical Mapping Advisory Committee released a report recommending how FEMA could incorporate sea-level rise and long-term erosion rate data in floodplain maps used to administer the National Flood Insurance Program.[171]

3. State Activities and Programs

In 2015, several states released new or updated plans for responding to the impacts of climate change. Fifteen states now have comprehensive state-wide adaptation plans, while others are conducting planning for specific sectors.[172] In March 2015, Delaware released a Climate Framework with more than 150 recommendations for actions that Delaware agencies should pursue.[173]

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aba3a873bc5f1140f7320d1ebebd18c6/State_Mitigation_Plan_Review_Guide_2015.pdf. (States and communities must have FEMA-approved Hazard Mitigation to be eligible for federal disaster relief dollars under the Robert T. Stafford Disaster Relief and Emergency Assistance Act).

[168] *National Disaster Resilience Competition*, HUD EXCHANGE, https://www.hudexchange.info/programs/cdbg-dr/resilient-recovery/ (last visited Mar. 15, 2016).

[169] Press Release, The White House, Resilience AmeriCorps Announces Ten Cities for Its Pilot Program to Support Communities in Building Capacity and Technical Support for Climate Resilience (Aug. 20, 2015). The program will be implemented through a partnership between the Corporation for National and Community Services (CNCS), the Department of Energy (DOE), EPA, and the National Oceanic and Atmospheric Administration (NOAA), in collaboration with the Rockefeller Foundation and Cities of Service. *See* Robin Bravender, *Americorps "Resilience Volunteers" Headed to 10 Cities*, E&E NEWS GREENWIRE (Aug. 20, 2015), http://www.eenews.net/greenwire/stories/1060023713/search.

[170] Press Release, U.S. Dep't of the Interior, Interior Department Announces $11.8 Million to Support Tribal Climate Change Adaptation and Planning Projects (July 9, 2015).

[171] *Technical Mapping Advisory Council*, FED. EMERGENCY MGMT. AGENCY, https://www.fema.gov/technical-mapping-advisory-council (last updated Feb. 12, 2016).

[172] Aaron Ray & Jessica Grannis, *From Planning to Action: Implementation of State Climate Change Adaptation Plans*, 3 MICH. J. SUSTAINABILITY 5 (Spring 2015).

[173] DEL. DEP'T OF NAT. RES. AND ENVTL. CONTROL, CLIMATE FRAMEWORK FOR DELAWARE (Dec. 31, 2014), *available at* http://www.dnrec.delaware.gov/energy/Documents/The%20Climate%20Framework%20for%20Delaware.pdf.

States continue to make progress in implementing their adaptation plans. In 2015, California passed three climate adaptation bills: (1) A.B. 1482[174] requires the California Natural Resource Agency to update the state's adaptation strategy every three years; (2) S.B. 246[175] establishes the Integrated Climate Adaptation and Resiliency Program within the Governor's Office of Planning and Research to coordinate regional, local, and state adaptation efforts; and (3) S.B. 379[176] requires California cities and counties to incorporate adaptation and resiliency strategies as a safety element in local land-use plans (general plans). The governor also implemented several measures to respond to the state's historic drought and to reduce risks from future water shortages as a result of climate change. For example, executive orders signed in April and November require cities to reduce water use by 25% and direct the State Water Board to take actions to facilitate the storage and reuse of water.[177]

States continue to pass legislation aimed at promoting local action, generating revenues for adaptation, and leveraging interagency working groups to better understand adaptation needs. In May 2015, Florida passed S.B. 1094 requiring local governments to consider the impacts of future sea-level rise and to identify development strategies and engineering solutions to reduce future flood risks in their local land use plans.[178] In June 2015, the Hawaii legislature passed H.B. 444[179] authorizing the use of a hotel tax to pay for beach restoration and conservation. In October 2015, Governor Malloy of Connecticut signed Executive Order 50, which establishes a permanent working group, the State Agency Fostering Resilience Council, that is charged with increasing the state's resilience to extreme weather and climate change.[180]

4. Local/Regional Activities and Programs

Local governments continue to plan and take actions to reduce risks posed by climate change. In April 2015, New York City Mayor Bill DeBlasio released the OneNYC Plan, a sustainability master plan for the city that puts a heightened emphasis on preparing the city for climate change while meeting environmental targets and social equity goals.[181] In May 2015, fourteen cities in the metro-Boston region agreed to work collaboratively to prepare for climate change impacts by signing the Metro Boston Climate Preparedness Commitment.[182] Miami-Dade County in Florida allocated $300,000 of their capital budget to make investments to prepare roads, bridges, and other

[174]A.B. 1482, 2015-2016 Sess. (Cal. 2015).
[175]S.B. 246, 2015-2016 Sess. (Cal. 2015).
[176]S.B. 379, 2015-2016 Sess. (Cal. 2015).
[177]Exec. Dep't State of Cal., *Executive Order B-29-15* (Apr. 1, 2015), *available at* https://www.gov.ca.gov/docs/4.1.15_Executive_Order.pdf ; *see also* Exec. Dep't State of Cal., *Executive Order B-36-15* (Nov. 13, 2015), *available at* https://www.gov.ca.gov/docs/11.13.15_EO_B-36-15.pdf.
[178]S.B. 1094, 2015 Sess. (Fla. 2015) (The law modifies FLA. STAT. § 163.3178(2)(f)1, which deals with Coastal management elements of comprehensive plans).
[179]H.B. 444, 28th Legis. (Haw. 2015).
[180]Press Release, Gov. Dannel P. Malloy, State of Connecticut, Gov. Malloy Permanently Establishes State Council on Storm Resiliency (Oct. 29, 2015).
[181]#ONENYC, http://www1.nyc.gov/html/onenyc/index.html (last visited Mar. 15, 2016).
[182]*Metropolitan Boston Climate Preparedness Commitment* (May 13, 2015), *available at* http://www.mapc.org/sites/default/files/Metro%20Boston%20Climate%20Preparedness%20Commitment.pdf.

infrastructure for sea-level rise, as well as to hire a chief resiliency officer.[183] Several cities that are part of the 100 Resilient Cities initiative, led by the Rockefeller Foundation, released resilience plans in 2015.[184]

II. SUSTAINABLE DEVELOPMENT

A. International Activities

1. United Nations Initiatives

In September 2015, the United Nations General Assembly adopted a resolution,[185] setting forth seventeen new global sustainable development goals for 2015-2030, as called for by the United Nations Conference on Sustainable Development (Rio+20).[186] The new goals touch on the topics of poverty, hunger, health, equitable quality education, gender equality, water and sanitation, energy, economic growth and employment, resilient infrastructure, inequality among countries, sustainable cities, sustainable consumption and production, climate change, oceans and marine resources, forests and land degradation, access to justice, and strengthening implementation. The goals contain 169 targets and offer a way forward by identifying six "essential elements" common to all goals—dignity, people, prosperity, planet, justice, and partnership.[187]

2. Corporate Social Responsibility/Sustainability Initiatives

During 2015, the membership in the United Nation's Sustainable Stock Exchanges (SSE) initiative more than doubled, bringing the number of member exchanges to forty-eight around the world[188] that are committed to promote long term sustainable investment and improved environmental, social and corporate governance (ESG) disclosure and performance among companies listed on their exchanges.[189]

On March 6, 2015, fifty-four African countries signed the Cairo Declaration on Managing Africa's Natural Capital for Sustainable Development and Poverty Eradication at the Fifteenth Session of the African Ministerial Conference on the Environment

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[183]Peter Andrew Bosch, *Climate Change Gets Last-Minute Nod in New Miami-Dade Budget*, MIAMI HERALD (Sept. 17, 2015, 10:44 PM), http://www.miamiherald.com/news/local/community/miami-dade/article35657733.html.

[184]CITY OF NEW ORLEANS, RESILIENT NEW ORLEANS: STRATEGIC ACTIONS TO SHAPE OUR FUTURE CITY (Aug. 2015); *available at* http://resilientnola.org/wp-content/uploads/2015/08/Resilient_New_Orleans_Strategy.pdf; CITY OF NORFOLK, NORFOLK RESILIENT STRATEGY (Oct. 2015), *available at* http://nfkresilientcity.org/wp-content/uploads/2015/10/Norfolk_Resilient_Strategy_October_2015.pdf; *see also* 100 RESILIENT CITIES, http://www.100resilientcities.org/#/-_/ (last visited Feb. 12, 2016).

[185]U.N. General Assembly, Seventieth session, *Resolution Adopted by the General Assembly on 25 September 2015*, A/RES/70/1 (Oct. 21, 2015).

[186]Richard L. Field & Ira R. Feldman, *The United Nations Post-2015 Development Agenda*, 44 INT'L L. NEWS 1 (Winter 2015), http://www.americanbar.org/publications/international_law_news/2015/winter/the_united_nations_post2015_development_agenda.html.

[187]*Id.*

[188]*Partner Exchanges*, SUSTAINABLE STOCK EXCHANGES INITIATIVE, http://www.sseinitiative.org/sse-partner-exchanges-text/ (last visited Mar. 15, 2016).

[189]*One of the "World's Best Sustainability Ideas," – Forbes Magazine*, SUSTAINABLE STOCK EXCHANGES INITIATIVE, http://www.sseinitiative.org/ (last visited Mar. 15, 2016).

(AMCEN), which took place in Cairo, Egypt.[190] Building off of the 2012 Gaborone Declaration for Sustainability in Africa, the Cairo Declaration seeks to optimize the use of Africa's natural resources to, among other things, integrate natural capital into national and financial planning decisions and leverage ecosystem services (i.e. water regulation, carbon sequestration, biodiversity) to support economic sectors such as energy, tourism, and agriculture as a means of promoting sustainable development and poverty alleviation.

In March 2015, version 1.2 of the STAR Community Rating System standard was issued by the nonprofit STAR Community organization, whose membership includes more than seventy U.S. and Canadian municipalities. The rating system defines community-scale sustainability.[191] As of November 5, 2015, forty communities have achieved certification under the standard's three-to-five-star rating system.[192]

In April 2015, the Centre for International Governance and Innovation (CIGI) published a paper entitled *Development of Sustainability and Green Banking Regulations—Existing Codes and Practices*.[193] It addresses the risk that climate change poses to the financial sector and the need to integrate the financial sector into a green economy.[194]

The Association for Sustainable and Responsible Investment in Asia (ASrIA) established the Private Equity ESG Initiative in May 2015 to "support [private equity firms] in building internal ESG capacity, strengthening capabilities[,] and raising awareness of ESG best practices across the industry more broadly."[195]

In September 2015, the International Chamber of Commerce launched a revised version of its Business Charter for Sustainable Development. The latest edition reflects a new approach to sustainable development and its economic, societal, and environmental dimensions, and is aimed at helping companies contribute to the achievement of the United Nation's new Sustainable Development Goals for 2015-2030.[196]

B. State and National Activities

1. Voluntary Initiatives

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[190] *Cairo Declaration*, *supra* note 23. *See also* Summit for Sustainability in Africa, *The Gaborone Declaration*, May 24-25, 2012, *available at* http://static1.squarespace.com/static/52026c1ee4b0ee324ff265f3/t/559974f9e4b02838d130e0af/1436120313951/Gaborone-Declaration+(1).pdf.

[191] STAR COMMUNITIES, STAR COMMUNITY RATING SYSTEM: VERSION 1.2 (Mar. 2015), *available at* http://www.starcommunities.org/wp-content/uploads/2015/03/STAR_Rating_System_Version1.2.pdf.

[192] Press Release, STAR Communities, 40 Communities Achieve Star Certification (Nov. 5, 2015).

[193] Adeboye Oyegunle & Olaf Weber, *Development of Sustainability and Green Banking Regulations: Existing Codes and Practices*, CIGI No. 65 (Apr. 22 2015).

[194] *Id.* at 1.

[195] Rachel Alembakis, *ASrIA Launches Private Equity ESG Initiative*, THE SUSTAINABILITY REPORT (May 13, 2015), http://www.thesustainabilityreport.com.au/asria-launches-private-equity-esg-initiative/ (subscription).

[196] INT'L CHAMBER OF COMMERCE, BUSINESS CHARTER FOR SUSTAINABLE DEVELOPMENT – BUSINESS CONTRIBUTIONS TO THE UN SUSTAINABLE DEVELOPMENT GOALS (Sept. 2015), *available at* http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2015/ICC-Business-Charter-for-Sustainable-Development-Business-contributions-to-the-UN-Sustainable-Development-Goals/.

In 2015, legislation authorizing public benefit corporations was adopted in Idaho, Indiana, Montana, Minnesota, New Hampshire, New Jersey, and Tennessee, meaning thirty states and the District of Columbia now have such legislation. These laws allow corporations to go beyond the fiduciary duty of maximizing value for stockholders to address social, environmental, and employee benefit.[197]

Investors filed 433 corporate shareholder resolutions on environmental and social issues in 2015, an all-time record, with over half coming from faith-based groups and socially responsible investors. More than one-fourth of the filings concerned climate and energy, and roughly the same fraction addressed corporate political activity.[198]

The Sustainability Accounting Standards Board (SASB), chaired by former New York City Mayor Michael Bloomberg, is a nonprofit organization that is attempting to develop sustainability accounting standards for use by publicly listed corporations for disclosing material sustainability issues in financial reports. In 2015, SASB issued reporting guidelines for: (1) chemicals and other heavy industry; (2) retailers and other consumable products industries; and (3) renewable resources and alternative energy companies.[199] SASB also launched the Fundamentals of Sustainability Accounting (FSA) Credential in 2015.[200] It teaches professionals how to identify, quantify, communicate, and analyze material sustainability factors.

2. Federal Agency Sustainability Planning

On March 19, 2015, President Obama issued Executive Order 13693, Planning for Federal Sustainability in the Next Decade.[201] The Executive Order requires each federal agency to appointment a chief sustainability officer. The order says that to "improve environmental performance and [f]ederal sustainability, priority should first be placed on reducing energy use and cost, then on finding renewable or alternative energy solutions." It calls for "[f]ederal leadership in energy, environmental water, fleet, buildings, and acquisition management . . . to drive national [GHG] reductions and support preparations for the impacts of climate change." [202] Agencies were called upon to increase efficiency, improve their environmental performance, and to include environmental performance and sustainability factors in their procurement decisions. On June 10, 2015, the White House released Implementing Instructions for Executive Order 13693, covering the topics in detail.[203]

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[197] *State by State Status of Legislation*, Benefit Corp., http://benefitcorp.net/policymakers/state-by-state-status (last visited. Mar. 15, 2016).

[198] HEIDI WELSH & MICHAEL PASSOFF, PROXY PREVIEW 2015 (Feb. 2015).

[199] *Key Dates & Status*, SUSTAINABILITY ACCOUNTING STANDARDS BD., http://www.sasb.org/standards/status-standards/ (last visited Mar. 15, 2016).

[200] *The Value of the FSA Credential*, SUSTAINABILITY ACCOUNTING STANDARDS BD., http://fsa.sasb.org/credential/ (last visited Mar. 15, 2016).

[201] Exec. Order No. 13693, 80 Fed. Reg. 15,871 (Mar. 19, 2015); *see also* Press Release, The White House, Executive Order—Planning for Fed. Sustainability in the Next Decade (Mar. 19, 2015).

[202] *Id.*

[203] THE WHITE HOUSE COUNCIL ON ENVTL. QUALITY, IMPLEMENTING INSTRUCTIONS FOR EXEC. ORDER 13693: PLANNING FOR FED. SUSTAINABILITY IN THE NEXT DECADE, (June 10, 2015).

III. ECOSYSTEMS

A. International Activities

1. United States – Cuba Environmental Agreement

On November 18, 2015, the U.S. and Cuba signed an agreement to protect the vast array of fish species and corals over which they share jurisdiction. The accord directs scientists with the several U.S. national marine sanctuaries to collaborate with researchers at two similarly fragile and protected Cuban reserves, Guanahacabibes National Park and the Banco de San Antonio.[204]

2. The Intergovernmental Platform on Biodiversity and Ecosystem Services (IPBES)

The Third Session of the Plenary of the IPBES (IPBES-3) took place from January 12-17, 2015, in Bonn, Germany.[205] One hundred twenty-three member states discussed the Work Program and task forces on capacity building, knowledge and data, and indigenous and local knowledge systems.[206] Members had until November 3, 2015, to submit comments on the draft scoping report.

3. Eighth Annual Polar Law Symposium

In September, the Eighth Annual Polar Law Symposium entitled, "The Science, Scholarship, and Practice of Polar Law—Strengthening Artic Peoples and Places," was held in Alaska. The symposium explored how lawyers and scientists can interact to benefit policy development in the Arctic.[207]

4. UNEP-IEMP Partnership

In June 2015, the Third Steering Committee for the United Nations Environmental Program (UNEP) International Ecosystem Management Partnership (IEMP)[208] approved a new work plan to provide assistance to developing countries to

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[204] Press Release, Nat'l Oceanic and Atmospheric Admin., U.S. and Cuba to Cooperate on Conservation and Management of Marine Protected Areas (Nov. 18, 2015).

[205] *Intergovermental Platform on Biodiversity and Ecosystem Servs. IPBES-3*, IPBES, http://ipbes.net/index.php/plenary/ipbes-3 (last visited Feb. 13, 2016).

[206] Plenary of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, Third session, Bonn, Ger., Jan. 12-17 2015, *Report of the Plenary of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services on the Work of its Third Session*, IPBES/3/18 (Jan. 12, 2015), *available at* http://ipbes.net/images/documents/plenary/third/working/3_18/IPBES_3_18_EN.pdf.

[207] EIGHTH POLAR LAW SYMPOSIUM, http://akpolarlawsymposium.squarespace.com/ (last visited Mar. 15, 2016).

[208] International Ecosystem Management Partnership (IEMP), http://www.unep-iemp.org/ (last visited Mar. 15, 2016).

restore and conserve their ecosystems, address impacts of climate change, and improve livelihoods by "providing knowledge, capacity, technology, and policy support."[209]

B. State and National Activities

1. Ecosystem Services

On October 7, 2015, President Obama released a memorandum for executive departments and agencies, directing them to incorporate ecosystem services into federal decision-making.[210] Ecosystem services are benefits that flow from nature to people, e.g., nature's contributions to the production of food and timber; life-support processes, such as water purification and coastal protection; and life-fulfilling benefits, i.e., recreation. The memo requires agencies to promote ecosystem services in planning, investment, and regulatory contexts. Agencies shall prepare written guidance and work plans that will be submitted to the Council for Environmental Quality (CEQ) no later than March 30, 2016, with subsequent interagency review, external peer reviews, and public comment.[211]

The EPA posted its National Ecosystem Services Classification System (NESCS) report in September 2015.[212] The NESCS report is designed to integrate ecosystem services into economic systems. The classification system makes consistent distinctions among: (1) biodiversity and ecosystem processes; (2) flows of ecosystem services to beneficiaries; and (3) economic activities utilizing these flows.

2. Mitigating Impacts on Natural Resources

On November 3, 2015, the White House adopted a memorandum requiring all natural resource management agencies to harmonize the implementation of federal policies mitigating the impacts of development on natural resources.[213] The memorandum accelerates restoration efforts and incentivizes private investment in natural resource conservation. In particular, certain agencies (the Departments of Defense, Agriculture, and Interior; EPA; and NOAA) should first seek to avoid negative environmental impacts to land, water, wildlife, and other ecological resources. If avoidance is not possible, the agencies should minimize impacts and seek compensatory offsets for harms that still occur. It encourages a no net loss and net benefit goal for natural resources and directs agencies to make full use of local, state, and federal plans to protect the resources, calling for compatible policies and transparency. Any new analyses

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[209] *3rd Steering Committee Meeting Approves New Work Plan 2015/16 for the Centre*, UNEP-IEMP, http://unep-iemp.org/content/3rd-steering-committee-meeting-approves-new-work-plan-201516-centre (last updated June 4, 2015).

[210] Memorandum from Shaun Donovan, Dir. Office of Mgmt. and Budget, et al., to Exec. Dep't and Agencies, Incorporating Ecosystem Servs. into Fed. Decision Making, M-16-01 (Oct. 7, 2015).

[211] *Id.* at 4.

[212] ENVT'L PROT. AGENCY, NATIONAL ECOSYSTEM SERVICES CLASSIFICATION SYSTEM (NESCS), EPA-800-R-15-002 (Sept. 2015), *available at* http://www.epa.gov/sites/production/files/201512/documents/110915_nescs_final_report_-_compliant_1.pdf.

[213] Presidential Memorandum on Mitigating Impacts on Natural Resources from Dev. and Encouraging Related Private Inv., 80 Fed. Reg. 68,743 (Nov. 6, 2015).

and mitigation requirements could expand the agencies' permitting obligations, timelines, and procedures.[214]

3. Clean Water Rule

On June 29, 2015, EPA and the Army Corps of Engineers released the Clean Water Rule: Definition of "Waters of the United States" (WOTUS) in the Federal Register.[215] The Clean Water Rule was adopted to clarify the jurisdictional limits of the Clean Water Act and to protect streams and wetlands that have been scientifically shown to have the greatest impact on downstream water quality. It identifies six types of waters that are to be categorically within jurisdiction and two types that are case-by-case determinations. It is estimated to place roughly 3% more waterways under federal jurisdiction.[216] On October 9, 2015, the Sixth Circuit Court of Appeals stayed the rule in *State of Ohio v. U.S. Army Corps of Engineers*, finding petitioners had a substantial likelihood of winning on the merits.[217]

4. Economic Impacts in ESA Critical Habitat Designations

In *Building Industry Association of the Bay Area v. U.S. Department of Commerce*,[218] the Ninth Circuit Court of Appeals upheld the designation of more than 13,000 square miles (8.6 million acres) of critical habitat for the federally threatened green sturgeon. The decision is the latest in a line of cases extending judicial deference to critical habitat designations under the Endangered Species Act (ESA).[219] The Ninth Circuit held: (1) the National Marine Fisheries Service must consider economic impacts when designating critical habitat, but it has discretion about how to do it and has no obligation to consider economic impacts when deciding what areas to exclude from critical habitat; (2) the carve out decision is not reviewable; and (3) ESA displaces the National Environmental Policy Act (NEPA).[220] The Ninth Circuit's conclusion in the Building Industry case was challenged in *Bear Valley Mutual Water Co. v. Jewell*, but the U.S. Supreme Court denied the petition for certiorari.[221]

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[214]Lowell M. Rothschild & Kevin A. Ewing, *Obama Admin. Adopts Wide-Raging Natural Resources Mitigation Requirements*, THE NAT'L L. REV. (Nov. 3, 2015), http://www.natlawreview.com/article/obama-administration-adopts-wide-ranging-natural-resource-mitigation-requirements.

[215]Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401).

[216]Brent Kendall & Amy Harder, *U.S. Appeals Court Blocks EPA Water Rule Nationwide*, WALL ST. J. (Oct. 9, 2015, 4:34 PM), http://www.wsj.com/articles/u-s-appeals-court-blocks-epa-water-rule-nationwide-1444400506 (subscription).

[217]Ohio v. U.S. Army Corps of Eng'rs, 803 F.3d 804 (6th Cir. 2015).

[218]Bldg. Indus. Ass'n v. U.S. Dep't of Commerce, 792 F.3d 1027 (9th Cir. 2015).

[219]*See, e.g.*, San Luis & Delta-Mendota Water Auth. v. Locke, 776 F.3d 971, 999 (9th Cir. 2014); Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv., 616 F.3d 983 (9th Cir. 2010); Ariz. Cattle Growers' Ass'n v. Salazar, 606 F.3d 1160 (9th Cir. 2010).

[220]*Bldg. Indus. Ass'n*, 792 F.3d at 1033-36.

[221]*See* Bear Valley Mut. Water Co. v. Jewell, No. 15-367, 2015 WL 5626368, *petition for cert. denied*, 136 S. Ct. 799 (U.S. Jan. 11, 2016).

Chapter 26 • CONSTITUTIONAL LAW
2015 Annual Report[1]

In 2015, noteworthy decisions at the intersection of constitutional law and environmental, energy, and natural resources law occurred in the areas of standing, the Commerce Clause, preemption, takings, due process, the First Amendment, the Eleventh Amendment, and state constitutional law.

I. STANDING

To invoke the jurisdiction of an Article III court, a plaintiff must establish standing by proving: (1) an injury in fact that is concrete and particularized, not hypothetical or conjectural; (2) causation that is fairly traceable to the defendant's actions; and (3) redressability showing that a judicial remedy is likely to fix the injury caused by the defendant. A plaintiff also has to meet the requirements of prudential standing, including the requirement that the plaintiff's alleged injury falls within the zone of interest of the relevant statute.

During 2015, the U.S. Supreme Court issued two standing decisions that, although not specifically in environmental cases, speak to important issues of legislative standing and association standing. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Supreme Court heard the state legislature's challenge to a citizen ballot initiative that gave redistricting power to an independent commission, Arizona Independent Redistricting Commission (AIRC), in an effort to end gerrymandering in the state. After AIRC created the 2012 redistricting map, the legislature sought a declaratory judgment and an injunction, claiming the power given to the commission ran afoul of the Elections Clause of the U.S. Constitution, which arguably gives sole authority to the state legislature. A three-judge panel of the U.S. District Court for the District of Arizona ruled the legislature had standing to sue but rejected the suit on its merits. The U.S. Supreme Court upheld the district court ruling, finding that the legislature had standing but rejecting on the merits, noting that "one must not 'confus[e] weakness on the merits with the absence of Article III standing."[2] Justice Ginsburg, writing for the majority, said that the constitutional amendment giving sole authority to the AIRC completely nullifies any vote the legislature might take to affect redistricting plans. The nullification of votes the legislature could previously take was sufficient to establish an injury in fact.

In *Alabama Legislative Black Caucus v. Alabama*, voters in Alabama challenged the redistricting plans for the state's house and senate, claiming at least four counties

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[2]Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2663 (2015) (quoting Davis v. United States, 131 S. Ct. 2419, 2434 (2011)).

were gerrymandered along racial boundaries, violating the Equal Protection Clause. The district court ruled, among other issues, that one of the plaintiffs, the Alabama Democratic Conference (Conference), lacked associational standing because the record did "not clearly identify the districts in which the individual members of the [Conference] reside."[3] For an association to have standing, the association must show that one of its members has the standing to sue in his or her own right, which means in this case the member would have to live in the district where the alleged gerrymandering took place. The district court raised the standing issue sua sponte and found it insufficient that the Conference merely stated in testimony that it has members in almost every county in the state. The Supreme Court reversed, finding that the record was sufficient to support at least a request that the Conference submit further evidence showing it has members in the counties at issue rather than dismissing the claim entirely.

The Courts of Appeals also gave us notable standing decisions. In *Organized Village of Kake v. U.S. Department of Agriculture*, the Ninth Circuit en banc addressed intervenor standing.[4] The Village of Kake brought suit against the U.S. Department of Agriculture (USDA) over whether the federal agency properly exempted the Tongass National Forest from the Roadless Rule, which requires certain areas of land to limit construction and tree harvesting. The U.S. District Court for the District of Alaska granted summary judgment for the Village, holding the exemption violated the Administrative Procedure Act (APA) because the USDA failed to provide adequate reasoning for the exemption. The State of Alaska appealed as an intervenor. While intervenors are able to seek review, their test for injury in fact is whether their interests "have been adversely affected by the judgment."[5] The Ninth Circuit held that Alaska would be adversely affected by the judgment because under the National Forest Receipts program, Alaska is entitled to 25% of gross timber sales from the state's national forests, which will be affected by the Roadless Rule and the Tongass Exemption. A petition for certiorari is pending at the Supreme Court as of December 2015, but it does not raise the standing issue; rather, it asks the Court to consider the circumstances under which a federal agency may alter its policy position—here, in the never-ending battle about the Roadless Rule.

In *Gunpowder Riverkeeper v. FERC*, the D.C. Circuit addressed the zone of interests test.[6] An environmental organization (Gunpowder) challenged a certificate issued to Columbia Gas Transmission by the Federal Energy Regulatory Commission (FERC) for the extension of a natural gas pipeline in Maryland. The appeals court found that Gunpowder had organizational standing but concluded the threat of eminent domain, embodied in the proposed pipeline extension, did not fall within the zone of interest protected by the statutes under which they sued.

Other appellate court standing cases from this year include:

- *WildEarth Guardians v. U.S. Dept. of Agriculture*, in which the Ninth Circuit ruled an environmental organization had standing to sue USDA for using archaic and unnecessarily destructive predator control methods, rather than using updated methods and systems.[7] Mere speculation that the state could implement its own

[3]Ala. Legis. Black Caucus v. Alabama, 135 S. Ct. 1257, 1260 (2015).
[4]795 F.3d 956 (9th Cir. 2015) (en banc), *petition for cert. filed* (pending on the merits, not the standing issue).
[5]*Id.* at 963 (quoting Didrickson v. U.S. Dep't of Interior, 982 F.2d 1332 (9th Cir. 1992)).
[6]807 F.3d 267 (D.C. Cir. 2015)
[7]795 F.3d 1148 (9th Cir. 2015).

equally destructive methods in the absence of the federal government doing so did not defeat redressability.

- *Cottonwood Environmental Law Center v. U.S. Forest Service*, in which the Ninth Circuit ruled an environmental organization had standing to sue the Forest Service when it declined to reinitiate consultation with the U.S. Fish and Wildlife Service after a critical habitat designation was revised for the Canadian Lynx.[8] Because the organization alleged a "procedural injury," it did not have to demonstrate that additional consultation would change the ultimate outcome of the government's deliberations.

II. COMMERCE CLAUSE

The Commerce Clause of the United States Constitution provides that "Congress shall have the Power . . . [t]o regulate Commerce . . . among the several States."[9] In its positive form, the Commerce Clause is the source of constitutional authority underlying most federal environmental laws. In its negative or "dormant" form, it prevents states from adopting protectionist laws that erect barriers to interstate commerce or attempt to control commerce beyond the state's borders.

Over the last few years, states have adopted various measures trying to address greenhouse gases, including renewable energy mandates or low carbon fuel standards, and those state efforts have been challenged under the dormant Commerce Clause. In 2015 that trend continued in *Energy and Environment Legal Institute v. Epel*, a Tenth Circuit decision that considered the validity of a Colorado law requiring a certain percentage of consumer electricity to come from renewable sources.[10] The petitioner asked the Court of Appeals to apply one particular variant of dormant Commerce Clause jurisprudence, namely the so-called *Baldwin* "extraterritoriality" doctrine.[11] The Tenth Circuit referred to this as "the most dormant doctrine in dormant [C]ommerce [C]lause jurisprudence" and "the least understood."[12] After giving a helpful explanation of the few cases in the *Baldwin* line, the court concluded that Colorado's mandate did not "share any of the three essential characteristics that mark those cases", in that the statute was not "a price control statute"; it did not "link prices paid in Colorado with those paid out of state"; and it did not "discriminate against out-of-staters."[13]

As to the positive (not dormant) form of the Commerce Clause, we noted in the 2014 Constitutional Law chapter that the U.S. District Court for the District of Utah struck down protections for the prairie dog under the Endangered Species Act because the creature does not have sufficient connections to interstate commerce.[14] The Tenth Circuit heard oral argument in that case in September 2015, so look for a decision in the near future.[15]

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[8]789 F.3d 1075 (9th Cir. 2015).
[9]U.S. CONST. art. I, § 8, cl. 3.
[10]793 F.3d 1169 (10th Cir. 2015).
[11]*Id.* at 1172.
[12]*Id.* at 1170, 1172.
[13]*Id.* at 1173.
[14]People for the Ethical Treatment of Prop. Owners v. U.S. Fish and Wildlife Serv., 57 F. Supp. 3d 1337, 1346 (D. Utah 2014).
[15]Amy Joi O'Donoghue, *10th Circuit hears prairie dog case brought by Iron County landowners*, DESERET NEWS (Sept. 28, 2015), http://www.deseretnews.com/article/print/865637783/10th-Circuit-hears-prairie-dog-case-brought-by-Iron-County-landowners.html.

III. PREEMPTION

In September, the U.S. Supreme Court granted certiorari on two petitions (now consolidated) challenging a Fourth Circuit opinion holding that certain state subsidies to instate power generators were preempted both on the grounds of "field preemption" and "conflict" (sometimes termed "obstacle") preemption.[16] The two cases are *Hughes v. PPL EnergyPlus, LLC*, No. 14-614, and *CPV Maryland, LLC v. PPL EnergyPlus, LLC*, No. 14-623.[17] With a decision expected no later than June 2016, these two cases promise to shed further light on the doctrines of field and conflict preemption in the context of the world of utility power and on the FERC's decision to delegate rate-making functions to various regional transmission entities covering interstate markets. The cases also mark the Court's apparent disregard of the recommendation of the Solicitor General not to take either case on the grounds that both cases were correctly decided by the Fourth Circuit.

A private plaintiff in a separate case alleging federal preemption of Connecticut's awards of electric power contracts for alternative sources of energy was not successful, with the Second Circuit holding that the private party either failed to exhaust administrative remedies under the statutory scheme or lacked standing to bring such a claim as to prior contractual awards. In *Allco Finance Limited v. Klee*,[18] the Court of Appeals held that a losing bidder (plaintiff) failed to establish that setting aside the state's awards to the two lowest bidders would result in a remedy that would redress plaintiff's alleged harm (not receiving an award). The court did not explain how plaintiff, which had one project listed fourth in the original bids, might not benefit if the two lowest bidders were deemed legally disqualified from the bid process.

A state common law suit founded on negligence, nuisance, and trespass based upon emissions from a whiskey distiller regulated under the federal Clean Air Act was held not preempted by the Sixth Circuit. In *Merrick v. Diageo Americas Supply, Inc.*,[19] the Sixth Circuit focused on the Clean Air Act's "citizen suit savings clause,"[20] which provided that nothing in the Act restricted the right of a person to sue under common law to seek enforcement of an emissions standard. This clause, the appellate court reasoned, expressly provided for such common law remedies. The Court of Appeals rejected defendant's effort to argue that preemption of state common law was merited under the Supreme Court's decision in *American Electric Power Co. v. Connecticut*,[21] finding that displacement of federal common law in *AEP* was quite different from federal preemption of state common law. The Sixth Circuit concluded that the savings clause in the Clean Air Act was intended to cover state common law suits and effectively exclude them from the scope of what might otherwise constitute a preempted state action.[22]

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[16]PPL Energy Plus, LLC v. Nazarian, 753 F.3d 467 (4th Cir. 2014).

[17]*See Hughes v. PPL EnergyPlus, LLC*, SCOTUSBLOG (Dec. 23, 2015), http://www.scotusblog.com/case-files/cases/nazarian-v-ppl-energyplus-llc/.

[18]805 F.3d 89 (2d Cir. 2015).

[19]805 F.3d 685 (6th Cir. 2015).

[20]42 U.S.C. § 7604(e) (2015).

[21]Am. Elec. Power Co. v. Conn., 131 S. Ct. 2527 (2011); *Merrick*, 805 F.3d at 693.

[22]The U.S. District Court for the Northern District of Ohio came to a similar conclusion in an unpublished decision holding that local residents' state common law claims against emissions from two former factories were not preempted under the Clean Air Act. Elmer v. S.H. Bell Co., No. 4:13-CV-02735, 2015 WL 5102707 (N.D. Ohio Aug. 31, 2015).

A suit by truckers asserting that regulation by the California State Air Resources' Board was preempted under federal transportation laws encountered a fatal obstacle—the lack of jurisdiction. In California Dump Truck Owners v. Nichols,[23] the Ninth Circuit held that the trucker's challenge was essentially a challenge to an EPA decision approving the regulation as part of California's State Implementation Plan (SIP) under the Clean Air Act. Pursuant to the Act, SIP challenges must be brought in the Court of Appeals, not the district court.[24] Although the Truck Association argued it was only contesting state enforcement and not the SIP itself, the appellate court did not agree.[25] Without jurisdiction, there was no judicial authority to examine the truckers' preemption claim on its merits.

In evaluating a personal injury claim alleging harmful exposure in connection with manufacturing parts for a nuclear power plant, the U.S. District Court for the Northern District of California concluded that state law claims were only preempted to the degree they actually conflicted with federal radiation standards under the federal Price-Anderson Act. In *Lawson v. General Electric Co.*,[26] the district court concluded that the Price-Anderson Act had a "hybrid" preemption provision that allowed consideration of state law as long as there was not a direct conflict with federal law. The court concluded that most of plaintiff's common law claims alleging strict liability conflicted with federal law and were preempted, although it allowed part of plaintiff's negligence claim to proceed.

The U.S. District Court for the District of Oregon rejected a claim of express and conflict preemption based on the federal Clean Air Act brought by truckers and the America Fuel & Petrochemical Manufacturers who sought to overturn Oregon state regulation of transportation fuels including methane content. In *American Fuel & Petrochemical Manufacturers v. O'Keefe*,[27] the district court concluded that EPA's determination not to regulate the methane content of fuels as part of its Reformulated Gasoline Rule simply did not have preemptive effect precluding state law regulation. The district court also concluded that plaintiff's claims of conflict preemption were also not well taken.

The U.S. District Court for the District of Hawaii concluded that a county's ordinance precluding Genetically Modified Organisms (GMO) or "genetic engineering" of foodstuffs was expressly preempted by the federal Plant Protection Act. In *Robert Ito Farm, Inc. v. County of Maui*,[28] the district court also concluded that Maui's county ordinance conflicted with federal law and therefore also fell pursuant to the doctrine of conflict preemption.

IV. Fifth Amendment Takings

The widely anticipated takings case of 2015 was *Horne v. Department of Agriculture*, which concerned whether USDA's mandate to relinquish a specific amount of raisin growers' crop as a condition to engaging in commerce was a per se taking.[29] The Secretary promulgates "marketing orders" to help maintain stable markets for particular

[23]784 F.3d 500 (9th Cir. 2015), *cert. denied*, 136 S.Ct. 403 (2015).
[24]42 U.S.C. § 7607(b)(1) (2012).
[25]*Cal. Dump Truck Owners Ass'n*, 784 F.3d at 508.
[26]No. 15-cv-02384-TEH, 2015 WL 5591714 (N.D. Cal. Sept. 23, 2015).
[27]No. 3:15-cv-00467-AA, 2015 WL 5665232 (D. Or. Sept. 23, 2015), *appeal docketed*, No. 15-35834 (9th Cir. Oct. 27, 2015).
[28]Nos. 14–00511 SOM/BMK and 14-00582 SOM/BMK, 2015 WL 4041480 (D. Haw. June 30, 2015), *appeal docketed*, No. 15-16552 (9th Cir. Aug. 5, 2015).
[29]135 S. Ct. 2419 (2015).

agricultural products. The marketing order for raisins requires growers in certain years to give a percentage of their crop to the federal government, free of charge. Growers generally ship their raisins to a raisin "handler," who physically separates the raisins owed to the government ("reserve raisins"), pays the growers for the remainder ("free-tonnage raisins"), and packs and sells the free-tonnage raisins. The Raisin Committee, a government entity of growers and others in the raisin business appointed by the Secretary, acquires title to the reserve raisins and decides how to dispose of them in its discretion, which can include selling them in non-competitive (*e.g.*, foreign) markets. Raisin growers retain an interest in any net proceeds from sales that the Committee makes. The Hornes, both growers and handlers, refused to comply with the marketing order, and they were charged for the market value of the missing raisins and a $200,000 penalty. The Ninth Circuit concluded that the reserve requirement was not a per se taking, reasoning that "the Takings Clause affords less protection to personal than to real property" and the Hornes "are not completely divested of their property rights" because growers retain an interest in the proceeds from any sale of reserve raisins.[30] Rather, the reserve requirement was a use restriction, similar to a government condition on a land use permit.

The Supreme Court reversed. As a threshold matter, the Court disagreed that the Takings Clause applies only to real property and not to personal property. The Court also rejected the notion that the government may avoid paying just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property. In other words, once there has been a physical taking, "'we do not ask . . . whether it deprives the owner of all economically valuable use' of the item taken."[31] Finally, the Court held that, at least "in this case," a governmental mandate to relinquish specific, identifiable property as a "condition" to engage in commerce effects a *per se* taking.[32]

Other takings cases of note this year included:

- *Rancho de Calistoga v. City of Calistoga*, in which the Ninth Circuit declined to entertain the creation of an "as-applied private takings claim," dryly observing that "[e]ach time a court closes one legal avenue to mobile home park owners seeking to escape rent control regimes, the owners, undaunted, attempt to forge a new path via another novel legal theory."[33] (Quoting Yogi Berra, the Ninth Circuit called it "déjà vu all over again."[34])

- *Dimare Fresh, Inc. v. United States*, in which the Federal Circuit affirmed the dismissal of tomato producers' regulatory taking claim based on Food and Drug Administration press releases warning consumers of a possible link between the producers' tomatoes and a salmonella outbreak, which caused the market for those tomatoes to crash.[35]

- *Boston Taxi Owners Association, Inc. v. City of Boston*, in which the U.S. District Court for the District of Massachusetts dismissed a takings claim against the City of Boston and Massachusetts, among others, for recent amendments to regulations

[30] *Id.* at 2425 (citing Horne v. U.S. Dep't of Agric., 750 F.3d 1128, 1139 (9th Cir. 2014)).
[31] *Id.* at 2429 (citing Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 323 (2002)).
[32] *Id.* at 2430–32.
[33] 800 F.3d 1083, 1086-87 (9th Cir. 2015).
[34] *Id.* at 1086.
[35] No. 2015-5006, 2015 WL 6500337, at *1-3 (Fed. Cir. Oct. 28, 2015).

that would allow "Transportation Network Companies" such as Uber and Lyft to operate in most respects as taxicabs without first obtaining a taxi medallion.[36]

V. DUE PROCESS

In *Grocery Manufacturers Association v. Sorrell*, a state motion to dismiss was denied in an industry's due process challenge to a Vermont statute prohibiting labeling, advertising, or signage for genetically engineered foods as natural or "any words of similar import." [37] The court held that the statute's restriction was void for vagueness because the phrase "any words of similar import" fails to provide fair notice of prohibited conduct and would thus permit arbitrary enforcement subject to civil penalties.[38] The appeal is pending in the Second Circuit.

In a closely-watched challenge to a county ban on fossil-fuel extraction by corporations, *Swepi, LP v. Mora County*, the court rejected a substantive due process challenge (although the ban was invalidated on preemption and Supremacy Clause grounds).[39] In ruling on a motion for judgment on the pleadings, the court determined that the county could not be said to lack a rational basis for targeting corporations which, for example, could evade responsibility by undercapitalizing themselves. The court also rejected the argument that property interests and rights are so fundamental as to require strict scrutiny. Courts similarly declined to find due process violations because of a lack of a legitimate property interest, including in loan programs for green car manufacturing.[40]

Interestingly, litigants brought challenges in environmental enforcement actions alleging that opposing counsel or an agency official should have been disqualified on due process grounds, although these challenges were unsuccessful in the end.[41] Litigants attempting to challenge the robustness of due process were similarly unsuccessful.[42]

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[36] 84 F. Supp. 3d 72, 75 (D. Mass. 2015).

[37] 102 F. Supp. 3d 583, 596 (D. Vt. 2015), *appeal docketed*, No. 15-1504 (2d Cir. May 6, 2015).

[38] *Id.* at 642-45. *But see* Little v. Dominion Transmission, Inc., No. 5:14-CV-00060, 2015 WL 5730424, at *5 (W.D. Va. Sept. 30, 2015) (state statute not void for vagueness where it allowed a natural gas company to enter a property for pipeline surveying purposes even if without owner consent where the statute so allows); Black v. Pritzker, No. 14-782 (CKK), 2015 WL 4747409, at *14 (D.D.C. Aug. 10, 2015) (fair notice satisfied where regulation banned fish aggregating devices and use of lights aggregated fish).

[39] 81 F. Supp. 3d 1075, 1173-78 (D.N.M. 2015).

[40] *See also* XP Vehicles, Inc. v. Dep't of Energy, No. 13-cv-0037 (KBJ), 2015 WL 4249167 (D.D.C. July 14, 2015) (no cognizable property interest where agency discretion prevents loan from becoming a government entitlement); McClung v. Paul, 788 F.3d 822, 829-30 (8th Cir. 2015) (no claim of entitlement in use permit); Klemic v. Dominion Transmission, Inc., No. 3:14-CV-00041, 2015 WL 5772220, at *20 (W.D. Va. Sept. 30, 2015) (no property right to exclude natural gas company from entering property for pipeline survey); Quinn v. Bd. of Cnty. Comm'rs for Queen Anne's Cnty., No. GLR-14-3529, 2015 WL 4910749, at *6 (D. Md. Aug. 13, 2015) (no claim of entitlement to a sewer connector from government).

[41] *See, e.g.*, Mississippi Comm'n on Envtl. Quality v. EPA, 790 F.3d 138, 183-84 (D.C. Cir. 2015) (no due process violation where EPA administrator who designated non-attainment area under the Clean Air Act declined to disqualify himself where clear and convincing showing was lacking that, despite his history of working with environmental advocates, he had not unalterably closed his mind in decision-making process); United States v. Farrell, No. 2:14-cr-00264, 2015 WL 3891640, at *7 (S.D. W. Va. June 24,

This review focuses on First Amendment cases that directly affect environmental, energy, or natural resources concerns. "Free speech" cases in this area are rare. Most such cases actually arise under federal statutes protecting religious freedom—the Religious Freedom Restoration Act (RFRA)[43] or the Religious Land Use and Institutionalized Persons Act (RLUIPA)[44]—rather than the Constitution itself. However, this year we address a landmark Supreme Court case that has the potential to dramatically affect a host of issues pertaining to the environment, energy, and natural resources, as well as many other aspects of First Amendment jurisprudence. Because of the importance of this singular case, discussion of other reported cases will necessarily be shorter in this review.

Reed v. Town of Gilbert, Arizona[45] merits a great deal of attention. The case flew into Washington under everyone's radar, characterized as a minor dispute involving a church's challenge to a local sign code. The itinerant church used temporary signs to advise parishioners about the location of services. Those signs were deemed illegal under the sign code, although messages of similar size were allowed if they fell under the category of "political signs" or "temporary directional signs." Following oral argument, commentators believed that the case would be decided on the basis of the general meanness and stupidity of the ordinance with no major change in doctrine. Instead, the Supreme Court used the opportunity to redefine what it means by a "content-based" law. This has major implications because content-based laws are automatically subject to strict scrutiny, and such strict review generally spells doom for a law.

The Supreme Court soundly rejected what it perceived as a tendency of the lower courts to uphold laws that were justified by a content-neutral purpose or that regulated speech at the level of broad categories as opposed to particular messages or speakers. Thus, laws that had the actual effect of regulating based on the message or speaker were upheld as long as the law did not suggest an actual intent to censor that speech. As the Supreme Court made clear, such justifications are no longer sufficient: "[A]n innocuous justification cannot transform a facially content-based law into one that is content neutral."[46]

A plurality of the Court instead adopted a rather strict and bright-line test for determining whether a law is content based; if the law defines the subject of its regulation in terms of the message, it is content based. Given the importance of this concept, a lengthy quote from the decision is warranted:

> Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. Some facial

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2015) (no due process violation where government counsel could be putative plaintiffs in a class action case involving the same chemical spill at issue in the prosecution).

[42]Myersville Citizens for a Rural Cmty, Inc. v. FERC, 783 F.3d 1301, 1327 (D.C. Cir. 2015) (no due process violation where no prejudice resulted from belated disclosure of information for commenting on environmental review).

[43]42 U.S.C. § 2000bb (2012).

[44]42 U.S.C. § 2000cc (2012).

[45]135 S. Ct. 2218 (2015).

[46]*Id.* at 2228.

> distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.
>
> Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be "'justified without reference to the content of the regulated speech,'" or that were adopted by the government "because of disagreement with the message [the speech] conveys." Those laws, like those that are content based on their face, must also satisfy strict scrutiny.[47]

Reed likely renders most sign ordinances in the country unconstitutional. It has already had a profound impact on decisions involving solicitation or panhandling laws. It is also likely to overhaul the law relative to "free speech zones," parades, demonstrations and many other real-world applications of First Amendment law. Citation to *Reed* will be *de rigueur* in any case where the content of speech is at issue or a facial attack is brought under the First Amendment.

Other First Amendment cases this year include:

- *Animal Legal Defense Fund v. Otter*, a significant case involving an "Ag-Gag law" which drew a fair amount of media attention.[48] Animal rights activists distributed video of dairymen doing unpleasant things to our bovine friends, which prompted the state legislature to criminalize interference with agricultural production facilities. The activists brought First Amendment and Equal Protection claims against the law, which went down in flames as both a content-based and viewpoint-based restriction on speech.

- *Congregation Rabbinical College of Tartikov, Inc. v. Village of Pomona*, an exceptionally lengthy opinion which can be recommended only because it includes an uncommon sanction for failure to preserve posts on social media and because of its "kitchen sink" approach to litigation.[49] This is a conventional RLUIPA case complaining about local zoning and environmental regulations that effectively prevented the construction of a religious school. The statutory case was dressed up with First Amendment claims based on free exercise, free speech, and free association. The laws were found to be content-neutral for purposes of all of the First Amendment claims. The Court found that construction of a college would promote free speech but was not itself a form of communication. Other claims survived for trial.

- *Bensalem Masjid, Inc. v. Bensalem Township, Pennsylvania*, addressing the same sort of combined RLUIPA/Free Exercise claims.[50] These religion cases are relatively common and no new ground was plowed here. One thing that does separate these cases from other First Amendment cases is the frequency with which summary judgment motions are denied. The expense of a trial places a burden on government not often encountered in other First Amendment cases.

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[47] *Id.* at 2227 (internal citations omitted).
[48] No. 1:14-cv-00104-BLW, 2015 WL 4623943 (D. Idaho Aug. 3, 2015).
[49] No. 07-CV-6304 (KMK), 2015 WL 5729783, at *50 (S.D.N.Y. Sept. 29, 2015).
[50] No. 14-6955, 2015 WL 5611546 (E.D. Pa. Sept. 22, 2015).

- *CTIA-The Wireless Association v. City of Berkeley, California*, a fun case involving energy—the electromagnetic kind that cellphones emit.[51] Berkeley required cell phone manufacturers and retailers to include a statement to the effect that cell phones emit radiation, which might be of concern. The First Amendment claim based on undue burden and compelled speech failed, although a minor preemption argument was partly sustained.

VII. ELEVENTH AMENDMENT

The Eleventh Amendment provides immunity from suit in federal courts, stating that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[52]

In *Hays v. LaForge*,[53] the federal district court discussed three possible exceptions to the suit immunity of the Eleventh Amendment: (1) valid abrogation by Congress pursuant to section 5 of the Fourteenth Amendment; (2) waiver or consent to suit by the state; and (3) applicability of the *Ex parte Young* doctrine. In *Hays*, the plaintiff, a professor at a state university, filed a section 1983 action against the university president in both his official capacity and individual capacity, alleging a free speech retaliation claim. The *Hays* court held that the *Ex parte Young* doctrine applied but granted the defendant's Rule 12(b)(6) motion because the plaintiff's actions and speech were part of his official duties and so were not protected by the First Amendment.

In *Beaulieu v. State of Vermont*,[54] the Second Circuit considered how a state defendant's removal of a case to federal court affected Eleventh Amendment immunity and general state sovereign immunity. More than 700 current and former employees of the State of Vermont alleged violations of the Fair Labor Standards Act (FLSA) in regard to overtime pay by the State. The plaintiffs sued the State, its Agency of Administration, and its Secretary of Administration in his official capacity in state court, and the defendants removed the case to federal court. The Second Circuit affirmed the lower court's dismissal of the suit. In so ruling, the appellate court decided to join the majority of circuit courts by holding "that, while [d]efendants may, by removing the action, have waived their Eleventh Amendment immunity from suit in a federal forum, Defendants have not expressly waived Vermont's general sovereign immunity from private FLSA suit, and their litigation conduct does not constitute such a waiver."[55]

In *Haven v. The Board of Trustees of Three Rivers Regional Library System*,[56] the Eleventh Circuit dealt with an age employment-discrimination lawsuit under the Age Discrimination in Employment Act (ADEA) against the Three Rivers Regional Library System (Library) and its Director. The U.S. District Court for the Southern District of Georgia granted the Library's motion for summary judgment and dismissed the plaintiff's ADEA suit for lack of subject-matter jurisdiction, ruling that the Library was entitled to immunity under the Eleventh Amendment and that it was "uncontestedly an arm of the

[51]No. C-15-2529 EMC, 2015 WL 5569072, at *20 (N.D. Cal. Sept. 21, 2015).
[52]U.S. CONST., amend. XI.
[53]No. 4:14-cv-00148-GHD-JMV, 2015 WL 4087070 (N.D. Miss. July 6, 2015).
[54]807 F.3d 478 (2d Cir. 2015).
[55]*Id.* at 481.
[56]No. 15-11064, 2015 WL 5040174 (11th Cir., Aug. 27, 2015).

state" even though the Library had not raised the immunity issue.[57] The lower court also ruled that the *Ex parte Young* exception did not apply.

The Court of Appeals reviewed the issue of Eleventh Amendment immunity *de novo* as well as the issue of whether the Library was an "arm of the state" entitled to immunity under the Eleventh Amendment. In its review, the court stated that "[a]lthough Congress has the power, within limitations, to abrogate the states' Eleventh Amendment immunity, the Supreme Court has held that Congress, in enacting the ADEA, did not validly abrogate the states' immunity."[58] The appellate court ultimately vacated the dismissal of the ADEA claim and remanded the issue of whether the Library was entitled to Eleventh Amendment immunity as an arm of the state under the four-prong test established in *Manders v. Lee*.[59]

Concerning the sovereign immunity of a state, on June 30, 2015, the Supreme Court agreed to hear two of the three questions presented in *Franchise Tax Board of California (CFTB) v. Hyatt.*[60] Both questions involved a state's sovereign immunity in another state's courts: (1) "[w]hether Nevada may refuse to extend to sister States haled into Nevada courts the same immunities Nevada enjoys in those courts"; and (2) "[w]hether *Nevada v. Hall* . . . which permits a sovereign State to be haled into the courts of another State without its consent, should be overruled."[61] Forty-five states supported California's position of overruling *Nevada v. Hall*.[62]

In the *CFTB* case, respondent Gilbert Hyatt won a multi-million dollar judgment against the California Franchise Tax Board in a Nevada state court.[63] Hyatt alleged that CFTB auditors committed several intentional torts against him in Nevada as part of CFTB's decades-old battle over his non-payment of California income taxes. During oral argument held on December 7, 2015, Justices Kagan, Ginsburg, and Sotomayor seemed sympathetic to upholding *Nevada v. Hall*.[64] Justice Breyer also seemed sympathetic to that position, but he expressed concern that Nevada had not extended its own $50,000 sovereign immunity limitation on damages to California.[65] Justices Alito and Scalia

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[57]*Id.* at *2 (quoting Haven v. Bd. Of Trs. Of Three Rivers Reg'l Library Sys., 69 F. Supp. 3d 1359, 1365-66 (S.D. Ga. 2014).

[58]*Id.* at *3.

[59]*Id.* at *4-5. In determining whether an entity is an "arm of the State", the Eleventh Circuit implements a four-part test: "(1) how state law defines the entiry; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity." Manders v. Lee, 338 F.3d 1304, 1309 (11th Cir. 2003).

[60]335 P.3d 125 (Nev. 2014), *cert. granted in part*, 135 S. Ct. 2940 (2015).

[61]Petition for Writ of Certiorari at *i, *Franchise Tax Bd. of Cal. v. Hyatt*, No. 14-1175 (U.S. *petition for cert. filed* Mar. 23, 2015). *See also Franchise Tax Bd. of Cal. v. Hyatt*, SCOTUSBLOG (Dec. 7, 2015), http://www.scotusblog.com/case-files/cases/franchise-tax-board-of-california-v-hyatt/; Nevada v. Hall, 440 U.S. 410 (1979).

[62]*See* Transcript of Oral Argument at 9, *Franchise Tax Bd. of Cal.*, No. 14-1175 (U.S. argued Dec. 7, 2015) [hereinafter Transcript]; Brief for S.C. State Ports Authority as Amici Curiae Supporting Respondents, *Franchise Tax Bd. of Cal.*, No. 14-1175 (U.S. filed Sept. 10, 2015); Brief for W. Va., et. al. as Amici Curiae Supporting Respondents, *Franchise Tax Bd. of Cal.* (U.S. filed Sept. 10, 2015).

[63]*Franchise Tax Bd. of Cal.*, 335 P.3d at 125.

[64]Transcript, *supra* note 62, at 4-7, 9-13, 15-17, 23-26, 57; Lyle Denniston, *Argument Analysis: Seeking Two-Century-Old Guidance*, SCOTUSBLOG (Dec. 7, 2015, 3:33 PM) [hereinafter *Argument Analysis*], http://www.scotusblog.com/2015/12/argument-analysis-seeking-two-century-old-guidance/.

[65]Transcript, *supra* note 62, at 17-19, 28-29, 40-44; *Argument Analysis*, *supra* note 64.

seemed sympathetic to California's position, although Justice Scalia did seem concerned that under California's position, a foreign country, but not a sister state, could be sued in a state court.[66] Justice Kennedy asked whether there was anything in "our constitutional tradition that say[s] States can protect each other by retaliating against each other?"[67] Chief Justice Roberts and Justice Thomas did not ask any questions. A decision could be issued as early as March 2016.

VIII. STATE CONSTITUTIONAL LAW

The New Mexico Court of Appeals, in *Sanders-Reed v. Martinez*[68] held that the common law public trust doctrine did not authorize the judicial branch to unilaterally impose greenhouse gas emissions. The court held that the New Mexico Constitution delegated environmental authority, including air regulation, to the New Mexico Legislature.[69] The court concluded that the constitutional provision superseded common law. Second, the Legislature implemented the constitutional provision by creating an Environmental Improvement Board (EIB), which provided an adequate remedy. Finally, the relief requested violated separation of powers.

The Georgia Supreme Court in *Elbert County v. Sweet City Landfill*[70] applied a balancing test on a dormant commerce clause challenge to a local solid waste ordinance. The ordinance was facially neutral. The court refused to apply the less deferential standard applicable to local law that facially discriminates against interstate commerce.[71]

The Mississippi Supreme Court in *Hosemann v. Harris*[72] ruled on an issue that is common to all states. Where is the location of the boundary between private uplands and submerged sovereign lands held in public trust by the state?[73] The *Hosemann* case followed up on a 1988 decision of a sharply divided U.S. Supreme Court in *Phillips Petroleum Co. v. Mississippi*,[74] which held that each state with tidelands took public trust title at statehood to all lands underlying tidally influenced waters. The *Hosemann* court noted that sandy beaches on the Gulf of Mexico ordinarily are bounded at the mean high water line. Nevertheless, the State alleged the beach at issue was filled in tidelands. The court reversed partial summary judgment for the private littoral owner and remanded for factual determination of the sovereign boundary.[75]

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[66]Transcript, *supra* note 62, at 22, 33-37, 49-50*; see also* David G. Savage, *In California Tax Dispute, Supreme Court Ponders When One State Can be Sued in Another's Courts*, L.A. TIMES (Dec. 7, 2015, 2:10 PM), http://www.latimes.com/nation/la-na-supreme-court-california-taxpayer-20151207-story.html, ("The justices sounded closely split in the case of *California Franchise Tax Board vs. Hyatt*, with a majority appearing to lean in favor of California.").

[67]Transcript, *supra* note 62, at 5; *Argument Analysis*, *supra* note 64.

[68]350 P.3d 1221 (N.M. Ct. App. 2015).

[69]*Id.* at 1225-27; *see also* N.M. Const., art. 20, § 21.

[70]297 Ga. 429, 774 S.E.2d 658 (Ga. 2015).

[71]*Id.* at 434-35 (citing United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338, 346 (2007)).

[72]163 So. 3d 263 (Miss. 2015).

[73]*See, e.g.*, Sidney F. Ansbacher, *Stop the Beach Renourishment: A Case of MacGuffins and Legal Fiction*, 35 NOVA L. REV. 587 (2011).

[74]484 U.S. 469, 473 (1988).

[75]*Hosemann*, 163 So.3d at 270, 274.

The Kentucky Court of Appeals in *Louisville Gas and Electric Company v. Kentucky Waterways Alliance*,[76] distinguished between state constitutional venue and jurisdiction. The Kentucky Constitution creates one unitary circuit court,[77] and a statute establishes venue for administrative appeals in one circuit court.[78] On an issue that addressed the separation of powers (even though it was not labeled as such) the majority held the State Energy and Environment Cabinet failed to conduct a statutorily required "case by case best professional judgment" of the subject effluent treatment technology. The dissent contended it is not the job of the judiciary to set technology-based effluent limitations.[79]

[76]No. 2013-CA-001695-MR, No. 2013-CA-00172-MR, 2015 WL 3427746 (Ky. Ct. App. May 29, 2015).
[77]KY. CONST. § 109.
[78]KY. REV. STAT. ANN. §§ 224.10-470, 452.105 (West 2015).
[79]*Louisville Gas and Elec. Co.*, 2015 WL 3427746, at *7.

Chapter 27 • GOVERNMENT AND PRIVATE SECTOR INNOVATION
2015 Annual Report[1]

Public-private partnerships, sometimes called P3s, have long provided an innovative mechanism to finance expensive public works projects. Historically, P3s involved a series of complex commercial risk-sharing documents. In more recent years, the government and private partnership concept has widened to include virtually any initiative where the government supports or facilitates private sector action. These types of partnerships can include government regulation that facilitates private markets, government authorization granting quasi-public entities authority to act, and government grants or tax credits that provide private sector incentive.[2] This report provides a snapshot of the key activities involving joint government and private sector partnerships in 2015.

I. U.S. CONGRESSIONAL ACTION

A. Funding of Publicly-Sponsored Private Water Projects

On December 4, 2015, President Obama signed into law the Fixing America's Surface Transportation (FAST) Act.[3] The five-year, $305 billion transportation bill covers highway, transit, and rail project funding. It also repeals previous restrictions on use of tax-exempt bonds to fund water projects under the Water Infrastructure Finance and Innovation Act (WIFIA) program.[4] As a result, municipalities now can use tax-exempt bonds to fund eligible WIFA-program water projects, such as public water systems. WIFIA is a five-year, $350 million pilot program administered by the EPA that makes low-cost federal loans available to finance up to 49% of eligible water projects, which are privately-owned and sponsored by a public agency.[5] The revisions to WIFIA provided by FAST now allow 51% of WIFIA-eligible water projects to be funded through tax-exempt bonds—the most common financing mechanism used by public water systems.[6]

B. Federal Tax Credits and Other Financial Incentives for Renewable Energy and Other Energy-Related Infrastructure

The Consolidated Appropriations Act of 2016 (2016 Appropriations Act) extended the federal production tax credit for qualifying renewable energy.[7] Qualifying

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[1]Brian Hamm and Douglas Canter edited and contributed to this chapter. David Biderman, Jessica Chiavera, Ashton Roberts, William Yon, Matthew Sanders, and Jordan Sisson also authored sections of this chapter.

[2]*See What are Public Private Partnerships?*, PUB. PRIVATE P'SHIP IN INFRASTRUCTURE RES. CTR., WORLD BANK, http://ppp.worldbank.org/public-private-partnership/overview/what-are-public-private-partnerships (last updated Oct. 2, 2015).

[3]Pub. L. No. 114-94, 129 Stat. 1312 (2015).

[4]*Id.* § 1445 (codified as amended at 33 U.S.C. § 3907(a)).

[5]ENVTL. PROT. AGENCY, WIFIA: INTRODUCTION AND DEV. at 14-15 (Apr. 1, 2015), *available at* http://www.epa.gov/sites/production/files/2015-09/documents/wifia-04-01-15-webcast-2.pdf.

[6]AM. WATER WORKS ASS'N, WIFIA'S BOND PROHIBITION SHUTS OFF WATER PROJECT FINANCE TOOL 2 (Mar. 11, 2015) *available at* http://www.awwa.org/Portals/0/files/legreg/documents/FlyInWIFIACorrection.pdf.

[7]Pub. L. No. 114-113, 2015 H.R. 2029 (2015). Congress has extended the credit on a short-term basis several times. Prior to the Appropriations Act of 2016, the credit would

renewable energy sources include biomass, geothermal electric, hydroelectric, landfill gas, municipal solid waste, ocean thermal, tidal, wave, and wind energy. The renewable electricity production tax credit (PTC) provides electric generators an inflation-adjusted per-kilowatt-hour (kWh) tax credit for electricity generated by qualified energy resources and sold to an unrelated person during the taxable year. The duration of the credit is ten years after the date the facility is placed in service for all facilities placed in service after August 8, 2005.

The 2016 Appropriations Act extended expiration of the credit to December 31, 2019, for wind facilities commencing construction, with a phase-down of the credit for facilities whose construction commenced after December 31, 2016. The Act also extended the credit for other eligible forms of renewable energy from facilities whose construction commenced through December 31, 2016. The 2016 Appropriations Act also extended the investment tax credit for solar and Production Tax Credit-eligible technologies with a gradual step down of the credit between 2019 and 2022.[8] The investment tax credit provides a rebate to taxpayers for capital investments they make toward a qualifying renewable technology.[9]

C. Other U.S. Congressional Activity

A number of bills introduced in the U.S. House and Senate in 2015 included a P3 component. They advanced P3s as a possible solution in matters of transportation, veteran medical care, student financial literacy, and energy. Senate Bill 858, introduced in March by Sen. Cory Gardner (R-CO), would amend the National Energy Conservation Policy Act to expand federal agencies' contracting authority (and thereby allow P3s) for energy efficiency upgrades to federal facilities.[10] The bill was referred to, and remains in, the Energy and Natural Resources Committee, which held a hearing on the bill and a number of other energy-related bills in April.[11] Also in March, an identical bill was introduced in the House by Representative Adam Kinzinger (R-IL), and that bill was referred to the Committee on Energy and Commerce.[12] Several other legislative proposals introduced in Congress during 2015, if enacted, could significantly impact waste collection and disposal in the United States.[13]

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have expired December 31, 2014. *Renewable Electricity Production Tax Credit (PTC)*, DSIRE, http://programs.dsireusa.org/system/program/detail/734 (last updated Dec. 21, 2015). DSIRE is operated by the N.C. Clean Energy Technology Center at N.C. State University and funded by the U.S. Department of Energy. *Id.*

[8]DSIRE, *supra* note 7.

[9]U.S. Dep't of Commerce, *Renewable Energy Investment Tax Credit (ITC)*, SELECTUSA, http://selectusa.commerce.gov/investment-incentives/renewable-energy-investment-tax-credit-itc.html (last visited Apr. 7, 2016).

[10]*See* Energy Savings Through Public-Private Partnerships Act of 2015, S. 858, 114th Cong. (2015) (amending 42 U.S.C. §§ 8253, 8258, 8259, 8287).

[11]At the hearing, Senator Gardner explained that S. 858 could offer real savings to the federal government, which owns and manages more than 2.6 billion square feet of office space in the United States. *Energy Efficiency Legislation: Hearing Before the S. Comm. on Energy & Natural Res.*, 114th Cong. at 1:06:30 (2015) (statement of Sen. Cory Gardner).

[12]*See* Energy Savings Through Public-Private Partnerships Act of 2015, H.R. 1629, 114th Cong. (2015) (amending 42 U.S.C. §§ 8253, 8258, 8259, 8287).

[13]*See, e.g.*, Trash Reduction and Sensible Handling (TRASH) Act, S. 1953, 114th Cong. (2015); Food Recovery Act, H.R. 4184, 114th Cong. (2015).

II. FEDERAL AGENCY ACTION

A. Federal Water Infrastructure Financing

On January 16, 2015, the EPA launched the Water Infrastructure and Resiliency Finance Center to help address the challenges in the country of aging and inadequate water infrastructure.[14] The Center has made P3s a focus and has given awards for excellence in that department. Among the projects awarded in 2015 were a twenty-year partnership in Nassau County, New York, with United Water to operate and maintain the county's three sewage treatment plants and sewer system to achieve greater environmental protection and a partnership between the City of Gresham, Oregon, and Veolia Water North America for the management and operations of its wastewater treatment plant, which in 2015 achieved an energy net-zero status.[15]

B. Coal Ash Disposal from Power Plants

In April 2015, EPA issued its long-awaited regulations governing the disposal of coal ash from electric utility power plants.[16] The regulations establish technical requirements for coal ash landfills and surface impoundments under RCRA Subtitle D.[17] The rules address leaking of coal ash into ground water and establish new reporting and recordkeeping requirements for facilities receiving coal ash. The new regulations also support recycling of coal ash by distinguishing safe, beneficial use from disposal.[18]

C. Federal-Federal Solar Project

In February 2015, the Department of Defense (DOD), in partnership with the Government Services Agency, completed the DOD's largest ever renewable energy solar

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[14] *About the Water Infrastructure and Resiliency Finance Center*, ENVTL. PROT. AGENCY, http://www.epa.gov/waterfinancecenter/about-water-infrastructure-and-resiliency-finance-center (last updated Sept. 24, 2015).

[15] *Leading Edge Financing for Water Infrastructure*, ENVTL. PROT. AGENCY, http://www.epa.gov/waterfinancecenter/leading-edge-financing-water-infrastructure (last updated Sept. 23, 2015).

[16] Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. 21,302 (Apr. 17, 2015) (to be codified at 40 C.F.R. pts. 257, 261) (direct final rule).

[17] EPA's The Solid Waste Program, under the Resource Conservation and Recovery Act (RCRA) Subtitle D, encourages states to develop comprehensive plans to manage nonhazardous industrial solid waste and municipal solid waste, sets criteria for municipal solid waste landfills and other solid waste disposal facilities, and prohibits the open dumping of solid waste. *See Regulatory Information by Topic: Waste*, ENVTL. PROT. AGENCY, http://www.epa.gov/regulatory-information-topic/regulatory-information-topic-waste (last updated Mar. 30, 2016).

[18] Hazardous and Solid Waste Management System, 80 Fed. Reg. at 21,354.

installation at Ft. Huachuca in Southwestern Arizona. The sixty-eight-acre project is expected to provide more than 18-megawatts of clean power.[19]

D. Green Banks

Also during 2015, the Department of Energy (DOE) clarified in its December guidance for Energy Investment Partnerships that DOE loans are available to state green banks.[20] The DOE's Loan Programs Office also announced $1 billion for distributed generation projects and signaled that state-financed agencies may apply for federal funds under the Energy Policy Act of 2005's Title XVII Loan program.[21]

E. Land Banking

All ten states that have passed land bank enabling statutes—even West Virginia, which passed its enabling statute in 2014—are now actively acquiring and conveying properties. The implementation stages vary broadly among the states that have passed legislation. Some states are having the initial organization meeting, implementing Boards of Directors, and drafting strategic business plans, such as in Pittsburgh.[22] Others are implementing ambitious goals that reach across different agencies, as well as different levels of government, and are pairing with the private sector to launch and implement the desired innovations achievable through land banking.[23]

F. EPA Proposed Rule for RD&D Permits at Municipal Solid Waste Landfills

In a November 13, 2015 Federal Register notice, EPA proposed to revise the maximum term for research, development, and demonstration (RD&D) permits at municipal solid waste landfills (MSWLFs), extending from the current total possible permit term of twelve years to a possible permit term of twenty-one years. [24] Six three-

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[19]Scott Nielsen, *GSA's Utility Contract Facilitates DoD's Charge Towards Sustainability at Ft. Huachuca*, GOV'T SERVS. AGENCY (July 28, 2015), http://www.gsa.gov/portal/content/212727.

[20]U.S. DEP'T. OF ENERGY, ENERGY INV. P'SHIPS: HOW STATE AND LOCAL GOV'TS ARE ENGAGING PRIVATE CAPITAL TO DRIVE CLEAN ENERGY INV. 1-2 (Dec. 7, 2015), *available at* http://energy.gov/sites/prod/files/2015/12/f27/Energy%20Investment%20Partnerships.pdf .

[21]Nathaniel T. Kron, et al., *DOE Loan Program Announces $1 Billion in Additional Funding and New Guidance for Distributed Generation Projects*, HOLLAND & KNIGHT (Sept. 2, 2015), http://www.hklaw.com/EnergyFinanceBlog/DOE-Loan-Program-Announces-1-billion-in-Additional-Funding-and-New-Guidance-for-Distributed-Generation-Projects-09-02-2015/.

[22]CITY OF PITTSBURGH, PITTSBURGH LAND BANK INITIAL MEETING (July 6, 2015), *available at* http://apps.pittsburghpa.gov/council/Land_Bank_Initial_Meeting.pdf.

[23]GREATER SYRACUSE LAND BANK, 2015 PERFORMANCE OBJECTIVES (Jan. 20, 2015), *available at* http://syracuselandbank.org/wp-content/uploads/2014/02/2015-Performance-Objectives.pdf.

[24]Revision to the Research, Development and Demonstration Permits Rule for Municipal Solid Waste Landfills, 80 Fed. Reg. 70,180 (Nov. 13, 2015) (to be codified at 40 C.F.R. pt. 258).

year permit renewals would be allowed on top of the original permit period, rather than just the three renewals currently allowed.[25]

III. STATE LEGISLATIVE ACTION

A. State Green Banks

On September 1, 2015, Rhode Island formally established the Rhode Island Efficient Buildings Fund within its Infrastructure Bank, which it financed by issuing a green bond and incorporating unused federal stimulus money for state energy, federal qualified energy conservation bond credits, and RGGI proceeds.[26] State-authorized green banks represent a shift in government spending from one-time subsidies to market-oriented financial support.[27]

Meanwhile, the New York Green Bank took another step towards its capitalization target of $1 billion by increasing total funding to $368.5 million.[28] New York Green Bank also began to distribute funding this year.[29] Projects included commercial distributed energy, small-scale commercial cogeneration, and residential and commercial energy efficiency and community generation.[30] New York Green Bank has also partnered with the Connecticut Green Bank, the Natural Resources Defense Council, and the Coalition for Green Capital to start the first international network of state green banks. [31]

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[25]*Municipal Solid Waste Permits Rules and Information Collection Requests (ICR) Notices*, ENVTL. PROT. AGENCY, http://www3.epa.gov/epawaste/nonhaz/municipal/landfill/mswlficr/ (last updated on Mar. 27, 2016).

[26]R.I. GEN. LAWS § 46-12.2-3 (2015); *see also* RHODE ISLAND INFRASTRUCTURE BANK, EFFICIENT BUILDINGS FUND POLICIES AND PROCEDURES, (Nov. 12, 2015), *available at* http://www.ricwfa.com/wp-content/uploads/2015/11/RIIB-Efficient-Buildings-Fund-Policies-and-Procedures-11-12-15.pdf.

[27]Ken Berlin et al., *State Clean Energy Finance Banks: New Investment Facilities for Clean Energy Deployment*, BROOKINGS (Sept. 12, 2012), http://www.brookings.edu/research/papers/2012/09/12-state-energy-investment-muro.

[28]Vipal Monga, *New York Green Bank Gets Another $150 Million*, WALL ST. J., (July 16, 2015, 3:50 PM), http://blogs.wsj.com/cfo/2015/07/16/new-york-green-bank-gets-another-150-million/ (subscription). Started in 2011, public green banks leverage state funds through, inter alia, long-term/low-interest loans, revolving loans, insurance products, low-cost public investments, and property-assessed clean energy programs to support targeted projects or activities, such as energy retrofits. *Id. See also* David Giambusso, *P.S.C. approves $150M. for New York Green Bank*, POLITICO N.Y. (July 16, 2015, 8:29 PM), http://www.capitalnewyork.com/article/albany/2015/07/8572285/psc-approves-150-m-new-york-green-bank.

[29]Scott Waldman, *State's $1B 'Green Bank' Gets off to a Slow Start*, POLITICO N.Y. (Nov. 16, 2015, 5:40 AM), http://www.capitalnewyork.com/article/albany/2015/11/8582903/states-1b-green-bank-gets-slow-start.

[30]*NY Green Bank's Initial Transactions*, NY GREEN BANK, http://greenbank.ny.gov/initial-transactions (last visited Jan. 20, 2016).

[31]*COP21: Global Green Bank Network Debuts in Paris*, ENVTL. NEWS SERV. (Dec. 7, 2015, 5:47 PM), http://ens-newswire.com/2015/12/07/cop21-global-green-bank-network-debuts-in-paris/.

B. State Tax

During 2015, New Jersey and Virginia amended their respective tax codes to provide incentives for renewable energy. New Jersey signed into law Senate Bill 2599 (Chapter 101), which includes certain bio-fuels within the types of fuel eligible for the motor fuel tax use exemption.[32] Virginia passed House Bill 1297 (Chapter 230) amending the state's machinery and tools tax for renewable energy production. With certain exceptions, the law authorizes localities in Virginia to set a separate, lower machinery and tool tax on renewable energy production. [33]

IV. OTHER STATE AND LOCAL ACTIONS

A. California PACE Programs

Verengo Solar, a solar panel installer, and CaliforniaFIRST, a public-private partnership, formed a partnership to allow customers to buy solar equipment using Property Assessed Clean Energy (PACE) financing.[34] Customers will qualify based on their home equity instead of their credit score. The partners expect 40% more households in the Southern California area will transition to solar energy.[35] Meanwhile, ReNewAll, a California financing solutions company, has undertaken the largest individual PACE project in the U.S. in the Hilton Los Angeles/Universal City by retrofitting the building's light bulbs, pumps, chillers, and HVAC system.[36]

B. New York Net Metering

In 2015, Orange and Rockland Utilities (ORU) protested to the New York Public Service Commission the 6% overall electricity-usage-cap for remote net metering that applies to farm and non-residential account owners.[37] The Commission temporarily suspended the cap pending resolution of the issue.[38]

C. Prince Georges County, Maryland Stormwater Management

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[32]S.B. 2599, 216th Leg. (N.J. 2015) (enacted Aug. 10, 2015) (amending P.L.2010, c.22).
[33]H.R. 1297, 2015 Gen. Assemb., Reg. Sess. (Va. 2015) (approved Mar. 17, 2015) (amending VA Code § 58.1-3508.6). The bill created a separate class of property for purposes of the Machinery and Tools Tax for machinery and tools owned by a business and used directly in producing or generating renewable energy. *Id.*
[34]*Verengo Solar Announces Partnership With CaliforniaFIRST*, CALIFORNIAFIRST (Oct. 8, 2015), https://californiafirst.org/verengo-solar-announces-partnership-with-californiafirst/.
[35]*40 Percent More Homeowners Eligible for Financing Through Verengo, CaliforniaFIRST Partnership*, PVSOLARREPORT (Oct. 19, 2015), http://www.pvsolarreport.com/verengo-californiafirst/.
[36]Glenn Meyers, *$300 Million Fund From ReNewAll Targets Clean Energy Projects*, CLEANTECHNICA (Oct. 21, 2015), http://cleantechnica.com/2015/10/21/300-million-fund-renewall-targets-clean-energy-projects/.
[37]*Net Metering/Remote Net Metering and Interconnection*, NYSERDA, http://www.nyserda.ny.gov/Cleantech-and-Innovation/Power-Generation/Net-Metering-Interconnection (last visited Apr. 7, 2016); William Opalka, *Net Metering Caps Temporarily Lifted in NY*, RTO INSIDER (Oct. 19 2015), http://www.rtoinsider.com/net-metering-caps-lifted-new-york-18527/.
[38]Opalka, *supra* note 37.

This past year, Prince George's County, Maryland (PG County), launched a joint partnership with Corvias Solutions to design, build, and maintain green stormwater infrastructure.[39] Corvias is a private business that specializes in helping the public sector finance energy, environment, and infrastructure. Relying on two master agreements, the PG County-Corvias partnership will retrofit up to 8,000 acres of impervious surfaces, e.g., parking lots, roads, and rooftops, using green infrastructure by 2025.[40] During the first phase of the thirty-year partnership, i.e., the first three years of the master design/build agreement, Prince George's County will invest $100 million funded through bond issuances for Corvias to retrofit 2,000 acres.[41] Corvias will retrofit another 2,000 acres if the County exercises its right to renew the design/build agreement for a second three-year term. The County commits to retrofitting the remaining 4,000 acres.[42] Under the thirty-year maintenance agreement, Corvias will maintain the new green stormwater infrastructure for the full thirty-year term of the agreement.

D. Onondaga County, California Resource Recovery Agency Waste Management

On May 14, 2015, Covanta Energy Corporation announced plans to extend an agreement with Onondaga County Resource Recovery Agency to operate and maintain the county's waste-to-energy resource recovery facility for an additional twenty years.[43] Covanta is the largest participant in the United States' waste-to-energy market. Similarly, on May 7, 2015, Covanta Long Beach Renewable Energy announced its extension to June 30, 2024, of an agreement with the City of Long Beach, California, for the operation and maintenance of the county's waste-to-energy resource recovery facility.[44]

E. San Diego County, California, Water Authority Desalinization Plant

On December 14, 2015, the seawater desalinization plant in Carlsbad officially completed its thirty-day test period showing it could deliver fifty-five million gallons of

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[39]The PG County Council approved the joint partnership with Corvias in November 2014, and the parties executed the master contracts reflecting the partnership in March 2015. *See* PRINCE GEORGE'S CNTY., CLEAN WATER P'SHIP: FREQUENTLY ASKED QUESTIONS (Apr. 2, 2015), *available at* http://www.princegeorgescountymd.gov/sites/StormwaterManagement/Documents/CWP_FAQ.pdf.

[40]OFFICE OF WETLANDS, OCEANS, AND WATERSHEDS, ENVTL. PROT. AGENCY, EPA 842-R-14-005, GETTING TO GREEN: PAYING FOR GREEN INFRASTRUCTURE, FINANCING OPTIONS AND RES. FOR LOCAL DECISION-MAKERS 19 (Dec. 2014).

[41]Press Release, Prince George's Cnty., White House and EPA Recognize Prince George's County Stormwater Retrofit Public-Private (P3) Among Most Innovative in the Nation, (Apr. 3, 2015); Telephone Interview by Douglas Canter with Adam Ortiz, Director, Prince George's Cnty. Dep't of Env't Prot. (Dec. 22, 2015) [hereinafter Interview with Adam Ortiz].

[42]Interview with Adam Ortiz, *supra* note 41.

[43]Press Release, Covanta, Covanta Extends Partnership with OCRRA for Operations of the Onondaga County Resource Recovery Facility (May 14, 2015).

[44]Press Release, Covanta, Covanta Extends Agreement with the City of Long Beach, CA for Operations of the Southeast Resource Recovery Facility (May 14, 2015). "After source reduction and recycling, the residual waste that remains is processed at the Energy-from-Waste facility to generate clean electricity for approximately 35,000 homes." *Id.*

drinkable water per day.[45] The nearly $1 billion facility is the largest in the Western Hemisphere and the result of a finance, design, build, operate, and maintain contract between the San Diego County Water Authority and Poseidon Water based in Boston. The Water Authority entered into a thirty-year performance-based purchase agreement with Poseidon, which bore the entire cost of construction through private activity bonds.[46]

F. Seattle's Living Building Challenge

After two years of operation, Seattle's Bullitt Center has become the largest building to have completed the so-called "Living Building Challenge," a twenty-point test requiring a building to, inter alia, generate as much energy as it consumes, supply its own water, and process its own sewage. The building's tenants now pay nothing for electricity, as the building generates 60% more electricity than it actually uses.[47]

V. OTHER RELATED FINANCING APPROACHES

A. Securitization

In July 2015, SolarCity closed on the sale of $123 million in bonds backed by a portfolio of its solar assets, marking the company's fourth successful securitization.[48] Also in July 2015, SunRun completed a securitization of its assets,[49] marking the first securitization by a company other than SolarCity. Moreover, in September 2015, AES Corp. announced plans to securitize its first portfolio of solar projects.[50]

B. Crowd Funding

Crowd funding refers to raising many small amounts of money from a large number of people, typically over the Internet. Crowd funding has become a popular

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[45]Anthony Clark Carpio, *Poseidon's Carlsbad desalination plant undergoes tests as H.B. Plan Waits in the Wings*, HUNTINGTON BEACH INDEP. (Dec. 2, 2015, 1:39 PM), http://www.latimes.com/socal/hb-independent/news/tn-hbi-me-1203-poseidon-20151202-story.html.

[46]Allysia Finley, *Slaking California's Thirst—if Politics Allows*, WALL ST. J. (May 15, 2015, 6:41 PM), http://www.wsj.com/articles/slaking-californias-thirstif-politics-allows-1431729692 (subscription); *see also* CARLSBAD DESALINATION PLANT, http://carlsbaddesal.com/ (last visited Mar. 15, 2016).

[47]Sanjay Bhatt, *Bullitt Center Tops its Green Goals, Is Making Energy to Spare*, SEATTLE TIMES (Mar. 28, 2015, 10:03 AM), http://www.seattletimes.com/business/real-estate/bullitt-center-tops-its-green-goals/.

[48]*SolarCity Completes its Fourth Securitization*, PV MAGAZINE (Aug. 13, 2015), http://www.pv-magazine.com/news/details/beitrag/solarcity-completes-its-fourth-securitization_100020603/ - axzz3tTWuMbCD.

[49]Eric Wesoff, *Update: Sunrun Announces Pricing of Its Securitized Portfolio of Residential Solar Rooftops*, GREENTECH MEDIA (July 1, 2015), http://www.greentechmedia.com/articles/read/10-Takeaways-Sunruns-Securitized-Portfolio-of-Residential-Solar-Rooftops.

[50]Brian Eckhouse, *AES Planning $100 Million U.S. Solar Power Securitization*, BLOOMBERG (Sept. 28, 2015, 2:57 PM), http://www.bloomberg.com/news/articles/2015-09-28/aes-planning-100-million-u-s-solar-power-securitization.

approach to financing renewable energy projects.[51] The Oakland, California-based company Mosaic used crowd funding to finance solar panel purchases by residential customers.[52] In another recent example, East River Electric Cooperative, which supplies power in rural areas of South Dakota and Minnesota, used crowd funding to diversify its energy portfolio with wind power.[53]

[51]Tanya Prive, *What is Crowdfunding and How Does it Benefit the Economy*, FORBES, (Nov. 27, 2012, 10:50 AM), http://www.forbes.com/sites/tanyaprive/2012/11/27/what-is-crowdfunding-and-how-does-it-benefit-the-economy/.

[52]After the twenty-year period, Mosaic's Home Solar Loan homeowners will own their equipment outright. Until 2014, Mosaic's projects had gone to schools, jobs-training centers, and other facilities, but they have since moved towards residential houses. *See Why Choose Mosiac?*, MOSAIC, https://joinmosaic.com/why-mosaic (last visited Apr. 7, 2016) (explaining Mosaic's initiative).

[53]Steven Goldman, *Want to Finance a Wind Farm Project in Your Community? Try Crowdfunding*, U.S. DEPT. OF ENERGY (Sept. 24, 2013, 10:12 AM), http://energy.gov/eere/articles/want-finance-wind-farm-project-your-community-try-crowdfunding.

Chapter 28 • INTERNATIONAL ENVIRONMENTAL AND RESOURCES LAW 2015 Annual Report[1]

I. ATMOSPHERE AND CLIMATE

A. Climate

The December 2015 United Nations (UN) climate meetings in Paris (COP21) marked a watershed moment politically for international efforts to combat climate change. Following the signature of the 1992 United Nations Framework Convention on Climate Change (UNFCCC) by nearly every country in the world, subsequent efforts have thus far been limited in scope or success. The 1997 Kyoto Protocol established a top-down approach, mandating specific emissions reductions for industrialized nations only, and was not ratified by the United States.[2] In 2009, parties at the Fifteenth Conference of the Parties to the UNFCCC (COP15) in Copenhagen agreed to a patchwork of actions until 2020. Although the parties extended the Kyoto Protocol for an increasingly small number of countries and others set forth their own pledges to reduce

[1]Any views or opinions expressed in this report are those of the authors in their personal capacities and do not represent the views of their organizations, including the Department of State or the United States Government. This report is jointly submitted on behalf of the International Environmental Law Committee of the ABA Section on International Law (SIL) and the International Environmental and Resources Law Committee of the Section on Environment, Energy, and Resources Law (SEER) by Vice-Chairs and Co-Editors Kristen Hite, Consultant, Environmental Law Institute, who also contributed to the section on climate change, and Lynn A. Long, Attorney-Adviser in the Office of the Solicitor, U.S. Department of the Interior, who also contributed to the section on water. Stephanie Altman, Attorney Advisor in the Office of General Counsel, International Law Section, National Oceanic and Atmospheric Administration (NOAA), contributed on marine environmental protection and conservation. Derek Campbell, Attorney-Advisor, Office of General Counsel, International Law Section, NOAA, contributed on marine environmental protection and conservation. David Gravallese, Attorney-Adviser in the Office of the Legal Adviser, U.S. Department of State, contributed on ozone. Richard A. Horsch, a Partner with White & Case LLP, contributed on hazardous waste. Finance-related developments are incorporated throughout and were contributed by David Hunter, Professor, and Erika Lennon, Coordinator of the Program on International and Comparative Environmental Law, at American University Washington College of Law. Thomas Parker Redick, with Global Environmental Ethics Counsel, contributed on international regulation of biotechnology. Matt Oakes, Trial Attorney in the Law and Policy Section, Environment and Natural Resources Division, U.S. Department of Justice, contributed on international environmental litigation. Erica Lyman, Professor, Lewis and Clark Law School, contributed on natural resources. Andrew Schatz, Legal Advisor, Ecosystem Finance Division, Conservation International, contributed on climate change. Baskut Tuncak and Giulia Carlini of the Center for International Environmental Law contributed on international chemicals.

[2]*Status of Ratification of the Kyoto Protocol*, UNFCCC, http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php (last visited Apr. 7, 2016); Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 (1998).

greenhouse gas (GHG) emissions, they failed to agree on a comprehensive long-term implementation plan with universal applicability.[3]

Learning from Kyoto and Copenhagen, a universal, bottom-up agreement emerged at COP21 in Paris in 2015, setting forth the global rules and framework applicable to all countries, but ultimately allowing them to choose their emissions reduction targets. In accordance with Decision 1/CP.20 (The Lima Call for Climate Action in 2014) at COP20 in Lima, Peru, parties were required to submit their individually chosen GHG emission reduction targets known as "Intended Nationally Determined Contributions" (INDCs) by October 2015.[4]

In the months leading up to COP21, almost all countries submitted these pledges. China agreed to increase its share of renewable energy to 20% and achieve peaking of CO_2 emissions by around 2030, while making best efforts to peak early.[5] The United States agreed to reduce emissions by 26%-28% below 2005 levels by 2025.[6] The European Union agreed to a binding target to reduce domestic emissions by at least 40% below 1990 levels by 2030.[7] India pledged to reduce the emissions intensity of its GDP by 33%-35% below 2005 levels by 2030.[8] Cumulatively, all announced pledges would only limit temperature increases to 2.7˚C above pre-industrial levels by 2100, as compared to a 4-5˚C increase under business as usual, but still above the global target

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[3]John Eick, *Paris Climate Change Talks: How Did We Get Here?*, ALEC (Oct. 19, 2015), https://www.alec.org/article/cop-21cmp-11-how-did-we-get-here/; Conference of the Parties on its Fifteenth Session, Copenhagen, Denmark, Dec. 7-18, 2009, *Framework Convention on Climate Change*, Draft Decision-/CP.15, U.N. Doc. FCCC/CP/2009/L.7 (Dec. 18, 2009) [hereinafter Copenhagen Accord of COP15], *available at* http://unfccc.int/resource/docs/2009/cop15/eng/l07.pdf.

[4]Conference of the Parties on its Twentieth Session, Lima, Peru, Dec. 1-14, *Decisions Adopted by the Conference of the Parties*, Dec. 1/CP.20 U.N. Doc. FCCC/CP/2014/10/Add.1 (Feb. 2, 2015) [hereinafter Lima Call For Climate Action of COP20]; *INDCs as Communicated by Parties*, UNFCCC, http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx (last visited Apr. 7, 2016).

[5]*Enhanced Actions on Climate Change: China's Intended Nationally Determined Contributions*, CHINA.ORG.CN (June 30, 2015), http://www.china.org.cn/environment/2015-06/30/content_35950951.htm. *See also* Press Release, The White House, U.S.-China Joint Announcement on Climate Change (Nov. 11, 2014).

[6]UNFCCC, *U.S. Cover Note INDC and Accompanying Information* (Mar. 31, 2015), *available at* http://www4.unfccc.int/submissions/INDC/Published%20Documents/United%20States%20of%20America/1/U.S.%20Cover%20Note%20INDC%20and%20Accompanying%20Information.pdf (INDC submission).

[7]UNFCCC, *Submission by Latvia and the European Commission on Behalf of the European Union and Its Member States* (Mar. 6, 2015), *available at* http://www4.unfccc.int/submissions/INDC/Published%20Documents/Latvia/1/LV-03-06-EU%20INDC.pdf (INDC submission).

[8]UNFCCC, *India's Intended Nationally Determined Contributions: Working Towards Climate Justice* (Oct. 1, 2015), *available at* http://www4.unfccc.int/submissions/INDC/Published%20Documents/India/1/INDIA%20INDC%20TO%20UNFCCC.pdf (INDC submission).

recommended by the Intergovernmental Panel on Climate Change to limit warming to 1.5-2˚C.[9]

Following two weeks of negotiations, 195 countries adopted the "Paris Agreement"[10] on December 12, 2015, establishing the first universally applicable global agreement to implement the UNFCCC. The Paris Agreement sets an overarching goal to hold global temperature increases to "well below 2˚C above pre-industrial levels" and aims to limit increases to 1.5˚C.[11] It further seeks to achieve a global peaking of GHG emissions as soon as possible and to achieve carbon neutrality—a balance between anthropogenic emissions by sources and removals by sinks—by the second half of this century.[12]

The Paris Agreement implements a common set of obligations applicable to all countries while recognizing differentiated responsibilities through some flexibility and support to developing and particularly vulnerable countries. To achieve the temperature goal of 1.5-2˚C, article 4 directs developed countries to take the lead by setting economy-wide emissions targets, while developing nations are encouraged to do so over time. Recognizing the need to further reduce annual emissions in order to meet the global temperature goal, the Paris Agreement provides that each party shall submit a nationally determined contribution (NDC) every five years, and that "[e]ach Party's successive [NDC] will represent a progression beyond the Party's then current [NDC] and reflect its highest possible ambition . . . ."[13] An interim review assessing the parties' progress in meeting the objective will take place in 2018, and then every five years starting in 2023 (a "global stocktaking"). Decision text from COP21 outlines a detailed process for developing a more detailed suite of rules and decisions to implement the Paris Agreement.

The Paris Agreement reaffirms and encourages current efforts to enhance the use of carbon sinks (i.e., REDD+) and, together with the decision text, contemplates a suite of market and non-market approaches to help countries achieve their NDCs.[14] Notably, Article 6 also creates a mechanism to mitigate GHGs and support sustainable development to be further developed at future meetings.

The Paris Agreement also strengthened international support to help countries adapt and cope with the adverse effects of climate change. It establishes a global goal of enhancing the capacity of countries to adapt to climate change, strengthening resilience, and reducing vulnerability; requires parties to plan and implement adaptation efforts; encourages parties to report their adaptation efforts and needs; and includes a review of progress through the global stock take.[15] The parties agreed to continue and strengthen the Warsaw International Mechanism for Loss and Damage associated with the negative impacts of climate change, but recognized that it "does not involve or provide a basis for any liability or compensation."[16]

The Paris Agreement also creates a transparency framework for action and support. Under this transparency regime, all Parties are required to submit and post

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[9]Press Release, UNFCCC, Global Response to Climate Change Keeps Door Open to 2 Degree C Temperature Limit (Oct. 30, 2015).

[10]Conference of the Parties on its Twenty-first Session, Paris, France, Nov. 30-Dec. 11, 2015, *Adoption of the Paris Agreement*, Draft Decision-/CP.21, UN Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015) [hereinafter Paris Agreement].

[11]*Id.* at annex art. 2.

[12]*Id.* at annex art. 4.

[13]*Id.*

[14]*Id.* ¶ 40, annex arts. 5-6.

[15]Paris Agreement, *supra* note 10, at annex art. 8.

[16]*Id.* ¶ 52, annex art. 8.

reports regarding their emissions data and progress in meeting their INDCs using a uniform accounting method with flexibility for developing countries lacking capacity.[17] Developed and other countries should also provide information on financial, technology-transfer, and capacity building support given.

The Paris Agreement will enter into force after it is formally ratified or approved by fifty-five countries cumulatively responsible for 55% of global GHG emissions, taking effect in 2020. The Parties to the UNFCCC will meet for COP22 in Marrakesh, Morocco, from November 7-18, 2016.

Financially, the decision text accompanying the Paris Agreement calls on developed nations to mobilize a floor of $100 billion annually in climate finance through 2025, when a new goal will be set, to help developing countries meet their mitigation and adaptation goals under the Agreement.[18] Financial aid may come from a variety of sources and should seek to achieve parity in allocation of resources between mitigation and adaptation support. Like each country's INDC, the financial commitments do not create new treaty-level obligations, a concession won by the United States so that the Agreement would not need Senate ratification, as compared to Kyoto.[19]

It is unclear what portion of climate finance will ultimately flow through the Green Climate Fund (GCF), which continued to advance its work in 2015. Entities seeking to become accredited to receive funds to implement projects (implementing entities) have to demonstrate their ability to comply with the GCF's fiduciary policy, environmental and social safeguards (which are currently the International Finance Corporation's Performance Standards), and gender policy.[20] Each entity is evaluated and accredited based on its capabilities, and thus, not all entities will be able to implement all projects. For example, projects with more significant environmental and social risks will have to be implemented by entities capable of dealing with those risks. As of December 2015, the GCF had accredited twenty implementing entities, including UN agencies, multilateral development banks, and government ministries, among others.[21] At the GCF's December 2015 meeting, the board approved eight projects, totaling $168 million in funds.[22] Despite having approved these projects, the GCF had not yet finalized adoption of operational procedures and structures such as an accountability mechanism.

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[17] *Id.* at annex art. 13.

[18] *Id.* ¶ 54, annex art. 9.

[19] *Id. See also The Paris Agreement: Putting the First Universal Climate Change Treaty in Context*, BAKER & MCKENZIE 12 (Jan. 2016), *available at* http://www.bakermckenzie.com/files/Uploads/Documents/Environmental/ar_global_climatechangetreaty_jan16.pdf (noting U.S. efforts to avoid new and additional commitments).

[20] In November 2014, the GCF opened its accreditation process. Press Release, Green Climate Fund, Green Climate Fund Opens Online Accreditation System for Implementing Entities and Intermediaries (Nov. 17, 2014). *See also Why Accredit*, GREEN CLIMATE FUND, http://www.greenclimate.fund/ventures/accreditation/#why-accredit (last visited Apr. 7, 2016).

[21] *List of Accredited Entities*, GREEN CLIMATE FUND, http://www.greenclimate.fund/documents/20182/114261/20151119_-_GCF_List_of_Accredited_Entities.pdf/e09bb9b3-9730-4adc-bca9-ff32739ecae8 (last visited Apr. 7, 2016).

[22] The projects are in Peru, Malawi, Senegal, Bangladesh, Eastern Africa, Latin America, the Caribbean, the Maldives, and Fiji. Each of the projects will be administered by an implementing entity. *See* Press Release, Green Climate Fund, Green Climate Fund Approves First 8 Investments (Nov. 6, 2015).

Beyond the GCF, countries made some progress particularly for climate forest funding, The World Bank Group's Forest Carbon Partnership Facility (FCPF)[23] continued to facilitate progress of countries towards reducing emissions from deforestation and forest degradation (REDD+) readiness. In FY15, the FCPF's Readiness Fund received $27 million in new contributions.[24] By the end of the year, it had allocated $211 million in readiness funding and began making strides to support results-based payments to certain countries for demonstrated emissions reductions.[25] In May, the Democratic Republic of Congo became the first country to present its readiness package.[26] Additionally, Costa Rica, Ghana, Liberia, Mexico, the Republic of Congo, and Vietnam all reported mid-term progress.[27] Additionally, the FCPF's Carbon Fund gained stability when it was extended to 2025. Consequently, this extension allowed for the expansion of pipeline projects, now totaling eleven countries.[28] The FCPF continued its collaboration with other REDD+ programs such as the Forest Investment Program (FIP), which in May 2015 selected six new countries in which to invest.[29]

B. Ozone

At the Twenty-seventh Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer (MOP27) in Dubai, the parties agreed for the first time to work to amend the Protocol to address the rapidly growing production and consumption of hydrofluorocarbons (HFCs).[30] To that end, in a decision called the

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[23]*See* FOREST CARBON PARTNERSHIP FACILITY, http://www.forestcarbonpartnership.org/ (last visited Apr. 7, 2016).

[24]FOREST CARBON PARTNERSHIP FACILITY, 2015 ANNUAL REPORT at 15, § 4.1 (Nov. 2015), *available at* https://www.forestcarbonpartnership.org/sites/fcp/files/2015/November/FCPF%20AR%20FY15%2011%204%20%28web%29_0.pdf (noting that the funds came from Germany and Finland).

[25]*Id.*

[26]*Id.* at 15, 26.

[27]*Id.* at 15.

[28]*Id.* (highlighting that this increased stability for the Carbon Fund led to Guatemala and Peru being selected and Indonesia being provisionally accepted and noting up to eight additional countries pending).

[29]At the FIP sub-committee meeting in May 2015, the Republic of the Congo, Ecuador, Guatemala, Ivory Coast, Mozambique, and Nepal were all approved as FIP countries. The FIP also agreed to fund the development of investment plans in nine countries: Bangladesh, Cambodia, Cameroon, Guyana, Honduras, Rwanda, Tanzania, Uganda, and Zambia. *Forest Investment Program (FIP): CIFS Monitor 12*, BRETTONWOODS PROJECT (Nov. 4, 2015), http://www.brettonwoodsproject.org/2015/11/forest-investment-program-fip-5/.

[30]Twenty-seventh Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, Dubai, United Arab Emirates, Nov. 1-5, 2015, *Report of the Meeting of the Parties*, UN Doc. UNEP/OzL.Pro.27/13 (Nov. 30, 2015) [hereinafter MOP27] *available at* http://conf.montreal-protocol.org/meeting/mop/mop-27/report/English/MOP-27-13E.pdf. At earlier MOPs, some parties had argued that HFCs must be addressed only under the UNFCCC and its Kyoto Protocol, and not under the Montreal Protocol, because HFCs are not ozone-depleting substances. Supporters of an HFC amendment in the Montreal Protocol have countered that Article 2(b)(2) of the Vienna Convention for the Protection of the Ozone Layer, to which the Montreal Protocol is attached, states that "Parties shall cooperate in harmonizing appropriate

"Dubai Pathway on Hydrofluorocarbons," the Parties also agreed to hold a series of meetings in 2016, including an Extraordinary Meeting of the Parties.[31] HFCs are potent greenhouse gases that are used as alternatives to chlorofluorocarbons (CFCs) and hydrochlorofluorocarbons (HCFCs), which are being phased out under the Montreal Protocol.

The Dubai Pathway represents a significant breakthrough in the efforts of more than forty parties who sponsored a total of four different HFC amendment proposals for consideration at MOP27.[32] The Dubai Pathway decision includes two annexes. The first carries forward a mandate for a "contact group" to continue to negotiate an HFC phasedown amendment. The second records progress made on issues discussed in a contact group at MOP27.[33] The annexes reflect the continuing concern of some developing country parties regarding the availability of alternatives to HFCs in high ambient temperature conditions, the difficulty of phasing down HFCs while simultaneously phasing out HCFCs, and the availability of financial assistance and technology transfer, including relevant intellectual property rights. Some parties are calling for an exemption for high ambient temperature countries, arguing that there are insufficient alternatives to HFCs in certain air conditioning applications.

Intensive, high-level diplomatic contacts among many parties, both before and during MOP27, was key to the adoption of the Dubai Pathway. Given the list of challenges and concerns, negotiations toward an amendment in 2016 promise to be contentious.

II. MARINE ENVIRONMENTAL PROTECTION AND CONSERVATION

A. Marine Biodiversity

In 2015, several regional actions were taken to advance marine environmental protection, conservation, and sustainable use of marine biodiversity. In November, National Oceanic and Atmospheric Administration (NOAA) and the National Park Service signed a Memorandum of Understanding (MOU) with Cuba's Ministry of Science, Technology, and Environment.[34] The first of its kind since the U.S. and Cuba

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policies associated with controlling ozone-depleting substances." *Annex III: Report of the Co-Chairs of the Discussion Group on Issues on the Management of Hydrofluorocarbons Using the Montreal Protocol and its Mechanisms*, UNEP, http://ozone.unep.org/en/handbook-montreal-protocol-substances-deplete-ozone-layer/90 (last visited Apr. 7, 2016). They have argued that such harmonization can include managing substitutes for CFCs and HCFCs. Supporters also point to language in the proposed amendments discussed at MOP27 which states explicitly that HFCs would not be exempted from the coverage of the UNFCCC and Kyoto Protocol. *See* Kristen Hite, et al., *Int'l Envtl. and Res. Law*, A.B.A. ENV'T, ENERGY & RES. L. THE YEAR IN REVIEW 2014 at 342-43 (2015).

[31]MOP27, *supra* note 30. The decision states that the Parties will "work within the Montreal Protocol to an HFC amendment in 2016 by first resolving challenges by generating solutions in the contact group on the feasibility and ways of managing HFCs at Montreal Protocol meetings[.]" *Id.* at pt. X, ¶ 1.

[32]*Id.* ¶¶ 59, 63, 68, and 72.

[33]*Id.* ¶ 11.

[34]Memorandum of Understanding between NOAA, U.S. Dep't of Commerce, and Nat'l Park Serv., U.S. Dep't of the Interior, of the one part and the Republic of Cuba Ministry of Science, Tech. and Env't Nat'l Ctr. for Protected Areas of the other part on

reestablished diplomatic ties, the MOU aims to facilitate joint efforts concerning science, stewardship, and management related to Marine Protected Areas. In particular, the MOU establishes a sister-sanctuary relationship between Guanahacabibes National Park, including its offshore Banco de San Antonio in Cuba, and the Florida Keys and the Flower Garden Banks National Marine Sanctuaries in the United States (as well as Dry Tortugas and Biscayne National Parks) to foster conservation of the interconnected ecosystems.

Also at the regional level, the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) at its October 2015 annual meeting in Hobart, Australia, for the fifth time rejected two proposals to establish marine protected areas in waters around Antarctica. The Ross Sea Region Marine Protected Area—intended to establish 1.34 million square kilometers to "conserve living marine resources; maintain ecosystem structure and function; protect vital ecosystem processes and areas of ecological significance; and establish reference areas that will promote scientific research"—was broadly supported but failed to pass.[35] Also defeated was a proposal to establish the East Antarctic Representative System of Marine Protected Areas, a system of seven marine protected areas.[36]

In October 2015, Chile hosted the second "Our Ocean Conference,"[37] an international two day conference that brought together heads of state, scientists, policy makers, and entrepreneurs from more than fifty countries. The conference focused on three principal threats to the ocean—marine pollution, acidification, and overfishing—and resulted in an array of outcomes valued at more than $2.1 billion as well as new commitments to protect more than 1.9 million square miles of the ocean.38

B. Fisheries Management

The year 2015 saw continued advancements in multilateral efforts to establish new, and improve existing, regional fisheries management organizations (RFMOs). On July 19, 2015, the Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean entered into force.[39] The Convention establishes the North Pacific Fisheries Commission (NPFC), a RFMO with international

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Cooperation in the Conservation and Management of Marine Protected Areas (Nov. 18, 2015); Press Release, NOAA, U.S. and Cuba to Cooperate on Conservation and Management of Marine Protected Areas (Nov. 18, 2015).

[35]*Proposal for the Establishment of a Ross Sea Region Marine Protected Area*, CCAMLR, https://www.ccamlr.org/en/ccamlr-sm-ii/04 (last updated June 19, 2013); Thirty-Fourth Meeting of the Commission of the Conservation of Antarctic Marine Living Resources, Hobart, Australia, Oct. 19-30, 2015, *Report of the Meeting*, Doc. No. CCAMLR-XXXIV, *available at* https://www.ccamlr.org/en/system/files/e-cc-xxxiv_4.pdf.

[36]*Revisions of the Draft East Antarctic Representative System of Marine Protected Areas (EARSMPA) Conservative Measure*, CCAMLR, https://www.ccamlr.org/en/ccamlr-xxxiv/30 (last updated Oct. 5, 2015).

[37]*Our Ocean Conference*, U.S. DEP'T OF STATE, http://www.state.gov/e/oes/ocns/opa/2014conf/resources/index.htm (last visited Feb. 28, 2016); *see also* OUR OCEAN CHILE 2015 VALPARAISO, http://www.nuestrooceano2015.gob.cl/en/ (last visited Feb. 28, 2016).

[38]Press Release, U.S. Dep't of State, Our Oceans Conference Results (Oct. 7, 2015).

[39]Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean, Feb. 24, 2012, S. Treaty Doc. No. 113-2 (2013).

responsibility for the conservation and management of living marine resources in the high seas of the North Pacific Ocean that are not covered by another RFMO, and establishes a framework for protecting vulnerable marine ecosystems on biodiverse seamounts from impacts of bottom fishing.[40] With respect to Atlantic highly migratory species fisheries, members of the International Commission for the Conservation of Atlantic Tunas (ICCAT) made progress in developing amendments to the ICCAT Convention to reflect international fisheries management principles that have evolved since the Convention's adoption in 1966, including new articles to require the Commission to apply the precautionary approach and an ecosystem approach to fisheries management, and to enhance Taiwan's participation in ICCAT as a fishing entity that enjoys rights and obligations of members of the Commission.[41]

On November 5, 2015, President Obama signed H.R. 774, the "Illegal, Unreported, and Unregulated Fishing Enforcement Act," into law.[42] The act includes legislation to implement the Food and Agriculture Organization's Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing.[43] Upon entry into force after the ratification of twenty-five countries, the agreement will require Parties to combat illegal, unreported, and unregulated (IUU) fishing by implementing certain monitoring and control measures in their ports, including prohibitions on port entry and landing of fish product by vessels engaged in IUU fishing.[44] H.R. 774 also includes legislation to implement the Convention for the Strengthening of the Inter-American Tropical Tuna Commission, established by the 1949 Convention between the United States of America and Costa Rica (Antigua Convention), which updates the International Tropical Tuna Commission's mandate to reflect modern fisheries management principles.[45]

On April 2, 2015, the International Tribunal for the Law of the Sea (ITLOS) issued an advisory opinion on questions concerning the respective rights and obligations

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[40]NORTH PAC. FISHERIES COMM'N, http://nwpbfo.nomaki.jp/index.html (last visited Feb. 27, 2016).

[41]INT'L COMM'N FOR THE CONSERVATION OF ATL. TUNAS, REPORT OF THE THIRD MEETING OF THE WORKING GROUP ON CONVENTION AMENDMENT (May 22, 2015), *available at* https://www.iccat.int/intermeetings/Convention/2015/ENG/2015_CONV_final_report_ENG.pdf; INT'L COMM'N FOR THE CONSERVATION OF ATL. TUNAS, DOC. NO. CONV-005A/I2015, COMPILED PROPOSALS FOR AMENDMENT OF THE INT'L CONVENTION FOR THE CONSERVATION OF ATL. TUNAS (Nov. 17, 2015), *available at* https://www.iccat.int/com2015/conv/CONV_005A_ENG.pdf; INT'L COMM'N FOR THE CONSERVATION OF ATL. TUNAS, DOC. NO. CONV-011B/2015, PROPOSAL RELATED TO THE PARTICIPATION OF FISHING ENTITIES IN ICCAT (Nov. 17, 2015), *available at* https://www.iccat.int/com2015/conv/CONV_011B_ENG.pdf.

[42]H.R. 774, 114th Cong. (2015); Press Release, The White House, Statement by the Press Secretary on H.R. 774, Illegal, Unreported, and Unregulated Fishing Enforcement Act (Nov. 5, 2015).

[43]Agreement on Port State Measures to Prevent, Deter, & Eliminate Illegal, Unreported, & Unregulated Fishing, Nov. 22, 2009, S. Treaty Doc. No. 112-4 (2011), *available at* http://www.gpo.gov/fdsys/pkg/CDOC-112tdoc4/pdf/CDOC-112tdoc4-pt1.pdf.

[44]*Id.*

[45]Convention for the Strengthening of the Inter-American Tropical Tuna Commission Established by the 1949 Convention between the United States of America and Costa Rica, Nov. 14, 2003, S. Treaty Doc. No. 109-2 (2005).

of flag and coastal states under international law to address IUU fishing.[46] The opinion was issued in response to a 2013 request from the Sub-Regional Fisheries Commission (SRFC), a West African sub-regional fisheries management body comprised of a number of States that allow fishing in their waters by vessels of other nations.[47] In the opinion, ITLOS found that the coastal state has primary responsibility for taking the necessary measures to prevent, deter, and eliminate IUU fishing in its waters; the flag state has an obligation of due diligence to take necessary measures to ensure compliance by its vessels with the laws and regulations enacted by the coastal state for purposes of conservation and management of its living marine resources; and that a flag state may be held liable for IUU fishing of its vessels attributable to the flag state's failure to carry out this due diligence obligation.[48]

On October 5, 2015, twelve Pacific nations announced they had reached agreement on the Trans-Pacific Partnership (TPP) regional trade agreement.[49] Unlike other free trade agreements to which the United States is a party, the Environment Chapter of the TPP contains sections specifically focused on marine fisheries. TPP fisheries provisions include: prohibitions on certain types of fisheries subsidies; commitments to implement a fisheries management system aimed at the sustainable use and conservation of marine species that is based on international best practices; commitments to promote the long-term conservation of sharks, marine turtles, seabirds, and marine mammals; and requirements to take a broad range of enumerated actions to combat IUU fishing, such as through the implementation of port state measures, cooperation through regional fisheries management organizations, and capacity building.[50]

III. INTERNATIONAL HAZARD MANAGEMENT

A. Transboundary Movement of Hazardous Waste

The Twelfth Meeting of the Conference of the Parties (COP12) to the Basel Convention on the Transboundary Movements of Hazardous Wastes and Their Disposal[51] was held in Geneva, Switzerland, from May 4-15, 2015, in conjunction with the seventh

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[46]Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), Case No. 21, Advisory Opinion of Apr. 2, 2015 [hereinafter SRFC Advisory Opinion].

[47]Letter from the Permanent Secretary, Sub-Regional Fisheries Comm'n, to Judge Shunji Yanai, President, ITLOS, Request for Advisory Opinion (Mar. 27, 2013).

[48]*See, e.g.*, SRFC Advisory Opinion, *supra* note 46, ¶¶ 106, 129, 147.

[49]*The Trans Pacific Partnership*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/tpp/ (last visited Feb. 27, 2016); Jackie Calmes, *11 Pacific Nations and U.S. Endorse Giant Trade Pact*, N.Y. TIMES, Oct. 6, 2015, A1, *available at* http://www.nytimes.com/images/2015/10/06/nytfrontpage/scan.pdf.

[50]U.S. Trade Representative, *Chapter 20: Environment – The Trans-Pacific Partnership*, MEDIUM.COM (NOV. 5, 2015) https://medium.com/the-trans-pacific-partnership/environment-a7f25cd180cb#.4z3bimsuw.

[51]Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal on its Twelfth Meeting, Geneva, Switzerland, May 4-15, 2015 (COP12 Basel Convention), *Report of the Conference of the Parties*, U.N. Doc. UNEP/CHW.12/27 (Aug. 13, 2015) [hereinafter COP12 Report]; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 126, *available at* http://archive.basel.int/text/con-e-rev.pdf.

meeting of the Rotterdam[52] and Stockholm Conventions[53] as part of the ongoing "synergies" process. The so-called "Triple COP" allowed delegates to negotiate issues of joint concern to more than one of the conventions, such as compliance, budgetary, and implementation issues, as well as address issues specific to only one of the conventions, including the Basel Convention. In all, the parties to the Basel Convention adopted twenty-five decisions, six of which were parallel decisions also adopted by the parties to the Rotterdam and Stockholm Conventions.[54]

COP12 adopted six new or updated technical guidelines on the environmentally sound management (ESM) of persistent organic pollutants (POPs) wastes.[55] Technical guidelines for the ESM of wastes consisting of, containing, or contaminated with mercury or mercury compounds were updated.[56] Technical guidelines on transboundary movements of e-waste were also adopted, albeit on an "interim" and "non-legally binding" basis.[57] In addition to providing guidance on the requirements for the transboundary movement of e-waste, the guidelines distinguish between waste (which is subject to Basel requirements) and non-waste (which is not) when used equipment is moved across borders.[58]

In other decisions, COP12 adopted a "roadmap" for implementing the Cartagena Declaration on Waste prevention, Minimization and Recovery, [59] and mandated the

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[52]Conference of Plenipotentiaries on the Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Rotterdam, Netherlands, Sept. 10-11, 1998, *Final Act*, U.N. Doc. UNEP/FAO/PIC/CONF/5 (Sept. 17, 1998), *available at* http://www.pic.int/Portals/5/incs/dipcon/eb)/English/FINALE.pdf.

[53]Conference of Plenipotentiaries on the Stockholm Convention on Persistent Organic Pollutants, Stockholm, Sweden, May 22-23, 2001, *Final Act*, U.N. Doc. UNEP/POPS/CONF/4 (June 5, 2001), *available at* http://www.pops.int/documents/meetings/dipcon/25june2001/conf4_finalact/en/FINALACT-English.pdf.

[54]COP12 Report, *supra* note 51.

[55]*Id.* at 51 (Annex at BC-12/3, adopting new ESM technical guidelines covering POPs wastes consisting of or contaminated with (a) perfluorooctane sulfonic acid, its salts and perfluorooctane sulfonyl fluoride; (b) hexabromodiphenyl ether, heptabromodiphenyl ether, tetrabromodiphenyl ether and pentabromodiphenyl ether; and (c) hexabromocyclododecane; updating ESM technical guidelines for wastes consisting of, containing, or contaminated with: (a) POPs; (b) unintentionally produced POPs (specifically, polychlorinated dibenzo-p-dioxins and polychlorinated dibenzofurans, hexachlorobenzene, or polychlorinated biphenyls) to include pentachlorobenzene; and (c) polychlorinated biphenyls, polychlorinated terphenyls or polybrominated biphenyls to include hexabromobiphenyl).

[56]*See id.* at 54 (Annex at BC-12/4, new ESM technical guidelines covering wastes consisting of, containing, or contaminated with mercury).

[57]*See id.* at 55 (Annex at BC-12/5, new technical guidelines on transboundary movements and ESM of electrical and electronic waste and used electrical and electronic equipment); *see also* COP12 Basel Convention, *Technical Guidelines*, U.N. Doc. UNEP/CHW.12/5/Add.1/Rev/1, at pt. I(A), ¶ 4 (June 23, 2015) (advance copy) [hereinafter COP12 Technical Guidelines], *available at* http://www.basel.int/Default.aspx?tabid=4249.

[58]COP12 Technical Guidelines, *supra* note 57, at pts. III-IV.

[59]COP12 Basel Convention, *Road Map for Action on the Implementation of the Cartagena Declaration*, U.N. Doc. UNEP/CHW.12/10 (Dec. 23, 2014); Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of

Expert Working Group on ESM to develop guidance to assist parties in preventing and minimizing the generation of hazardous and other wastes.[60] COP12 also addressed the ESM of household waste, agreeing to include in the work program of the Open Ended Working Group the development of a work plan for, among other things, the preparation of guidance documents and manuals on best practices, business models, and innovative solutions to address the issue.[61]

B. International Regulation of Agricultural Biotechnology

More nations planted biotech crops in 2014 and adopted regulatory approval requirements for biotech crops (both for planting and food-feed-processing import approvals) than there are parties to the 2003 Cartagena Protocol on Biosafety (CPB) to the Convention on Biological Diversity (CBD).[62]

The CBD has 196 parties (excluding the U.S.), and the CPB added two nations in 2014 to reach 170 parties.[63] The new Nagoya Protocol on Access and Benefit-Sharing (Nagoya) has sixty-eight parties, while the Nagoya-Kuala Lumpur Supplemental Protocol to the CPB on Liability & Redress (NKLS Protocol) has thirty-two parties after Slovakia's ratification in April 2015, and remains nine nations short of the ratifications needed to enter into force.[64] The eighth meeting of the CPB parties (MOP 8) will be held jointly with the CBD's 13th (MOP 13) and Nagoya (MOP 2) in December 2016 in Cancun, Mexico.[65]

Hazardous Wastes and Their Disposal on its Tenth Meeting, Cartagena, Colombia, Oct. 17-21, 2011, *Cartagena Declaration on the Prevention, Minimization and Recovery of Hazardous Wastes and Other Wastes* (Oct. 21, 2011), *available at* http://www.basel.int/Portals/4/Basel%20Convention/docs/meetings/cop/cop10/CartagenaDeclaration.pdf.

[60]COP12 Report, *supra* note 51, at 11.

[61]*Id.* at 74 (Annex at BC-12/13).

[62]*ISAAA Brief No. 49-2014: Executive Summary – Global Status of Commercialized Biotech/GM Crops: 2014*, ISAAA.ORG, http://isaaa.org/resources/publications/briefs/49/executivesummary/default.asp (last visited Feb. 27, 2016); *The Cartagena Protocol: About the Protocol*, CONVENTION ON BIOLOGICAL DIVERSITY, https://bch.cbd.int/protocol/background/ (last updated Feb. 27, 2016); *List of Parties*, CONVENTION ON BIOLOGICAL DIVERSITY, https://www.cbd.int/information/parties.shtml (last visited Feb. 27, 2016).

[63]*List of Parties*, CONVENTION ON BIOLOGICAL DIVERSITY, https://www.cbd.int/information/parties.shtml (last visited Feb. 27, 2016); *Parties to the Protocol and Signature and Ratification of the Supplementary Protocol*, CONVENTION ON BIOLOGICAL DIVERSITY, http://bch.cbd.int/protocol/parties/ (last updated June 11, 2014).

[64]*The Nagoya Protocol on Access and Benefit-Sharing*, CONVENTION ON BIOLOGICAL DIVERSITY, https://www.cbd.int/abs/ (last visited Feb. 27, 2016); *Parties to the Nagoya Protocol*, CONVENTION ON BIOLOGICAL DIVERSITY, https://www.cbd.int/abs/nagoya-protocol/signatories/default.shtml (last visited Feb. 27, 2016); *The Nagoya–Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety*, CONVENTION ON BIOLOGICAL DIVERSITY, https://bch.cbd.int/protocol/supplementary/ (last visited Feb. 27, 2016); Communiqué, CBD, The Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress Comes Closer to Entry into Force with the Latest Ratification by Slovakia (May 7, 2015).

[65]*Event: CBD COP 13, COP-MOP 8 to the Cartagena Protocol on Biosafety and COP-MOP 2 to the Nagoya Protocol on Access and Benefit-Sharing*, IISD.ORG,

Litigation over disruption of the corn trade to China in 2013-2014 is moving toward trial in a multidistrict litigation (MDL) case pending in the U.S. District Court for the District of Kansas, with more than forty "bellwether" test plaintiffs selected from thousands of growers.[66] Grain traders, including Cargill and Archer Daniels Midland (ADM), are also suing in state court.

While China approved Viptera in December 2014, this did not slow the steady progress of litigation involving farmers and grain traders from across the farm belt. In fact, plaintiffs won a significant victory on September 11, 2015, when the court denied most of Syngenta's motion to dismiss. This historic decision is the first to allow claims for nuisance, negligence, and other causes of action to proceed against Syngenta for its decision to market two biotech corn events ("Viptera™" or MIR 162 and "Duracade™" event 5307) without waiting for China to approve these corn events for import as food and feed. As the court noted in its 116-page opinion, it did not believe that "the risk of a flood of new litigation is sufficiently great and sufficiently unfair to preclude the recognition of a legal duty here."[67] This decision will make international approvals even more critical for most biotech crops in the research pipeline, significantly raising the costs to innovators.

IV. CHEMICALS

At its seventh meeting, the Conference of the Parties to the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam COP7), amended Annex III of the Convention (Chemicals Subject to the Prior Informed Consent Procedure) to list the insecticide[68] known as methamidophos and deferred a decision on listing four additional hazardous substances—trichlorfon, fenthion, paraquat, and chrysotile asbestos—to the next COP.

At the Seventh Meeting of the Conference of the Parties to the Stockholm Convention on Persistent Organic Pollutants (Stockholm COP7), the parties agreed to three new listings: polychlorinated naphthalenes under Annexes A (elimination) and C (unintentional production) of the Convention; hexachlorobutadiene (HCBD) under Annex A; and pentachlorophenol (PCP) and its salts and esters under Annex A, exercising Article 21.3 of the Convention for the first time to list a new POP by voting instead of by consensus.[69]

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http://nr.iisd.org/events/cbd-cop-13-cop-mop-8-to-the-cartagena-protocol-on-biosafety-and-cop-mop-2-to-the-nagoya-protocol-on-access-and-benefit-sharing/ (last visited Feb. 27, 2016).

[66] *Syngenta AG MIR162 Corn Litigation: 14-md-2591*, USCOURTS.GOV, http://www.ksd.uscourts.gov/syngenta-ag-mir162-corn-litigation/ (last visited Feb. 27, 2016); *Bellwether/Test Case Selection: Nebraska Example*, NEB. LOST CORN (Nov. 1, 2015), http://nebraskalostcorn.com/category/news/.

[67] Memorandum & Order at 19, 74, In re: Syngenta AG MIR 162 Corn Litigation, No. 14-md-2591 (D. Kan. Sept. 11, 2015).

[68] Conference of the Parties to the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade on its Seventh Meeting, Geneva, Switzerland, May 4-15, 2015, *Report of the Conference of the Parties*, U.N. Doc. UNEP/FAO/RC/COP.7/21 (July 29, 2015).

[69] Conference of the Parties to the Stockholm Convention on Persistent Organic Pollutants on its Seventh Meeting, Geneva, Switzerland, May 4-15, 2015, *Report of the Conference of the Parties*, U.N. Doc. UNEP/POPS/COP.7/36 (June 23, 2015).

The Twelfth Meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal adopted, inter alia, technical guidelines regarding management of crucial waste streams and environmentally sound management, including POPs and mercury wastes, and ad interim technical guidelines on transboundary movements of electronic and electrical waste (e-waste).[70]

As of December 2015, the Minamata Convention on Mercury has 128 signatories and twenty-three parties.[71] It will enter into force after the ratification of the fiftieth party.[72]

The International Conference on Chemicals Management, the governing body of the United Nations Environmental Program's (UNEP) Strategic Approach to International Chemicals Management (SAICM), met at its fourth session (ICCM4), the last decision-making meeting before 2020.[73] Addressing its future roadmap, conference delegates adopted the overall orientation and guidance for achieving its 2020 goal of "sound management of chemicals," and its goal beyond 2020 on the sound management of chemicals and waste. Additional outcomes include an omnibus resolution on existing emerging policy issues: lead in paint; chemicals in products; hazardous substance within the life cycle of electrical and electronic products; nanotechnology and manufactured nanomaterials; and endocrine disrupting chemicals—as well as the first time inclusion of "environmentally persistent pharmaceutical products." In addition, delegates to the ICCM4 passed a resolution on highly hazardous pesticides, supporting concerted action on the longstanding issue.

V. NATURAL RESOURCES

A. Water

The global water crisis continues to impact the planet with 1.6 billion people living with "absolute" water scarcity.[74] This number is estimated to rise to 2.8 billion, one-third of the world, by 2025.[75] Managing water resources will be critical, and the widespread effects "from accelerated glacier melt, altered precipitation, runoff, and groundwater recharge patterns, to extreme droughts and floods, water quality changes, saltwater intrusion in coastal aquifers" will "make water security even more difficult and costly to achieve."[76] Considering the increasing water security challenge, even in countries that have enjoyed reliable water supplies, the issue of fresh water and the

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[70]COP12 Report, *supra* note 51, at 2-3, 8-17, 45-46, 51-55, 78, 82, 87.

[71]*Minamata Convention on Mercury: Countries*, UNEP, http://www.mercuryconvention.org/Countries/tabid/3428/Default.aspx (last visited Feb. 27, 2016); Minamata Convention on Mercury, Oct. 10, 2013 [hereinafter Minamata Convention], *available at* http://www.mercuryconvention.org/Portals/11/documents/conventionText/Minamata%20Convention%20on%20Mercury_e.pdf.

[72]Minamata Convention, *supra* note 71, art. 31.

[73]Int'l Conference on Chemicals Management on its Fourth Session, Geneva, Switzerland, Sept. 28-Oct. 2, 2015, *Report of the Conference*, U.N. Doc. SAICM/ICCM.4/15 (Oct. 28, 2015).

[74]*Water and Climate Change*, WORLD BANK GRP., http://water.worldbank.org/topics/water-resources-management/water-and-climate-change (last visited Feb. 27, 2016).

[75]*Id.*

[76]*Id.*

ongoing global drought[77] was absent from the COP21 agenda,[78] despite the fact the global drought remained constant as of the end of December 2015.[79]

Three important developments in international water law occurred in 2015. First, Israel and Jordan signed a bilateral agreement to exchange water and jointly funnel Red Sea brine to the shrinking Dead Sea.[80] This marks one of the most significant cross-border efforts to address water scarcity and will hopefully reverse the Dead Sea's gradual decline. On March 25, 2015, the leaders of Ethiopia, Egypt, and Sudan gathered in Khartoum to sign a preliminary deal regarding Ethiopia's Grand Renaissance Dam.[81] The project had been an issue of contention, particularly as Egypt feared it would reduce its vital share of the Nile River's water. This agreement represents a historical progress in the spirit of cooperation and peaceful resolution of water conflicts among Nile Basin countries. Finally, China released a plan for water pollution on April 16, 2015, which set goals for cleaning up the country's heavily polluted water bodies by 2020.[82]

Waters along the United States' borders continue to receive considerable attention. The U.S. Department of State announced its intention to launch talks with Canada to renew and modernize the Columbia River Treaty.[83] The announcement came after twenty-six members of Congress complained in a second letter to the President that the administration had been slow to review the treaty.[84] On the U.S.-Mexico border, the most recent projections for Lake Mead have been released, showing that the Lake's water

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[77]Katherine Purvis, *Global Drought: Why is No One Discussing Fresh Water at COP21?*, THE GUARDIAN (Sept. 16, 2015), http://www.theguardian.com/environment/2015/sep/16/global-drought-why-is-no-one-discussing-fresh-water-at-cop21.

[78]*Event Programme & Agenda for Sustainable Innovation Forum at UNFCCC COP 21*, COP21PARIS, http://www.cop21paris.org/agenda (last visited Feb. 27, 2016).

[79]*Global Drought Information System: Current Conditions*, NIDIS, http://www.drought.gov/gdm/current-conditions (last visited Feb. 27, 2016).

[80]Sharon Udasin, *Israel, Jordan Sign Historic Plan to Save Dead Sea*, THE JERUSALEM POST (Feb. 27, 2016), http://www.jpost.com/Israel-News/New-Tech/Israel-Jordan-sign-historic-plan-to-save-Dead-Sea-392390.

[81]*Nile Water Countries Sign Framework Deal on Grand Renaissance Dam*, SUDAN TRIBUNE (Mar. 23, 2015), http://www.sudantribune.com/spip.php?article54369. *See also* John Mukum Mbaku, *Confronting Water Allocation Problems in the Nile River Basin: The Need for a New Compact*, WATER: REG'L PERSPECTIVES (A.B.A. Env't, Energy, & Res. L. Int'l Envtl. Law Committee), Fall/Winter 2014, at 2-10, *available at* http://apps.americanbar.org/dch/comadd.cfm?com=NR350500&pg=3; Ambereen Shaffie, *Arab Spring to Arab Drought: Securing International Cooperation Over the Nile River Basin*, WATER: IMPACTS OF CLIMATE CHANGE (A.B.A. Env't, Energy, & Res. L. Int'l Envtl. Law Committee), Summer 2015, at 23-30, *available at* http://www.americanbar.org/content/dam/aba/publications/nr_newsletters/wr/ielc_water_impacts_of_climate_change_june_2015.authcheckdam.pdf.

[82]Kong Lingyu, *Inside China's Grand Plan to Fight Water Pollution*, MARKET WATCH (May 4, 2015, 9:56 PM), http://www.marketwatch.com/story/inside-chinas-grand-plan-for-water-pollution-2015-05-04.

[83]Rob Hotakainen, *U.S. Plans to Focus on Environment in Columbia River Talks*, SEATTLE TIMES (June 11, 2015, 9:28 PM), http://www.seattletimes.com/seattle-news/environment/us-plans-to-focus-on-environment-in-columbia-river-talks/.

[84]Press Release, U.S. Sen. Patty Murray, Murray, Wyden, DeFazio, Walden & Northwest Delegation Urge Obama to Initiate Negotiations on Columbia River Treaty This Year (Apr. 14, 2015).

levels will fall below the drought trigger point in 2017, which will continue to challenge the existing arrangements between the U.S. and Mexico.[85]

The Mekong Commission continues to be ineffectual, limiting its role in consultation on the proposed Don Sahong dam on the Lower Mekong River.[86] The government of Laos approved the controversial project, despite widespread objections on environmental impacts and health and safety concerns by neighboring countries and NGOs.[87]

B. Biological Resources and Wildlife

Framed by the continued onslaught of poaching and illegal trade, 2015 showcased an outpouring of support for international collaboration in wildlife and biodiversity conservation. Related to the poaching and illegal wildlife trade crises, the international community deepened its understanding of the linkages between conservation and human development with a range of actions—most significantly, the adoption of the Sustainable Development Goals. The 2015 World Wildlife Day (March 3) theme was "It's time to get serious about wildlife crime"[88] and the 2015 International Day for Biodiversity (May 22) theme was "Biodiversity for Sustainable Development,"[89] which set the stage for ongoing discussions on these two issues. In addition, the World Heritage Convention and the Ramsar Convention both met and designated new sites important for wildlife and biodiversity conservation. Finally, as the year ends, states ramp up for a push to agree to biodiversity protection beyond national jurisdictions.

1. Wildlife Trafficking

As wildlife trafficking continues to threaten endangered species around the world, addressing the threat has been taken up as a major issue by a number of international fora. For example, the Convention on International Trade in Endangered Species (CITES) and UNEP have announced a new collaborative effort to improve the target countries' legislation implementing CITES.[90] In a testament to the global concern and desire for cooperation, the United Nations General Assembly adopted a resolution tackling illicit trafficking in wildlife.[91] The resolution calls for Member States to declare

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[85]Ken Ritter, *Feds Project Lake Mead Below Drought Trigger Point in 2017*, KRQE NEWS 13 (May 19, 2015, 5:46 AM), http://krqe.com/2015/05/19/feds-project-lake-mead-below-drought-trigger-point-in-2017/.

[86]Tom Fawthrop, *Death by Strangulation? Hydropower Threatens to Kill the Mighty Mekong*, THE ECOLOGIST (Mar. 27, 2015), http://www.theecologist.org/News/news_analysis/2806736/death_by_strangulation_hydropower_threatens_to_kill_the_mighty_mekong.html.

[87]Prashanth Parameswaran, *Laos Officially Approves Controversial Dam Project*, THE DIPLOMAT (Sept. 4, 2015), http://thediplomat.com/2015/09/laos-officially-approves-controversial-dam-project/.

[88]*World Wildlife Day 2015: It's Time to Get Serious About Wildlife Crime!*, UNODC (Mar. 3, 2015), https://www.unodc.org/unodc/en/frontpage/2015/March/world-wildlife-day-2015-its-time-to-get-serious-about-wildlife-crime.html.

[89]Letter from the Exec. Sec'y of the Convention on Biological Diversity to CBD Nat'l Focal Points and Relevant Orgs., U.N. Doc. SCBD/MPO/AF/DA/fd/84165 (Dec. 10, 2014), *available at* https://www.cbd.int/doc/notifications/2014/ntf-2014-137-idb-en.pdf.

[90]Press Release, CITES, CITES and UNEP Support Strengthening of Wildlife Laws (May 5, 2015).

[91]G.A. Res. 69/L.80, U.N. Doc. A/69/L.80 (July 15, 2015).

wildlife trafficking a "serious crime" pursuant to the Convention against Transnational Organized Crime.[92] Bilaterally, the United States and China have formed an agreement to ban most imports and exports of ivory as part of a joint effort to stop illegal trading.[93] The agreement follows part of the U.S.'s implementation plan for the National Strategy for Combating Wildlife Trafficking President Obama launched in 2014.[94]

The Trans-Pacific Partnership (TPP) presented perhaps 2015's most historic opportunity for multilateral engagement in the fight against wildlife crime and other wildlife and biodiversity conservation concerns. Indeed, provisions lauded as "historic" suggest that the TPP parties recognize a responsibility to implement their treaty obligations, such as CITES and fisheries agreements.[95] The conservation plight of several species is specifically noted in the TPP, including sharks, marine turtles, seabirds, and marine mammals; however, the actions agreed to with respect to these species are merely to "seek" to undertake actions "as appropriate" in most cases. Recognizing the overfished state of commercially important fisheries, the TPP prohibits subsidies that "negatively affect fish stocks that are in an overfished condition."[96] But notably, subsidies that *cause* overfishing and fishery collapse are not prohibited. Little to nothing in these provisions pushes parties beyond the scope of what they have already agreed to multilaterally, so it remains to be seen whether the TPP marks a historic sea-change in international cooperation. One provision in the TPP, however, potentially presents an interesting wildlife and biodiversity conservation tool: the parties have a duty to combat and cooperate to prevent trade in wildlife that was taken or traded in violation of law, including that party's law or the law of the country where the take or trade occurred.[97] If used to prosecute wildlife crimes in one country for violations of law in another country, the TPP sets up a mechanism much like the U.S. Lacey Act, which makes it unlawful to import, export, sell, acquire, or purchase fish, wildlife, or plants taken, possessed, or sold in violation of state or foreign law.[98]

2. Biodiversity for Sustainable Development

The linkages between conservation and development are more visibly at the forefront of wildlife and biodiversity law than in the past. The United Nations General Assembly adopted the Sustainable Development Goals to replace its Millennium

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[92] *Id.* ¶ 4.

[93] Press Release, The White House, Fact Sheet: President Xi Jinping's State Visit to the United States (Sept. 25, 2015).

[94] Press Release, The White House, Fact Sheet: Nat'l Strategy for Combating Wildlife Trafficking & Commercial Ban on Trade in Elephant Ivory (Feb. 11, 2014). *See also* EXEC. OFFICE OF THE PRESIDENT, NAT'L STRATEGY FOR COMBATING WILDLIFE TRAFFICKING (Feb. 2014), *available at* https://www.whitehouse.gov/sites/default/files/docs/nationalstrategywildlifetrafficking.pdf.

[95] Press Release, Office of the U.S. Trade Rep., Trans-Pacific Partnership Ministers' Statement (Oct. 5, 2015); *see also* Brian Deese & Christy Goldfuss, *What They're Saying: Envtl. Advocates Point to the Trans-Pacific Partnership as a Historic Opportunity to Protect Our Oceans, Forests, and Wildlife*, WHITE HOUSE BLOG (Mar. 31, 2015, 11:28 AM), https://www.whitehouse.gov/blog/2015/03/31/what-theyre-saying-environmental-advocates-point-trans-pacific-partnership-historic-.

[96] Trans-Pacific Partnership § 20.16(5)(a).

[97] *Id.* § 20.17(5), n.26.

[98] 16 U.S.C. § 3372(a)(2) (2012).

Development Goals.[99] Notably, Goal 15 encourages nations to "[p]rotect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss."[100] One of the "targets" for achieving this Goal encourages nations to "[t]ake urgent action to end poaching and trafficking of protected species of flora and fauna and address both demand and supply of illegal wildlife products."[101]

3. Multilateral Environmental Agreement (MEA) Updates

The only biodiversity-related MEAs that met this year were the World Heritage Convention and Ramsar Convention. The meetings resulted in the designation of natural heritage and wetlands, respectively, that positively impact biodiversity conservation. The 39th meeting of the World Heritage Committee inscribed the Blue and John Crow Mountains in Jamaica as a world heritage site, recognizing its value as a biodiversity hotspot in the Caribbean.[102] Additionally, the Committee recognized extensions of the boundaries of two natural sites: the Cape Floral Region Protected Areas in South Africa and the Phong Nha-Ke Bang National Park in Vietnam.[103] Nineteen sites were added to Ramsar's List of Wetlands of International Importance.[104]

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[99]G.A. Res. 70/1, U.N. Doc. A/RES/70/1 (Oct. 21, 2015).

[100]*Id.* at 24 (Goal 15).

[101]*Id.* at 25 (Goal 15, 15.7). The release of the SDGs also inspired a number of statements from the international community. The Biodiversity Liaison Group, which includes seven complementary multilateral environmental agreements, noted the world faces cross-cutting global issues and highlighted how collaborative work, such as the BLG does, will be necessary to achieving the new goals. Joint Statement by the Liaison Group of the Biodiversity-Related Conventions on the Occasion of the United Nations Sustainable Development Summit (Sept. 25–27, 2015). It concluded, "By working together, we can achieve the future we want." *Id.*

[102]Convention Concerning the Protection of the World Cultural and Natural Heritage, Bonn, Germany, June 28-July 8, 2015, *Decisions Adopted by the World Heritage Committee at its 39th Session*, Dec. 39 COM 8B.7 Blue and John Crow Mountains, U.N. Doc. WHC-15/39.COM/19 (July 8, 2015).

[103]Convention Concerning the Protection of the World Cultural and Natural Heritage, Bonn, Germany, June 28-July 8, 2015, *Decisions Adopted by the World Heritage Committee at its 39th Session*, Dec. 39 COM 8B.2 Cape Floral Region Protected Areas, U.N. Doc. WHC-15/39.COM/19 (July 8, 2015); Convention Concerning the Protection of the World Cultural and Natural Heritage, Bonn, Germany, June 28-July 8, 2015, *Decisions Adopted by the World Heritage Committee at its 39th Session*, Dec. 39 COM 8B.6 Phong Nha-Ke Bang National Park, U.N. Doc. WHC-15/39.COM/19 (July 8, 2015).

[104]*The Ramsar Sites*, RAMSAR, http://www.ramsar.org/sites-countries/the-ramsar-sites (last visited Apr. 7, 2016). Sites designated in 2015 include: Chile's Las Salinas de Huentelauquén, designated Feb. 2; the Congo's Leketi-Mbama and Tchikapika-Owando, both designated Feb. 2; Guinea-Bissau's Lagune de Wendu Tcham and Parc Naturel des Mangroves du Fleuve Cacheu (PNTC), both designated May 22; Japan's Higashiyoka-higata, Hinuma, Hizen Kashima-higata, and Yoshigadaira Wetlands, all designated May 28; Kuwait's Mubarak Al-Kabeer Reserve, designated Sept. 5; Madagascar's Complexe des lacs Ambondro et Sirave (CLAS), designated Feb. 2; the Republic of Korea's Hanbando Wetland and Sumeunmulbaengdui, both designated May 13; South Africa's False Bay Nature Reserve, designated Feb. 2; Tunisia's Réserve Naturelle de Saddine, designated Feb. 2; the United States' Chiwaukee Illinois Beach Lake Plain, designated Sept. 25; Uruguay's Laguna de Rocha, designated June 5; and Vietnam's Lang Sen

4. Marine Biodiversity

The year 2015 also set the stage for more collaboration next year, especially regarding marine biodiversity. In January 2015, a U.N. working group concluded its final meeting on marine biodiversity beyond national jurisdiction.[105] The group recommended the U.N. establish a new instrument under the U.N. Convention on the Law of the Sea. In June, the U.N. adopted a resolution to create a new instrument and called for a preparatory committee to meet and prepare recommendations on a draft text in early 2016 and 2017.[106] Thus, as 2016, the Year of the Whale,[107] begins, collaboration will remain an international focus.

VI. LITIGATION

Particularly from a U.S. perspective, a significant development in the international criminal arena occurred with the criminal conviction under the U.S. Lacey Act[108] of Lumber Liquidators, which agreed to pay $13.15 million for the illegal importation of hardwood[109] from an area of eastern Russia that formed critical habitat for the endangered Siberian tiger.[110] The company falsely identified the types and origin of the imported wood and failed to take action when suppliers could not provide supporting documentation on the wood's source.[111] This action constituted the first felony conviction for the import of illegal timber and the largest fine ever under the Lacey Act.[112]

On November 20, 2015, the Appellate Body of World Trade Organization (WTO) ruled against the United States and in favor of Mexico in a case challenging the United States' "dolphin safe" tuna labeling requirements.[113] Mexico took the position that the U.S. statutory and regulatory requirements for tuna products to be marketed as "dolphin

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Wetland Reserve, designated May 22, and U Minh Thuong National Park, designated April 30. Ramsar, *The List of Wetlands of Int'l Importance* (Feb. 24, 2016), *available at* http://www.ramsar.org/sites/default/files/documents/library/sitelist_0.pdf.

[105]Letter Dated 13 February 2015 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly, U.N. Doc. A/69/780 (Feb. 13, 2015), *available at* http://www.un.org/ga/search/view_doc.asp?symbol=A/69/780.

[106]G.A. Res. 69/292, U.N. Doc. A/RES/69/292 (July 6, 2015).

[107]Secretariat of the Pac. Reg'l Env't Programme, Circular 15/55, Year of the Whale in the Pacific Islands 2016/17 Background Information and Proposal for Workshop (Aug. 25, 2015).

[108]Lacey Act, 16 U.S.C. §§ 3371-3378 (2012) (prohibiting the illegal importation, possession, transportation, or sale of certain wildlife, plants, and fish).

[109]Plea Agreement at §§ 5(a)-(b), 7-8, 12, United States v. Lumber Liquidators, Inc., No. 2:15-cr-00126 (E.D. Va. Oct. 22, 2015).

[110]Statement of Facts at pt. II, United States v. Lumber Liquidators, Inc., No. 2:15-cr-00126 (E.D. Va. Oct. 22, 2015).

[111]*Id.* at pt. II.B.

[112]Press Release, U.S. Dep't of Justice, Lumber Liquidators Inc. Pleads Guilty to Environmental Crimes and Agrees to Pay More Than $13 Million in Fines, Forfeiture and Community Service Payments (Oct. 22, 2015).

[113]Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶¶ 8.1–8.2, WT/DS381/AB/RW (Nov. 20, 2015) [hereinafter U.S. – Tuna II Appellate Body Report].

safe" [114]—already amended in part to address previous WTO disputes on this matter[115]—violated both the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the Agreement on Technical Barriers to Trade (TBT).[116] The appellate body found, inter alia, that the amended requirements modify "the conditions of competition to the detriment of Mexican tuna products in the U.S. market;" that such detrimental impact does not stem "exclusively from a legitimate regulatory distinction;" and, thus, that the amended tuna measure accords "less favourable treatment to Mexican tuna products [as compared] to like [tuna] products from the United States . . . ."[117]

VII. FINANCE

A. Global Environment Facility

Since 2012 the Global Environment Facility (GEF) has been undertaking an "Accreditation Pilot" to accredit up to ten new GEF Project Agencies that will be able to help implement GEF financed projects.[118] Additionally, the accreditation panel approved the Development Bank of Latin America (CAF), the Foreign Economic Cooperation Office of the Ministry of Environmental Protection of China (FECO), and Banque Quest Africaine de Developpement (BOAD) to progress from Stage II to Stage III (the final stage of the accreditation process),[119] and established grant-funding ceilings for these four agencies to ensure that they will not be able to take on projects that they cannot handle.[120] However, following desk reviews, the accreditation panel rejected the International Federation of the Red Cross and the National Environment Fund–Peru (FONAM).[121]

B. World Bank Environmental and Social Safeguard Policy Review

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[114]*Id.* ¶¶ 1.3, 1.9.

[115]*See id.* ¶¶ 1.3–1.8. The United States does not require the "dolphin safe" label, but previous appellate body findings establish that such labeling does have "significant commercial value" that constitutes an "advantage" in the U.S. market. *See* Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 7.111, WT/DS381/R (Apr. 14, 2015).

[116]U.S. – Tuna II Appellate Body Report, *supra* note 113, ¶ 1.2.

[117]*Id.* ¶ 8.1. The U.S. requirements varied depending on the fishing method by which tuna was harvested, where the tuna was caught, and the type of vessel used. *Id.* ¶ 1.3 (citing Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 2.2, WT/DS381/RW (Apr. 14, 2015); Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 172, WT/DS381/AB/R (May 16, 2012)).

[118]These project agencies include the Fundo Brasileiro para a Biodiversidade (FUNBIO) and the World Wildlife Fund, among others. *See* Global Env't Facility, *Progress Report on the Pilot Accreditation of GEF Project Agencies*, ¶ 13, GEF/C.48/10/Rev.01 (June 1, 2015), *available at* https://www.thegef.org/gef/sites/thegef.org/files/documents/EN_GEF.C.48.10.Rev_.01_Progress_Report_on_the_Pilot_Accreditation_of_GEF_Project_Agencies.pdf.

[119]*Id.* ¶ 5.

[120]*Id.* ¶ 13.

[121]*Id.* ¶ 7.

The World Bank continued its Environmental and Social Safeguard Policy Review.[122] Following a global consultation on its Environmental and Social Framework, the World Bank released a second draft Environmental and Social Framework in August 2015 and began phase 3 consultations.[123] Along with the new draft, the World Bank released a list of outstanding issues on which phase 3 of the consultations would focus. The list of issues includes a number of environmental concerns, including the relationship between the World Bank's safeguards and the UNFCCC and countries' climate change commitments under it, criteria for biodiversity offsets, and assessing cumulative impacts in the environmental impact assessment, among others.[124] The World Bank is still in phase 3 of consultations and expects to finalize its new Environmental and Social Framework in 2016.

C. Asian Infrastructure Investment Bank

The Asian Infrastructure Investment Bank (AIIB), which is led by China and designed to promote investment and economic growth in Asia, continued its path toward full operation. In June 2015, the fifty-seven prospective founding members finalized the AIIB Articles of Agreement, and fifty of the fifty-seven prospective founding members signed it immediately.[125] In September 2015, the AIIB released a draft Environmental and Social Framework (ESF) for comments.[126] This draft framework is similar to the safeguard policies at other international financial institutions, including the World Bank, International Finance Corporation, and Asian Development Bank (ADB). It includes a vision statement, a broad Environmental and Social Policy (ESP) that sets forth overarching policies, including categorization, due diligence, environmental and social management planning, consultation, access to information, monitoring, and grievances, among others, and sets out the requirements for the AIIB and its clients. The ESP includes an "Environmental and Social Exclusion List" in Appendix I, which sets forth the operations that AIIB will not knowingly finance and it includes projects that violate several international environmental agreements such as CITES and the Montreal Protocol, but does not include all of the MEAs nor does it exclude coal-fired power plants.[127] Additionally, the framework includes three Environmental and Social Standards (ESS): ESS1, Environmental and Social Assessment; ESS2, Involuntary Resettlement; and ESS3, Indigenous Peoples. Lastly, it includes brief Environmental and Social Procedures that give more detailed information on the mandatory actions detailed in the ESP and ESSs, namely relating to the Environmental and Social Management Plan (ESMP) and the Environmental and Social Management Planning Framework (ESMPF). The draft environmental and social framework is significant; however, the draft framework fails to detail procedures, and the AIIB has yet to provide information about how a potential accountability mechanism would operate.[128] The framework was

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[122] *Safeguard Policies*, WORLD BANK, http://go.worldbank.org/WTA1ODE7T0 (last visited Apr. 7, 2016).

[123] World Bank, *Environmental and Social Framework: Setting Environmental and Social Standards for Investment Project Financing (Second Draft for Consultation)* (July 1, 2015).

[124] World Bank, *Issues for Phase 3 Consultations* (Aug. 3, 2015).

[125] Asian Infrastructure Investment Bank, *Articles of Agreement* (2015).

[126] Asian Infrastructure Investment Bank, *Consultation Draft: Environmental and Social Framework* (Aug. 3, 2015).

[127] *Id.* at 19.

[128] The AIIB Draft ESF says that AIIB clients will have to establish suitable operational level grievance redress mechanisms for their projects, but it does not provide any detail

expected to be finalized by the end of 2015, but neither an update nor a final version was available online by December.

about how that should be done. Additionally, it says that operation-affected people can bring a complaint to the AIIB "Oversight Mechanism" in accordance with the policies for that mechanism, but those have yet to be established and the policy notes that the mechanism is still under development. *See* Asian Infrastructure Investment Bank, ¶¶ 50-51.

Chapter 29 • SCIENCE AND TECHNOLOGY
2015 Annual Report[1]

The Science and Technology Committee evaluates scientific and technological issues and trends in litigation, federal and state regulatory regimes, and legislative developments in practice areas across the spectrum of environmental, energy, and natural resources law. This year's annual report covers two topics in which there were developments in 2015. Part I discusses the U.S. Environmental Protection Agency's (EPA) guidance relating to vapor intrusion. Part II provides a summary of the EPA's progress in its Chemical Work Plan Risk Assessments Program.

I. EPA'S TECHNICAL GUIDANCE FOR EVALUATING POTENTIAL VAPOR-INTRUSION RISKS FROM SUBSURFACE

In June 2015, EPA released two technical guides (Technical Guides)—one guide addressing organic vapors generally and a second guide specifically for petroleum vapors—to support assessment and mitigation activities at sites where vapor intrusion is an actual or potential concern.[2] These guides are the newest guidance since 2002, when EPA released *Draft Guidance for Evaluating the Vapor Intrusion to Indoor Air Pathway from Groundwater and Soils* (Draft VI Guidance).

A. Background on Technical Guides

EPA's Technical Guides provides technical recommendations based on its current understanding of vapor intrusion into indoor air from subsurface vapor sources.[3] These Technical Guides provide a flexible science-based approach to assessments that encompass methods pertaining to vapor intrusion.[4] For efficiency, one guide will be specifically discussed here. The more general 2015 Technical Guide provides national uniformity for use at any

> Site . . . being evaluated by EPA pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or the corrective action provisions of the Resource Conservation and Recovery Act (RCRA), EPA's brownfield grantees, or state agencies

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[1]This report was prepared and edited by Vice Chair, Lindsey C. Moorhead, Jackson Walker, L.L.P. Houston, Texas, with contributions from Michael Staines, J.D. Candidate at the University of Arkansas at Little Rock School of Law (Vapor Intrusion) and Jessica Christy, J.D. Candidate at the UDC David A. Clarke School of Law (TSCA Work Plan).

[2]OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, ENVTL. PROT. AGENCY, OSWER TECHNICAL GUIDE FOR ASSESSING AND MITIGATING THE VAPOR INTRUSION PATHWAY FROM SUBSURFACE VAPOR SOURCES TO INDOOR AIR, OSWER PUB. 9200.2-154, at xii (June 2015) [hereinafter 2015 TECHNICAL GUIDE], *available at* http://www.epa.gov/sites/production/files/2015-09/documents/oswer-vapor-intrusion-technical-guide-final.pdf; OFFICE OF UNDERGROUND STORAGE TANKS, ENVTL. PROT. AGENCY, TECHNICAL GUIDE FOR ADDRESSING PETROLEUM VAPOR INTRUSION AT LEAKING UNDERGROUND STORAGE TANK SITES, EPA 510-R-15-001 (June 2015), [hereinafter 2015 TECHNICAL GUIDE FOR PETROLEUM VAPOR] *available at* http://www.epa.gov/sites/production/files/2015-06/documents/pvi-guide-final-6-10-15.pdf.

[3]2015 TECHNICAL GUIDE, *supra* note 2 at xii-xiii.

[4]*Id.* at xiii.

acting pursuant to CERCLA or an authorized RCRA corrective action program where vapor intrusion may be of potential concern.[5]

The technical recommendations are more specifically described for the narrower subset of petroleum vapors in the *Technical Guide For Addressing Petroleum Vapor Intrusion At Leaking Underground Storage Tank Sites*.

B. Approaches for Assessing Vapor Intrusion

Approaching vapor intrusion varies from site to site; therefore, EPA provides and recommends a framework for planning and conducting vapor intrusion investigations. Rather than a step-by-step approach to be applied to every site, EPA discusses two levels of vapor intrusion assessments.[6] First is a preliminary analysis, which utilizes information to develop an initial understanding of potential human risks posed by vapor intrusion, typically part of an initial site assessment.[7] Second is a detailed investigation, which is typically recommended if the initial assessment indicates that subsurface contamination may be present underlying or near buildings and includes a detailed vapor intrusion pathway investigation.[8]

1. Planning, Scoping and Conducting Investigations

By considering the site, building access agreements, and the locations of underground utilities and piping when planning vapor intrusion investigations, it is important to take time to account for all possible sources to minimize the amount of return visits, "which can cause disruption and inconvenience for building occupants and owners."[9] If there are numerous buildings potentially subject to vapor intrusion, it is suggested to use the "worst first" approach to prioritize an investigation.[10] After sampling the indoor air and/or groundwater, mathematical modeling of the results in conjunction with other evidence should be used to confirm the reliability of modeling results.[11] By collecting all of the appropriate site-specific information, one is able to show that the property fulfills the findings of the conceptual model underlying the vapor intrusion screening levels.[12]

2. Data Evaluation and Decision-Making

Assessing the totality of multiple lines of evidence is recommended to support decision-making and conclusions drawn.[13] Multiple lines of evidence are particularly important for a finding of "'no-further-action' . . . regarding the vapor intrusion pathway . . . to reduce the chance of reaching a false-negative conclusion[.]"[14] EPA recommends considering reasonable future conditions, in addition to current conditions when

[5] *Id.*
[6] *Id.* at xiv.
[7] *Id.* at 49-59.
[8] 2015 TECHNICAL GUIDE, *supra* note 2, at 61-113.
[9] *Id.* at 63, 67.
[10] *Id.* at 69-70.
[11] *Id.* at 113-16.
[12] *Id.* at 105-08.
[13] 2015 TECHNICAL GUIDE, *supra* note 2, at 117-24.
[14] *Id.* at 40.

considering vapor intrusion pathways.[15] When going through this evaluation of evidence, EPA recommends individuals identify any conditions that may warrant prompt action[16] and respond in accordance to the applicable statutes and regulations to avoid and reduce the risk to human health posed by the vapor intrusion.[17]

3. Engineered Exposure Controls and Building Mitigation

When vapor intrusion has been determined to pose unacceptable human health risks, the goal is to achieve a permanent remedy by eliminating or substantially reducing the contaminants from the subsurface source medium, whether it be groundwater, subsurface soil, or sewer lines.[18] EPA recommends the use of engineered exposure controls in cases where subsurface vapor sources cannot be remedied quickly to reduce or eliminate vapor intrusions in buildings or indoor air exposures.[19] When developing programs to assess the effectiveness of building mitigation, it is imperative to consider the risk to human health, the building use, the technology involved, and the coordination with site remediation efforts.[20] Also, one should keep in mind that cleanup levels and criteria for terminating the engineered exposure controls and other building mitigation methods must be established.[21]

4. Document Activities and Decisions

EPA recommends that individuals conducting vapor intrusion investigations maintain a document of objectives and methods of the investigations, such as a vapor intrusion work plan.[22] When making decisions, individuals should refer back to the information and data in the administrative record. Decisions to undertake response actions should be based on lines of site- or building-specific evidence that the vapor intrusion could possibly rise to the level where it poses an unacceptable human health risk.[23] It is necessary to maintain documents that reflect compliance with statutory requirements and that consider prevailing guidance for the respective restoration process decision, as well as any and all decisions that pertain to vapor intrusion..[24] It is also important to prepare and publish documents that concern building mitigation and remediation systems.[25] Preparation and implementation of operations, including performance of engineered exposure controls and remediation systems for subsurface vapor sources, needs to be documented.[26]

5. Community Outreach Involvement

EPA recommends that a community involvement plan or public participation be developed and incorporated as a means to educate the community, as well as a way to

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[15] *Id.* at 122-24.
[16] *Id.* at 129.
[17] *Id.* at 132-35.
[18] 2015 TECHNICAL GUIDE, *supra* note 2, at 132-35, 143.
[19] *Id.* at 134.
[20] *Id.* at 153.
[21] *Id.* at 131-32.
[22] *Id.* at 63-67.
[23] 2015 TECHNICAL GUIDE, *supra* note 2, at 117-41.
[24] *Id.* at xx.
[25] *Id.* at xx, 156-57.
[26] *Id.* at xx, 167-70.

obtain access to assess and to monitor the vapor intrusion pathways throughout the assessment, remediation, and mitigation phases.[27] To do this, building-by-building contact and communication may be required.[28] Personal contact is also suggested to establish a relationship with the building owner.[29] Keeping the building owner up to date on the progress by providing results and findings in a timely manner will help to maintain a good standing relationship.[30] To keep the public involved, it is important to provide opportunities for its participation when appropriate.[31]

C. Future of Vapor Intrusion Methods

EPA concludes its Technical Guide by noting that it is dedicated to the science and technology to assess and mitigate vapor intrusion, and it will continue to monitor evolving developments and to provide updates and recommendations in the future, as appropriate.[32]

II. UPDATE ON TOXIC SUBSTANCES CONTROL ACT CHEMICAL RISK ASSESSMENTS PROGRAM

In 2015, unlike in 2014,[33] EPA did not update the Toxic Substances Control Act (TSCA) Work Plan (TSCA Work Plan) for Chemical Assessments. EPA did, however, complete a full chemical assessment for N-Methylpyrrolidone, problem formulations and initial assessments for four groups of chemicals, and a data needs assessment for a fifth group of chemicals. These problem formulations related to four groups of chemicals commonly used as flame retardants and to one group used in silicone applications.[34]

A. Completed Chemical Assessments

1. N-Methylpyrrolidone (NMP)

On March 23, 2015, EPA released its final chemical risk assessment for NMP, a chemical used in paint and coating removal products. NMP was listed in the TSCA Work

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[27] *Id.* at 177-81.
[28] 2015 TECHNICAL GUIDE, *supra* note 2, at 44, 182-84.
[29] *Id.* at xx, 183.
[30] *Id.* at 185.
[31] *Id.* at 187.
[32] *Id.* at xxi.
[33] The 2014 update is more fully described in previous Year in Review Science and Technology Committee chapters. *See* Christine L. Hein, et al., *Science and Technology*, A.B.A. ENVT., ENERGY, AND RES. LAW 2014 THE YEAR IN REVIEW at 357-63 (2015).
[34] OFFICE OF CHEM. SAFETY & POLLUTION PREVENTION, ENVTL. PROT. AGENCY, EPA 740-Q1-4004, TSCA WORK PLAN CHEMICAL PROBLEM FORMULATION AND DATA NEEDS ASSESSMENT BROMINATED PHTHALATES CLUSTER FLAME RETARDANTS at 26 (Aug. 2015) [hereinafter BPC ASSESSMENT]. It should be noted that one limitation to the public from EPA's assessments is data that is protected from disclosure as Confidential Business Information (CBI). Most CBI includes the volume produced; however, in some problem formulations the name of the manufacturer, use category, and even the chemical formula are protected as CBI. Indeed, the data needs assessment for the Brominated Phthalate Cluster discussed herein contains two chemicals whose formulae are protected as CBI.

Plan due to the risk of reproductive toxicity and high use in consumer products.[35] EPA's risk assessment focused exclusively on the human health risks from NMP's use in commercial and consumer paint removal applications due to NMP's high risk of skin absorption, low volatility, low persistence, and low bioaccumulation potential in the environment.[36] EPA found that NMP poses a particular risk to pregnant women and women of child-bearing age, as existing data indicated a strong potential for developmental toxicity.[37] The United States uses 184 million pounds of NMP per year, most of which is used in paint and coating removal, the cleaning industry, and other industrial areas.[38] EPA continues to consider a range of possible voluntary and regulatory actions for paint and coating materials that contain NMP.[39]

B. Completed Problem Formulations and Initial Assessments

On August 10, 2015, EPA released problem formulation and initial assessments for the below chemical groups and TSCA Work Plan chemicals. The goal of these problem formulations was to identify scenarios where further risk analysis may be necessary.

1. Chlorinated Phosphate Ester Cluster Flame Retardants

EPA released a problem formulation for a cluster of chlorinated phosphate ester flame retardants (CPE FR), which includes three chemicals used as flame retardants in furniture foams and textiles.[40] CPE FR chemicals are used in paints and coatings, furniture, and building/construction materials. Additionally, tests have also found these chemicals in baby products, including toys, mattresses, and car seats.[41] EPA conducted a problem formulation and initial assessment of the CPE FR group due to the potential exposure and risks to human health, as well as the potential for environmental contamination, as these chemicals have been found in land mammals, plants, soil, drinking water, surface water, and aquatic organisms, and are anticipated to be moderate to highly persistent.[42] The most significant risks include "cancer, kidney and liver effects,

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[35] OFFICE OF CHEM. SAFETY AND POLLUTION PREVENTION, ENVTL. PROT. AGENCY, EPA 740-R1-5002, TSCA WORK PLAN CHEMICAL RISK ASSESSMENT N-METHYLPYRROLIDONE: PAINT STRIPPER USE at 14 (Mar. 2015), *available at* http://www.epa.gov/sites/production/files/2015-11/documents/nmp_ra_3_23_15_final.pdf.

[36] *Id.*

[37] *Id.* at 15.

[38] *Assessing and Managing Chemicals Under TSCA Fact Sheet: N-Methylpyrrolidone*, ENVTL. PROT. AGENCY (Mar. 2015), *available at* http://www.epa.gov/sites/production/files/2015-09/documents/nmpfaq.pdf.

[39] *Assessments for TSCA Work Plan Chemicals*, ENVTL. PROT. AGENCY, http://www.epa.gov/assessing-and-managing-chemicals-under-tsca/assessments-tsca-work-plan-chemicals (last visited Jan. 17, 2015).

[40] OFFICE OF CHEM. SAFETY & POLLUTION PREVENTION, ENVTL. PROT. AGENCY, EPA 740-R1-5001, TSCA WORK PLAN CHEMICAL PROBLEM FORMULATION AND INITIAL ASSESSMENT CHLORINATED PHOSPHATE ESTER CLUSTER FLAME RETARDANTS at 10-11 (Aug. 2015) [hereinafter CPE FR ASSESSMENT], *available at* http://www.epa.gov/sites/production/files/2015-09/documents/cpe_fr_cluster_problem_formulation.pdf.

[41] *Id.* at 13, 17-18.

[42] *Id.* at 22.

neurotoxicity and developmental toxicity."[43] Several chemicals in this group have been identified as carcinogens.[44]

EPA concluded that it will assess the risk of exposure to consumers, the general population, and aquatic animals. Specifically, EPA identified that the highest anticipated exposure pathway—inhalation and absorption through the skin—has no data to assess in developing a risk assessment.[45] Also missing are studies from land and aquatic animals, environmental releases, and consumer exposure from using products containing CPE FR chemicals.[46]

2. Cyclic Aliphatic Bromides Cluster (CABC)

EPA's problem formulation for the Cyclic Aliphatic Bromides group includes three chemicals, one on which is on the TSCA Work Plan, Hexabromocyclododecane (HBCD). HBCD was identified for assessment due to its high volume of production as well as its persistence, bioaccumalativity, and toxicological properties.[47] Ninety-five percent of HBCD is used as flame retardants in polystyrene foams and products, which are the focus of the assessment; however, HBCD is also used for electronic materials, appliances, and "possible HBCD-containing textiles for institutional (e.g. prisons), military and aviation uses only."[48] Several studies have found low or no risk to consumers, but significant risks of exposure to workers and environmental releases.[49] Reports have found HBCD in soil, sludge, wastewater, sediment, and marine species.[50] EPA will evaluate exposures to workers from inhalation, to the general public from the consumption of fish and use of products indoors, and to the environment from industrial discharges.[51]

3. Tetrabromobisphenol A and Related Chemical Cluster (TBBPA)

This group of four chemicals includes one on EPA's TSCA Work Plan—tetrabromobisphenol A or TBBPA—which is a priority because of its use as a flame retardant in plastics and consumer electronics, as well as its indication for aquatic toxicity and environmental persistence.[52] EPA will assess risks to aquatic, sediment-, and soil-dwelling organisms; to workers who inhale dust while manufacturing or processing

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[43] *Id.* at 27.
[44] *Id.* at 26.
[45] CPE FR ASSESSMENT, *supra* note 40, at 23, 29.
[46] *Id.* at 36.
[47] OFFICE OF CHEM. SAFETY & POLLUTION PREVENTION, ENVTL. PROT. AGENCY, EPA 743-D1-5001, TSCA WORK PLAN CHEMICAL PROBLEM FORMULATION AND INITIAL ASSESSMENT CYCLIC ALIPHATIC BROMIDES CLUSTER FLAME RETARDANTS at 9-10 (Aug. 2015), *available at* http://www.epa.gov/sites/production/files/2015-09/documents/hbcd_problem_formulation.pdf.
[48] *Id.* at 10.
[49] *Id.* at 15-16.
[50] *Id.* at 23-24.
[51] *Id.* at 28-30.
[52] OFFICE OF CHEM. SAFETY & POLLUTION PREVENTION, ENVTL. PROT. AGENCY, EPA 740-R1-4004, TSCA WORK PLAN CHEMICAL PROBLEM FORMULATION AND INITIAL ASSESSMENT TETRABROMOBISPHENOL A AND RELATED CHEMICALS CLUSTER FLAME RETARDANTS at 12, 13, 24 (Aug. 2015), *available at* http://www.epa.gov/sites/production/files/2015-09/documents/tbbpa_problem_formulation_august_2015.pdf.

TBBPA; and to the general public from consumption of fish, dust from various sources, and proximity to manufacturing facilities.[53]

4. 1,4-Dioxane (Dioxane)

Dioxane is on EPA's TSCA Work Plan and is of concern due to its status as a probable carcinogen; wide use in consumer products; high environmental releases; and presence in groundwater, ambient air, and indoors.[54] Dioxane is mainly used as an industrial solvent, in addition to a variety of consumer products ranging from cosmetics to varnishes; however, the volume of the products produced in the United States is CBI.[55] EPA will evaluate exposures to workers who manufacture Dioxane and workers and consumers who use products containing Dioxane.

C. Data Needs Assessment

1. Brominated Phthalate Cluster (BPC)

EPA released a data needs assessment on August 13, 2015, for the BPC used as flame retardants in polyurethane foams. This group of seven chemicals includes two chemicals from EPA's TSCA Work Plan and two chemicals whose formulas are protected as CBI. The volume produced or stored for this group is incomplete because five of the reporting requirements are CBI.[56] EPA identified BPC for a data needs assessment due to its potential for persistency, bioaccumulativity, and developmental toxicity to humans as well as its environmental toxicity.[57] The BPC chemicals are generally used as flame retardants in polyurethane foams and polyvinyl chloride.[58] EPA believes that the biggest risks are from inhalation and skin exposure to workers who manufacture BPCs or work with or around them, such as carpet installers or flight attendants; however, no data exists for occupational exposures.[59] Additionally, EPA is seeking data on the environmental effects as well as household air monitoring of BPCs.[60]

D. Ongoing Assessments

1. Octamethylcyclotetrasiloxane (D4)

In 2014, EPA entered into a voluntary consent agreement with four chemical companies, which will test for the presence of D4 in wastewater and sediment at various locations near industrial users of D4 in order to determine the sources and locations of environmental releases.[61] D4 is commonly used in silicone products. The final report is scheduled to be published in 2016.[62]

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[53] *Id.* at 9-10, 29-31.
[54] OFFICE OF CHEM. SAFETY & POLLUTION PREVENTION, ENVTL. PROT. AGENCY, EPA 740-R1-5003, TSCA WORK PLAN CHEMICAL PROBLEM FORMULATION AND INITIAL ASSESSMENT 1,4-DIOXANE at 10 (Apr. 2015).
[55] *Id.* at 7, 18.
[56] BPC ASSESSMENT, *supra* note 34, at 18-19.
[57] *Id.* at 9.
[58] *Id.* at 15-16.
[59] *Id.* at 19-20.
[60] *Id.* at 33-35, 37-39.
[61] ENVTL. PROT. AGENCY, ENFORCEABLE CONSENT AGREEMENT FOR ENVIRONMENTAL TESTING FOR OCTAMETHYLCYCLOTETRASILOXANE at 5-6 (Feb. 2014) *available at*

http://www.epa.gov/sites/production/files/2015-01/documents/signed_siloxanes_eca_4-2-14.pdf.

[62] *Id.* at 8.

Chapter 30 • SMART GROWTH AND GREEN BUILDINGS
2015 Annual Report[1]

I. GREEN BUILDING

The year-end tax extenders omnibus passed by Congress and the President included the extension of tax incentives for solar and wind energy projects and for energy efficient buildings as well as parity in tax treatment of employer-provided mass transit and parking benefits.[2] The President increased the energy efficiency goals for the federal government, including a 2.5% per year drop in energy use in federal buildings to achieve a minimum 40% reduction in greenhouse gas emissions below 2008 levels by 2025.[3] The Government Accountability Office (GAO) affirmed that third-party green building standards such as Leadership in Energy and Environmental Design (LEED) and Green Globes are useful tools to implement federal green building requirements.[4] A new federal green building law requires: (1) the Environmental Protection Agency (EPA) to create a voluntary "Tenant Star" program to recognize energy efficiency achievements by tenants; (2) federal agencies to lease space that is benchmarked for energy efficiency by Energy Star or similar standard and is renovated with all energy efficiency updates that are cost effective over the life of the lease; and (3) the Department of Energy (DOE) to maintain a database of public energy-related info on commercial and multifamily buildings.[5] The DOE launched two new Better Buildings Accelerators that aggregate energy use and efficiency information to promote increased residential energy performance.[6] The Department of Housing and Urban Development (HUD) and the Department of Agriculture (USDA) issued a final determination that the DOE-certified 2009-IECC and ASHRAE 90.1-2007 energy codes will not negatively affect the affordability and availability of housing and therefore will be required for HUD- and USDA-assisted housing, with certain other equivalent green building standards permitted as alternative compliance paths.[7] Fannie Mae announced a ten basis point reduction for new loans to multifamily projects with existing green building certifications, including LEED and Green Globes, and launched its Green Rewards incentive program for green building refits or construction for multifamily projects that obtain a third-party certification or invest in energy and water efficiency upgrades.[8]

New California laws mandated the Public Utilities Commission double building energy efficiency by 2030 and increased the accessibility of energy benchmarking data

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[1]This chapter was prepared by Maximilian Tondro.

[2]Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, H.R. 2029 (2015); Press Release, U.S. Green Building Council, Congress Passes Funding and Tax Incentives for Green Building Community (Dec. 22, 2015).

[3]Exec. Order No. 13,693, 80 Fed. Reg. 15,871 (Mar. 19, 2015).

[4]U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-667, FEDERAL GREEN BUILDING: FED. EFFORTS AND THIRD-PARTY CERTIFICATION HELP AGENCIES IMPLEMENT KEY REQUIREMENTS, BUT CHALLENGES REMAIN (July 2015), *available at* http://www.gao.gov/assets/680/671618.pdf.

[5]Energy Efficiency Improvement Act of 2015, Pub. L. No. 114-11, 129 Stat. 182 (2015).

[6]Press Release, Dep't of Energy, Better Buildings Expanding to Help Increase Efficiency in Homes (May 28, 2015).

[7]Final Affordability Determination—Energy Efficiency Standards, 80 Fed. Reg. 25,901 (May 6, 2015) (to be codified at 7 C.F.R. ch. 0 and 24 C.F.R. pts. 91, 93).

[8]Press Release, Fannie Mae, Green Financing Leader Fannie Mae Announces Green Rewards for Multifamily (May 14, 2015).

from utilities.[9] Effective October 1, 2015, Arlington County, Virginia raised the standard for its Green Building Incentive Program to LEED v4, more than a year before the older LEED v2009 standard's termination date.[10] New York City launched its NYC Retrofit Accelerator program, providing free technical assistance for property owners to adopt green building, energy, and water efficiency upgrades.[11] Local jurisdictions in the United States have free access through 2018 to the Clear Path tool developed by ICLEI Local Governments for Sustainability to create and maintain greenhouse gas emissions inventories and to manage climate mitigation initiatives.[12]

The United States Green Building Council (USBGC) closed certifications under old LEED versions (LEED NC v 2.2; LEED CS v2.0; LEED CI v2.0; LEED for Schools v2007; LEED EB v2008) on June 27, 2015, as part of the switch to the new LEED v4.[13] To reflect the postponement of LEED v2009's project registration deadline to October 31, 2016, USGBC proposed to update the energy efficiency requirement for LEED v2009.[14] USGBC also updated LEED Online to include v2009 projects, published new tools for LEED EB v2009, and released a list of v4 credits that can be adopted by v2009 project.[15] USGBC promoted incorporating LEED BD+C projects within LEED ND projects, whether v2009 or v4.[16] For v4, USGBC released a user guide, updated O+M

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[9] S.B. 350, 2015-2015 Reg. Sess. (Cal. 2015); A.B. 802, 2015-2016 Reg. Sess. (Cal. 2015).

[10] Press Release, Arlington County, Arlington Updates Green Building Incentive Program (Nov. 15, 2014); Grant Olear, *How Arlington County is Incentivizing LEED*, U.S. GREEN BUILDING COUNCIL (Oct. 2, 2015), http://www.usgbc.org/articles/how-arlington-county-incentivizing-leed.

[11] Press Release, City of New York, Mayor de Blasio Launches Retrofit Accelerator, Providing Key Support for Buildings to go Green as NYC Works Toward 80X50 (Sept. 28, 2015).

[12] Celina Plaza, *ClearPath Opens to All US Cities For Free*, ICLEI USA (Sept. 15, 2015), http://icleiusa.org/clearpath-opens-to-all-us-cities-for-free/.

[13] Dean DiPietro, *Upcoming Sunset Dates for LEED v2.0/2.2 Projects*, U.S. GREEN BUILDING COUNCIL (Mar. 27, 2015), http://www.usgbc.org/articles/upcoming-sunset-dates-leed-v2022-projects.

[14] Gregory Shank, *Public Comment Period Open Until 11/13: LEED 2009 Energy Updates*, U.S. GREEN BUILDING COUNCIL (Sept. 28, 2015), http://www.usgbc.org/articles/public-comment-period-open-until-1113-leed-2009-energy-updates.

[15] Selina Holmes, *Q&A: Using the New LEED Online*, U.S. GREEN BUILDING COUNCIL (Jan. 13, 2015), http://www.usgbc.org/articles/qa-using-new-leed-online; Selina Holmes, *LEED Online Upgrade LEED ND Projects*, U.S. GREEN BUILDING COUNCIL (Apr. 9, 2015), http://www.usgbc.org/articles/leed-online-upgrade-leed-nd-projects; Megan Sparks, *New Tools for LEED 2009 Existing Buildings Projects*, U.S. GREEN BUILDING COUNCIL (Apr. 30, 2015), http://www.usgbc.org/articles/new-tools-leed-2009-existing-buildings-projects; Batya Metalitz, *New LEED v4 Credit Substitutions for 2009 Projects*, U.S. GREEN BUILDING COUNCIL (Nov. 13, 2015), http://www.usgbc.org/articles/new-leed-v4-credit-substitutions-2009-projects.

[16] Jeanne Allen Carswell, *Combining LEED ND and LEED BD+C Certification: The New Tool*, U.S. GREEN BUILDING COUNCIL (Nov. 2, 2015), http://www.usgbc.org/articles/combining-leed-nd-and-leed-bdc-certification-new-tool; Jeanne Allen Carswell, *Combining LEED ND and LEED BD+C Certification: Recognition*, U.S. GREEN BUILDING COUNCIL (Nov. 9, 2015), http://www.usgbc.org/articles/combining-leed-nd-and-leed-bdc-certification-recognition.

Multifamily to v4, and resolved a controversy over a v4 credit for building material disclosure with participation of the chemical industry.[17]

The year 2015 saw the first projects recertified with the new LEED Dynamic Plaque that provides ongoing building performance monitoring and scoring.[18] LEED's other significant 2015 innovations included: creating a streamlined documentation path for LEED compliance for projects subject to the California Green Building Standards Code, (CalGREEN); adopting three new pilot credits for resilient design; and launching a new indoor air quality performance calculator for compliance with ASHRAE 62.1.[19] The Robert Wood Johnson Foundation awarded a three-year grant to USGBC's partnership with the University of Virginia Medical School to create tools integrating green building and public health principles for both building project teams and for real estate investment portfolio managers in association with the Green Real Estate Sustainability Benchmark (GRESB).[20] GRESB, together with its partner Green Business Certification Inc.[21] (GBCI), released its Green Bond Guidelines, launched a benchmarking tool for infrastructure investments, and initiated an annual survey of environmental sustainability and governance in private debt investment.[22] GBCI, which oversees LEED certification, launched two new sustainability standards: Sustainable Sites Initiative (SITES) (for sustainable landscapes) and Performance Excellence in Electricity Renewal (PEER) (for sustainable energy supply systems).[23]

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[17]Selina Holmes, *Get to Know LEED v4 with the LEED v4 User Guide*, U.S. GREEN BUILDING COUNCIL (Feb. 12, 2015), http://www.usgbc.org/articles/get-know-leed-v4-leed-v4-user-guide; Selina Holmes, *LEED v4 O+M: Multifamily Approved by USGBC Membership,* U.S. GREEN BUILDING COUNCIL (Nov. 19, 2015), http://www.usgbc.org/articles/leed-v4-om-multifamily-approved-usgbc-membership; SUPPLY CHAIN OPTIMIZATION GROUP, U.S. GREEN BUILDING COUNCIL, LEED V4 MR CREDIT BUILDING DISCLOSURE AND OPTIMIZATION—MATERIAL INGREDIENTS OPTION 3 IMPLEMENTATION GUIDANCE (Nov. 10, 2015).

[18]Stuart Kaplow, *LEED Dynamic Plaque Coming to a Building Near You*, GREEN BUILDING L. UPDATE (Jan. 10, 2016), http://www.greenbuildinglawupdate.com/2016/01/articles/leed/leed-dynamic-plaque-coming-to-a-building-near-you/.

[19]Courtney Yan, *Streamlined LEED Documentation Path Now Available for California Projects*, U.S. GREEN BUILDING COUNCIL (June 30, 2015), http://www.usgbc.org/articles/streamlined-leed-documentation-path-now-available-california-projects; Alex Wilson, *LEED Pilot Credits on Resilient Design Adopted*, RESILIENT DESIGN INSTITUTE (Nov. 13, 2015), http://www.resilientdesign.org/leed-pilot-credits-on-resilient-design-adopted/; Richard Kimball, *LEED Calculation Tool: Ventilation Rate Procedure Compliance*, U.S. GREEN BUILDING COUNCIL (Aug. 3, 2015), http://www.usgbc.org/articles/leed-calculation-tool-ventilation-rate-procedure-compliance.

[20]Press Release, U.S. Green Building Council, USGBC and UVA School of Medicine Awarded $1.2 Million Grant from Robert Wood Johnson Foundation (July 14, 2015).

[21]Press Release, U.S. Green Building Council, GBCI Renamed Green Business Certification Inc. (Apr. 16, 2015).

[22]Press Release, GBCI, GRESB Introduces Green Building Bond Guidelines for the Real Estate Sector (June 3, 2015); Press Release, U.S. Green Building Council, Major Investors Launch Sustainability Benchmark for Infrastructure Investments (Sept. 9, 2015); Press Release, GBCI, GRESB Launches Survey for Real Estate Debt Funds (May 4, 2015).

[23]Press Release, Green Business Certification, Inc., GBCI Launches SITES, its Newly Acquired Rating System for Sustainable Landscapes (June 10, 2015); Marisa Long,

Jerry Yudelson, a LEED Fellow who surprised the green building industry in 2014 by becoming president of the Green Building Institute (GBI), home of Green Globes, the alternative green building rating system to LEED, announced his retirement after just over a year.[24] GBI released a draft revised Green Globes standard for public review and comment.[25]

II. SMART GROWTH

At the national level, President Obama announced $3 million awards to six community development organizations that incorporate arts and cultural strategies into their revitalization efforts on behalf of a public-private partnership, ArtPlace America.[26] The U.S. Department of Transportation (DOT) published its first guide for separated bike lane planning and design and also launched a pilot LadderSTEP program to provide seven communities with technical advice on integrating sustainable economic development into transportation planning.[27] A partnership between Syracuse University and the Harvard Forest of Harvard University published a study of the effectiveness of green infrastructure, while HUD published case studies of the thirty grantees of its Green Infrastructure and Sustainable Communities Initiative.[28] EPA gave awards to three communities for their redevelopment projects that combined environmental and health improvements with sustainable economic revitalization and awarded over $13 million to thirty-one grantees for gap financing of brownfields revitalization projects from the Revolving Loan Fund.[29] Google launched its Project Sunroof to provide estimates of solar potential and return on investment in solar panels for individual property addresses,

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PEER: New Rating System for Sustainable Power Systems, U.S. GREEN BUILDING COUNCIL (Apr. 29, 2015), http://www.usgbc.org/articles/peer-new-rating-system-sustainable-power-systems.

[24]Tina Perinotto, *Jerry Yudelson Steps Down from the Green Building Initiative*, THE FIFTH ESTATE (Aug. 18, 2015), http://www.thefifthestate.com.au/jobs-news/jerry-yudelson-steps-down-from-the-green-building-initiative/76698.

[25]Press Release, GBI, Green Building Initiative Announces Start of Public Comment Period on Revised ANSI Standard (Sept. 8, 2015).

[26]Press Release, ArtPlace, ArtPlace America Invests $18 Million in Six Place-Based Organizations Around the Country to Incorporate Arts & Culture Into Their Community Development Work (Aug. 31, 2015).

[27]DEP'T OF TRANSP., FED. HIGHWAY ADMIN., SEPARATED BIKE PLANNING LANE AND DESIGN GUIDE (May 2015), *available at* https://www.fhwa.dot.gov/environment/bicycle_pedestrian/publications/separated_bikelane_pdg/; Press Release, Dep't of Transp., U.S. Transportation Secretary Foxx Announces LadderSTEP Technical Assistance Program (Apr. 23, 2015).

[28]CHARLES T. DRISCOLL ET AL., SCIENCE POLICY EXCHANGE, GREEN INFRASTRUCTURE: LESSONS FROM SCIENCE AND PRACTICE (June 2015), *available at* http://projects.iq.harvard.edu/files/science-policy/files/gi_report_surdna_6_29_15_final.pdf; DEP'T OF HOUS. & URBAN DEV., GREEN INFRASTRUCTURE AND THE SUSTAINABLE COMMUNITIES INITIATIVE (Feb. 2015), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=greeninfrastructsci.pdf.

[29]Press Release, Envtl. Prot. Agency, EPA Recognizes Three Communities for Smart Growth Achievement (Sept. 16, 2015); Press Release, Envtl. Prot. Agency, EPA Announces $13.2 Million in Supplemental Funds to Clean up Contaminated Brownfields Sites Across the Country (Sept. 9, 2015).

starting in areas near San Francisco, California, and Cambridge, Massachusetts, but with plans to expand nationwide.[30]

The Nevada Public Utility Commission approved significant rate increases for solar net-metering customers, increasing the connection fee and decreasing the reimbursement for excess electricity sent to the grid by residential rooftop customers.[31] Vermont's Green Mountain Power was the first utility to offer the Tesla Powerwall home battery to its customers on a lease or purchase basis.[32] California reduced parking requirements to no more than one car per two units for 100% affordable housing projects within a half mile of transit or for seniors or disabled adults.[33]

Minneapolis reduced its parking requirements for projects outside downtown that are within a quarter mile of a major transit stop, while Chicago included parking requirement reductions along with increased building height and density for projects near major transit stops, with additional incentives for projects with on-site affordable housing.[34] Chicago also opened its Bloomingdale Trail, a revitalized abandoned elevated rail line, as a pedestrian and bike trail and park spanning four city neighborhoods.[35] Los Angeles launched a bike-share program and released its Mobility Plan 2035 that includes complete streets and bike networks.[36] Los Angeles County joined Santa Clara County and Sacramento in implementing tax breaks for urban farms under a 2013 state law.[37]

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[30]*About*, GOOGLE PROJECT SUNROOF, https://www.google.com/get/sunroof/about/ (last visited Mar. 15, 2016); Jillian D'Onfro, *Google Wants You to Put Solar Panels on Your Roof*, BUS. INSIDER (Aug. 17, 2015, 6:29 PM), http://www.businessinsider.com/google-project-sunroof-2015-8.

[31]Daniel Rothberg, *Rates for Rooftop Solar Customers Set to Increase Friday*, LAS VEGAS SUN (Dec. 31, 2015, 6:40 PM), http://lasvegassun.com/news/2015/dec/31/rates-for-rooftop-solar-customers-set-to-increase/.

[32]Press Release, Green Mountain Power, Green Mountain Power Files First in the Country Innovative Plan to Offer Vermonters the Tesla Powerwall Home Battery (Dec. 3, 2015).

[33]A.B. 744, 2015-2016 Reg. Sess. (Cal. 2015).

[34]Eric Roper, *Mpls. Relaxes Parking Requirements to Reduce Housing Costs*, STAR TRIBUNE (July 10, 2015, 11:34 AM), http://www.startribune.com/mpls-relaxes-parking-requirements-to-reduce-housing-costs/313286521/; *Chicago's 2015 TOD Ordinance*, METROPOLITAN PLANNING COUNCIL, http://www.metroplanning.org/work/project/30/subpage/4?utm_source=%2ftod-ordinance&utm_medium=web&utm_campaign=redirect (last visited Mar. 15, 2016).

[35]Press Release, City of Chicago, Mayor Emanuel Announces the 606 Park and Trail to Open on 6/06/15 (Apr. 20, 2015).

[36]Dave Sotero, *Metro Board Approves Regional Bikeshare Vendor*, THE SOURCE (June 25, 2015), http://thesource.metro.net/2015/06/25/metro-board-approves-bikeshare-vendor-for-los-angeles-county/; Dave Sotero, *L.A. City Council Approves Funding for Downtown Bikeshare*, THE SOURCE (Aug. 28, 2015), http://thesource.metro.net/2015/08/28/l-a-city-council-approves-bringing-more-than-1000-bikeshare-bikes-to-downtown-l-a/; L.A. DEP'T OF CITY PLANNING, MOBILITY PLAN 2035: AN ELEMENT OF THE GENERAL PLAN (Dec. 17, 2015), *available at* http://planning.lacity.org/documents/policy/mobilityplnmemo.pdf.

[37]Elizabeth Marcellino, *Los Angeles County Plans to Lower Property Taxes on Urban Lots Used for Farming*, LOS ANGELES DAILY NEWS (Sept. 22, 2015, 1:57 PM), http://www.dailynews.com/government-and-politics/20150922/los-angeles-county-plans-to-lower-property-taxes-on-urban-lots-used-for-farming; Eli Zigas, *Urban Ag Incentives Adopted in Santa Clara County and Sacramento*, SPUR (Oct. 5, 2015),

Detroit saw the first harvest of a pioneering indoor vertical hydroponic farm that aims to provide fresh food and good jobs to underserved neighborhoods, while JFK Airport in New York City saw a roof garden installed using composted food scraps with the crops to be used in future airplane food products.[38]

New York City's efforts to maximize city-owned parcels for affordable housing clashed with the current use of some parcels as community gardens, with a last minute proposal to retain three-quarters of the parcels as community gardens under the Department of Parks and Recreation and nine lots to remain designated for affordable housing infill projects.[39] New York City's mayor announced affordable housing initiatives, including a program aimed at keeping artists in the city, as well as expanding the transit network by creating a city-wide ferry system and thirteen bus rapid transit routes to reach areas underserved by public transit.[40] Detroit's Land Bank launched a program to sell houses in its portfolio to occupants for $1,000 plus taxes and water fees for a year in order to keep population in the city and reduce the Land Bank's property portfolio, which is estimated to include a quarter of the city's land, most of which came from tax sale auctions.[41] The City of Wichita, Kansas, approved a forty-acre land donation to create an urban wetlands park that will include storm water management as well as recreational elements.[42] The City of Portland, Oregon, started a pilot program to generate electricity from its water pipes through a public-private partnership, while the District of Columbia opened a wastewater treatment facility that generates energy from the methane gas emissions while converting the waste to energy to topsoil.[43]

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http://www.spur.org/blog/2015-10-05/urban-ag-incentives-adopted-santa-clara-county-and-sacramento.

[38]A.J. Hughes, *New Urban Farm Helps to Revitalize Detroit Neighborhood*, SEEDSTOCK (June 1, 2015), http://seedstock.com/2015/06/01/new-urban-farm-helps-to-revitalize-detroit-neighborhood/; Kylie Mohr, *'Farm to Air'? Why Jet Blue is Farming at a New York Airport*, NPR (Oct. 20, 2015), http://www.npr.org/sections/thesalt/2015/10/20/449213657/farm-to-air-why-jetblue-is-farming-at-a-new-york-airport.

[39]Cole Rosengren, *Brooklyn Community Gardeners React to De Blasio Admin. Deal*, CITY LIMITS.ORG (Jan. 4, 2016), http://citylimits.org/2016/01/04/brooklyn-community-gardeners-react-to-de-blasio-admin-deal/.

[40]Press Release, City of New York, State of the City: Mayor de Blasio Puts Affordable Housing at Center of 2015 Agenda to Fight Inequality (Feb. 3, 2015).

[41]Christine MacDonald, *Land Bank to Sell Properties to Occupants for $1,000*, THE DETROIT NEWS (Oct. 20, 2015), http://www.detroitnews.com/story/news/local/detroit-city/2015/10/20/detroit-land-bank-sell-properties-occupants/74292160/.

[42]Bryan Horwarth, *Wichita Approves Cadillac Lake Land Donation for Wetlands Park*, THE WICHITA EAGLE (Sept. 1, 2015, 2:48 PM), http://www.kansas.com/news/politics-government/article33215301.html.

[43]Press Release, Lucid Energy, Lucid Energy Announces Portland Water Pipeline Now Producing Renewable Energy for PGE Customers (Jan. 20, 2015); Beth Marlowe, *How Green Can the District Grow?*, ELEVATION DC (Oct. 6, 2015), http://www.elevationdcmedia.com/features/greengrowth_100615.aspx.

Chapter 31 • ETHICS AND THE PROFESSION
2015 Annual Report[1]

This chapter reports on activities of the American Bar Association Standing Committee on Ethics and Professional Responsibility, disciplinary boards, and other groups related to issues of legal ethics in environmental law, including the Special Committee on Ethics and Professionalism of the Section on the Environment, Energy, and Resources. Additionally, this chapter focuses on developments in the law that relate to ethical considerations in the practice context of environment, energy and resource law. The rules of ethics apply to all lawyers, including lawyers who practice in the areas of environment, energy, and resources, and all lawyers should be aware of and in compliance with the rules of their jurisdictions. The potential risks to public health and safety from violations of environmental law makes the stakes high for environmental lawyers concerned about ethics rules. While the ethics rules apply by virtue of the authority of state regulation, the ABA Model Rules of Professional Conduct provide the template for the rules of forty-nine states, and provide the logical starting place for understanding the law governing lawyers. Agency rules and executive orders impact the ethical obligations of lawyers and may (like statutory law) trump particular ethics rules. Ethics decisions by courts and disciplinary boards are directly applicable to lawyers within the jurisdiction issuing the decision, and, additionally, courts and boards rely on decisions of other jurisdictions as persuasive authority.[2]

I. SEER BOOK PROJECT

In 2015, the Special Committee on Ethics and Professionalism of the Section on the Environment, Energy, and Resources continued its work in support of education on issues of legal ethics for SEER members through development of ethics CLE content and panels at SEER conferences. Additionally, the committee continued its work on a new book, *Ethics and Environmental Practice: The Practitioner's Guide*, which will be available in 2016.[3]

II. PROPOSED AMENDMENT TO MODEL RULES

On December 22, 2015, the Standing Committee on Ethics and Professional Responsibility released its proposal to add knowing discrimination to the scope of misconduct governed by Rule 8.4 of the ABA Model Rules of Professional Conduct. The Proposed Amendment to Rule 8.4 would add a new section, section (g), to the rule governing lawyer misconduct, which would prohibit lawyers in all areas of practice from harassing or knowingly discriminating on the basis of race, religion, national origin,

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[1]Irma S. Russell, Professor of Law, and Edward A. Smith/ Missouri Chair of the Constitution, Law and Society, University of Missouri-Kansas City School of Law. The author gratefully acknowledges the able research assistance of Isaac W. Straub, and Traci Hayes. The author is the Chair of the Special Committee on Ethics and Professionalism of the Section on Environment, Energy, and Resources. Please address questions about this chapter and issues of ethics to the author at russelli@umkc.edu.

[2]To explore more cases of application of principles of legal ethics to the environmental context, *see* IRMA S. RUSSELL, ISSUES OF LEGAL ETHICS IN THE PRACTICE OF ENVIRONMENTAL LAW (2003).

[3]*Ethics and Professionalism*, A.B.A. SECTION OF ENV'T, ENERGY, AND RES., http://www.americanbar.org/groups/environment_energy_resources/resources/ethics.html (last visited Mar. 15, 2016).

ethnicity, disability, sex, age, sexual orientation, gender identity, marital status, or socioeconomic status.[4] This is of particular significance to lawyers practicing in the area of environment, energy, and resources due to environmental justice issues such as the siting of hazardous waste facilities and the need for input from minority residences in environmental impact statements under the National Environmental Policy Act (NEPA), which raise issues requiring consideration of disproportionate impact on minority and ethnic communities.

The amendment is scheduled for public comment on February 7, 2016, in San Diego, California.[5] If adopted, it would clarify the prohibition against discrimination and make the prohibition binding under the Model Rules,[6] eliminating the phrase "in the course of representing a client," thus broadening the rule.[7] In 1998, the ABA House of Delegates added Comment [3] to Rule 8.4 to deal with the issue of knowing discrimination, providing that discrimination prejudicial to the administration of justice was professional misconduct. The Committee report on the proposed amendment to Rule 8.4 noted that harassment or discrimination by lawyers negatively affects confidence in the legal system and legal profession.[8] By "choosing to move the prohibition against discrimination and harassment into a black letter rule, the ABA will join many other professions that prohibit this same behavior in their codes of conduct."[9]

III. SURVEY OF DEVELOPMENTS

A search of the LexisNexis and Westlaw databases revealed no case or ethics opinion specifically addressing ethics issues in the context of environmental law in 2015. Nevertheless, some developments in 2015 have relevance to issues of legal ethics in environmental law and deserve the attention of the environmental practitioner from an ethics perspective. This chapter addresses the types of violations lawyers need to identify and deal with as early as possible to help clients avoid or mitigate violations of environmental law that create risks to human health.

A. Violation of the Safe Drinking Water Act

On December 22, 2015, JACAM Manufacturing pled guilty to violating the Safe Drinking Water Act and Resource Conservation Act by dumping hazardous wastes down a saltwater disposal well. Allegations by a former employee led to an Environmental Protection Agency (EPA) investigation, and the company was fined $1 million as part of

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[4] MODEL CODE OF PROF'L CONDUCT R. 8.4 cmt [3]; A.B.A. COMM. ON ETHICS AND PROF'L RESPONSIBILITY, DRAFT PROPOSAL TO AMEND MODEL RULE 8.4 (Dec. 22, 2015), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_language_choice_memo_12_22_2015.authcheckdam.pdf.

[5] *Center for Professional Responsibility*, ABA (Dec. 2015), http://www.americanbar.org/groups/professional_responsibility.html (last visited Mar. 15, 2016); *see also* A.B.A. COMM. ON ETHICS AND PROF'L RESPONSIBILITY, NOTICE OF PUBLIC HEARING (Dec. 2015), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_amendments_12_22_2015.authcheckdam.pdf.

[6] DRAFT PROPOSAL TO AMEND MODEL RULE 8.4, *supra* note 4, at 1.

[7] *Id.* at 3-4.

[8] *Id.* at 7.

[9] *Id.* at 1.

a plea agreement.[10] In addressing such violations, lawyers must remember the goals of safety are of a higher order of importance than financial success. The old *malum in se* and *malum prohibitium* categories still offer a worthwhile distinction for lawyers to remember. Conduct that is wrong as a result of a legal prohibition is called "*malum prohibitum*," and conduct that is wrong as a matter of common sense or the clear prospect of harm is called "*malum in se*." When the natural consequence of conduct is the clear prospect of significant harm, lawyers have the right and even the responsibility to counsel a client against such conduct.

B. GAO ruling holds EPA Social Media Use Violated Anti-lobbying Prohibitions

The legal and ethical difficulties inherent in the use of social media for agencies and other organizations is highlighted by a finding this year by the Government Accountability Office (GAO). On December 14, 2015, GAO issued a ruling that the EPA violated anti-propaganda and anti-lobbying prohibitions by its use of social media in association with its rulemaking efforts to define "Waters of the United States" (WOTUS) under the Clean Water Act (CWA).[11] Two recent U.S. Supreme Court decisions[12] raised questions about the scope and validity of the regulatory definition of WOTUS.[13] In response to these cases, EPA and the Army Corps of Engineers (CORPS) determined that clarification of WOTUS was necessary. The proposed rule sparked controversy; 231 members of Congress objected to the rule and wrote the agencies a letter with their objections.[14] EPA then extended the comment period to more than 200 days, during which the agencies used various social media platforms to generate support for the proposed rule, including Thunderclap and two separate social media campaigns.[15] Thunderclap is a platform that allows a large number of users to simultaneously share the same message across Facebook, Twitter, and Tumblr accounts.

The GAO opinion divided violations by EPA into two categories: use of Thunderclap and use of social media campaigns linking to external sites.[16] GAO held Thunderclap and social media campaigns that linked to external sites violate the rule on anti-propaganda and anti-lobbying prohibitions, specifically finding that EPA was using covert propaganda, defined as "communications that fail to disclose the agency's role as

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[10]Envtl. Prot. Agency, EPA 310-N-15-012, Envtl. Crimes Case Bulletin (Dec. 2015), *available at* http://www.epa.gov/sites/production/files/2016-01/documents/env_crimes_case_bulletin-dec_2015.pdf. *See also* Roxanna Hegeman, *Kansas Chemical Company Fined $1 million for Hazardous Waste Dumps*, THE WICHITA EAGLE (Dec. 22, 2015, 7:21 PM), http://www.kansas.com/news/local/article51197660.html .

[11]U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-B-326944, ENVIRONMENTAL PROTECTIONS AGENCY-APPLICATION OF PUBLICITY OR PROPAGANDA AND ANTI-LOBBYING PROVISIONS (2015) [hereinafter GAO-B-326944].

[12]*See* Rapanos v. United States, 546 U.S. 932 (2006); Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs, 531 U.S. 159 (2001).

[13]Jeffrey S. Lubbers, *GAO Finds EPA Actions in WOTUS Rulemaking to Violate Anti-Propaganda and Anti-Lobbying Prohibitions*, NOTICE & COMMENT BLOG (Dec. 16, 2015), http://www.yalejreg.com/blog/gao-finds-epa-actions-in-wotus-rulemaking-to-violate-anti-propaganda-and-anti-lobbying-prohibitions-.

[14]*Id.*; *see also* Letter from Chris Collins, Member of Congress, et. al., to Gina McCarthy, Admin'r, Envtl. Prot. Agency, and John M. McHugh, Sec'y, Dep't of the Army (May 1, 2014).

[15]Lubbers, *supra* note 13.

[16]GAO-B-326944, *supra* note 11, at 3.

the source of information."[17] Once the EPA "supporter goal" of 500 was reached, Thunderclap posted the message written by the EPA on all of the supporters' social media accounts.[18] GAO considered this to be a violation of section 718 of the Financial Services and General Government Appropriations Act, 2014, which provides: "No part of any appropriation contained in this or any other Act shall be used directly or indirectly, including by private contractor, for publicity or propaganda purposes within the United States not heretofore authorized by Congress."[19] GAO's main issue with the use of Thunderclap was that the supporters of the message "were conduits of the EPA's message," not knowing the EPA was behind the message because it originated from someone that they followed.[20] EPA failed to disclose to the estimated 1.8 million people reached that the government was the origin of the message, violating the purpose of the propaganda prohibition, which is to ensure that the government identifies itself as the source of its communications.[21]

GAO also found a violation of the anti-lobbying provision of section 715, which provides:

> No part of any funds appropriated in this or any other Act shall be used by an agency of the executive branch, other than for normal and recognized executive-legislative relationships, for publicity or propaganda purposes, and for the preparation, distribution or use of any kit, pamphlet, booklet, publication, radio, television, or film presentation designed to support or defeat legislation pending before the Congress, except in presentation to the Congress itself.[22]

An EPA blogpost had links to the external websites of Surfrider Foundation and Natural Resources Defense Council's (NRDC) Brewers for Clean Water initiative, both of which had links on the same page directing visitors to contact members of Congress to support their effort.[23] GAO considered this an indirect lobbying effort and, thus, a violation of section 715. Agencies must proceed cautiously when linking to an external advocacy site because such websites can change.[24]

EPA also used two social media campaigns to "spread positive commentary on the clean water and the WOTUS rule."[25] GAO did not find a violation since the goal of the campaign was to emphasize the significance of the EPA rule rather than "laud or credit EPA," but GAO noted concerns that such a "campaign raises a question about self-aggrandizement because certain posts described what EPA declared as benefits or positive changes that would come about, and attributed such benefits to the agency's new rule."[26] Unlike the propaganda provision of section 718, agencies generally have "wide discretion in their informational activities" to allow agencies to disseminate

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[17] *Id.* at 12.
[18] *Id.* at 4.
[19] *Id.* at 11 (citing Consolidated Appropriations Act, 2014, Pub. L. No. 113-76 § 718, 128 Stat. 5, 36 (2014)).
[20] *Id.* at 13.
[21] GAO-B-326944, *supra* note 11, at 13.
[22] *Id.* at 17 (citing Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235 § 715, 128 Stat. 2130, 2382 (2014)).
[23] *Id.* at 7.
[24] *Id.* at 22.
[25] *Id.* at 15.
[26] GAO-B-326944, *supra* note 11, at 15.

information.[27] However, commentators have pointed to the "inherent tension between these two prongs of the anti-publicity or propaganda restriction—the more open an agency is as to 'owning' the disseminated material, the more it risks being found to be [] self-aggrandizing."[28]

C. DOJ Policy of "Individual Accountability for Corporate Wrongdoing"

Another important development that all environmental lawyers should know is a new policy of the U.S. Department of Justice (DOJ) to make prosecution of individuals the norm for corporate wrongdoing. On September 9, 2015, the DOJ announced its commitment to prosecuting individuals connected with corporate violations in a memo entitled *Individual Accountability for Corporate Wrongdoing*.[29] While this policy is not directed at environmental laws per se or limited to any particular area of law, the prevalence of organizational actors in the environmental arena and the significant criminal sanctions imposed by environmental laws deserves attention by lawyers practicing in the areas of environmental, energy, and natural resource law, who should have a solid working knowledge of corporate governance, as well as the substantive area of law. The significance of organizational entities to the U.S. economy and to environmental practice can hardly be overstated. In fact, the impact of corporations on the economy is the major reason given for the new policy. Every lawyer practicing in the environmental area will represent or deal with organizational entities, including corporations, limited liability companies, nonprofit organizations, and tribal entities, and, therefore, should be aware of the new DOJ focus on pursuing individuals for corporate wrongdoing.

The general principle at work is that "flesh-and-blood people" are accountable for their actions and are subject to prosecution for what they do even when their actions are taken on behalf of an organizational entity. The DOJ memo, intended to deter future illegal activity and promote corporate behavior change, directs federal prosecutors to make prosecution of individual corporate employees a priority in "any investigation of corporate misconduct."[30] In the policy, the Department found that corporate fraud and other corporate misconduct affects the stability of the country's financial economy and that demanding a new focus on the individuals making decisions for corporate misconduct will affect the way prosecutors investigate corporation crimes. The memo indicates that prosecutors should no longer afford corporations any cooperation credit until they have provided information relating to the individuals involved in the conduct at issue. The memo directs both criminal and civil attorneys representing the government to focus on individual wrongdoing from the beginning of any investigation regardless of ability to pay, and to communicate with one another regularly throughout the investigation. It notes that individual liability should not be released with the resolution of corporate liability, and it directs DOJ attorneys to refrain from resolving a corporate investigation without considering ongoing individual investigations and documenting their reasons for not pursuing individuals when that is the decision.

The DOJ memo emphasized that the policy increases scrutiny of high-level executives and pressures corporations to turn over evidence against their employees, in both criminal and civil proceedings. The DOJ may also require a company's continued

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[27] *Id.*

[28] Lubbers, *supra* note 13.

[29] Memorandum from Sally Quillian Yates, Deputy Att'y Gen., Dep't of Justice, to Assistant Att'y Gen., Antitrust Div., et al., Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015).

[30] *Id.* at 2.

cooperation against relevant individuals even after the company has resolved the matter. Deputy Attorney General Yates told The New York Times that the DOJ won't "be accepting a company's cooperation when they just offer up the vice president in charge of going to jail."[31] She explained that corporate ignorance of violations is not an excuse, stating that "[i]f [companies] want any cooperation credit, they will need to investigate and identify the responsible parties, then provide all non-privileged evidence implicating those individuals."[32]

While the memo provides specific directives, how the DOJ will proceed to implement the directives is unclear. Still, the DOJ did state it will revise the Principles of Federal Prosecution of Business Organizations contained in the U.S. Attorneys' manual.[33] This new memo follows a long line of memos indicating the prosecution of individuals for corporate wrongdoings, but some critics speculate that the new policy could cause prosecutors to proceed more vigorously in the pursuit of individuals for corporate offenses in order to satisfy the goal of preventing misconduct.[34]

While the DOJ memo does not single out violations of environmental statutes or regulations, the new emphasis for prosecutions may have dramatic consequences for individuals in the environmental arena. The goal of the attorney-client privilege is to protect client information. In a situation in which the corporate client is cooperating with the prosecution, the privilege would not protect the lawyer. Similarly, the work product doctrine seems to offer little protection, operating to protect clients rather than counsel. Once the corporation decides to cooperate with the prosecution, it would be within its rights to turn over documents that indicate legal reasoning and advice.

Most prominent environmental laws include both civil and criminal penalties,[35] and violations by corporations take many forms.[36] Under the ESA, for example, criminal violations carry higher penalties and risk revocation of any licenses or permits related to the import or export of fish, wildlife, or plants. Critics of the memo have noted possible unintended consequences of the policy, such as large scale investigations leading to more

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[31]Matt Apuzzo & Ben Protess, *Justice Department Sets Sights on Wall Street Executives*, N.Y. TIMES (Sept. 9, 2015), http://www.nytimes.com/2015/09/10/us/politics/new-justice-dept-rules-aimed-at-prosecuting-corporate-executives.html?_r=0.

[32]Lawrence J. Zweifach, *The U.S. Department of Justice's New Policy Initiative Targeting Corporate Officers and Employees*, EXPERTGUIDES (Jan. 22, 2016), https://www.expertguides.com/articles/the-us-department-of-justices-new-policy-initiative-targeting-corporate-officers-and-employees/arcunmza.

[33]Covington & Burling LLP, *DOJ Issues New Guidance on Pursuing Individual Accountability for Corporate Wrongdoing*, at 4 (Sept. 11, 2015), *available at* https://www.cov.com/~/media/files/corporate/publications/2015/09/doj_memo_individual_corporate_wrongdoing.pdf.

[34]*Unpacking the Yates Memo: What the "New" DOJ Policy Really Means*, MCGUIREWOODS (Sept. 11, 2015), https://www.mcguirewoods.com/Client-Resources/Alerts/2015/9/Unpacking-Yates-Memo-New-DOJ-Policy.aspx.

[35]*See, e.g.*, 16 U.S.C. §1540(a), (b) (2012); 42 U.S.C. §§ 7401-7671q (2012); 33 U.S.C. §§ 1251-1388 (2012).

[36]For example, in 2013, Wal-Mart pled guilty to violating the Clean Water Act and paid more than $81 million in penalties for illegal disposal of hazardous materials in Bentonville, Arkansas, in violation of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The DOJ charged Wal-Mart with improperly handling pesticide products returned to stores by customers. Press Release, Dep't of Justice, Wal-Mart Pleads Guilty to Federal Environmental Crimes, Admits Civil Violations and Will Pay More Than $81 Million (May 28, 2013).

employee refusals to cooperate, resulting in failed investigations.[37] Additionally, critics charge that the policy of targeting individual wrongdoers in corporate settings is substantially the same as the earlier policies, and no new methods or techniques for meeting the standard of beyond a reasonable doubt are given.[38] Another speculation is that executives may be less likely to cooperate for fear of implicating themselves.[39]

While the effects of the DOJ policy statement are not clear, all environmental lawyers should review the policy to learn the risks involved. It is especially important for lawyers to analyze and consider ethics obligations before circumstances of exigency present those issues and make analysis more difficult. The stakes to assess for environmental lawyers are often high. They can include issues of public health and safety, the most fundamental protections.

[37]Daniel P. Chung, *Individual Accountability for Corporate Wrongdoing*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Sept. 21, 2015) http://corpgov.law.harvard.edu/2015/09/21/individual-accountability-for-corporate-wrongdoing/.

[38]Dorsey & Whitney, LLP, *The Yates Memo: A New DOJ Investigative Approach* (Sept. 21, 2015), https://www.dorsey.com/newsresources/publications/client-alerts/2015/09/the-yates-memo-a-new-doj-investigative-approach.

[39]*Unpacking the Yates Memo: What the "New" DOJ Policy Really Means*, *supra* note 34.